Law, Cognition, and Identity

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I. UNDERSTANDING LAW AND SOCIAL IDENTITY: THE NEED FOR A SOCIAL COGNITIVE TURN

There is a growing literature within sociolegal research regarding the constitutive nature of law.[1] This literature primarily has been concerned with demonstrating that legal institutions constitute aspects of social life, including, at times, aspects of human social identity.[2] The constitutive influence of law becomes most obvious when the legal system under scrutiny exhibits an overtly differentiated form of citizenship, such as in ancient Athens, feudal Europe, or even the pre-Civil War United States.[3] In these societies, law served to embed multiple privileged and subordinate social and political statuses, differentiated according to

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1. Applications and interpretations of constitutive theory in law have arisen across a substantial variety of disciplines, including the law and society movement, see, e.g., Austin Sarat & Thomas R. Kearns, *Editorial Introduction, in* LAW IN EVERYDAY LIFE 1–20 (Austin Sarat & Thomas R. Kearns eds., 1993); the critical legal studies and critical race theory movements, see, e.g., Ian Haney Lopez, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996), and Robert W. Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57 (1984); the discipline of political science, see, e.g., Rogers M. Smith, *Political Jurisprudence, The New Institutionalism, and the Future of Public Law,* 82 AM. POL. SCI. REV. 89 (1988); Michael W. McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); and within analytic jurisprudence, see, e.g., Neil MacCormick & Ota Weinberger, AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM (Ruth Adler & Neil MacCormick trans., 1986). For a general treatment of constitutive theory, see Alan Hunt, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993).

2. For recent illustrations, see, e.g., David M. Engel & Frank W. Munger, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003); Rogers M. Smith, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP (2003); Efren Rivera Ramos, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001).

3. *See, e.g.,* Virginia Hunter, *Introduction: Status Distinctions in Athenian Law, in* LAW AND SOCIAL STATUS IN CLASSICAL ATHENS 1–29 (Virginia Hunter & Jonathan Edmondson eds., 2000); Rogers M. Smith, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); Gordon, *supra* note 1, at 103.

characteristics such as lineage, caste, and race. As a result, one's status as citizen, serf, or slave served not only as a social but also as a legal position, grounded not merely in social relations but also entrenched in, and reinforced by, the law itself.

As enlightening as constitutive treatments of ancient, medieval, and slave legal systems have been, however, the more interesting, surprising, and indeed potentially disquieting finding within the recent sociolegal literature on constitutive theory is the virtual ubiquity of law's constitutive influence in contemporary liberal democratic societies. For while consideration of pre-liberal society may throw the constitutive character of law more dramatically into relief, modern liberal democratic legal institutions persist unreservedly in structuring the categories through which individuals perceive social life and status. "Most social relations," Austin Sarat and Jonathan Simon have written, "are permeated with law. Long before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions."[4] The law defines social roles such as these, signifying how we should be interpreted and how we should interpret others. Consider the following social labels: one person might be described as "disabled," another mentioned as a "citizen," and a third as a member of a particular cultural group, such as a "Native American." Or, of course, each of these social labels might apply to a single individual, representing several different aspects of his social identity. The point here is that each of these identity types is constituted in virtue of the operation of a number of social institutions, including, in significant part, law.

Hence, the constitutive nature of law might be embodied in a legislative right defining and granting a right against discrimination to a certain category of persons differentiated on the basis of *disability*.[5] Or law's constitutive influence might emanate, as it does with *citizenship*, from an actual constitution and related statutes describing the types of individuals granted full political membership, along with the rights and obligations of that social, political, and legal status.[6] Consider too the sense in which U.S. legal institutions have conceptualized and categorized *Native Americans*: in the legislative arena, there is even a distinct volume

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4. Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 20 (2001).

5. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–13 (2000); Engel & Munger, *supra* note 2.

6. *See, e.g.*, Smith, *supra* note 3, at 31.

of the U.S. Code concerning federal Indian law; judicial decisions regarding particular tribes and their members typically serve as general precedents for all other Native American tribes and individuals; there is within the U.S. government an administrative agency, the Bureau of Indian Affairs, delegated by Congress general responsibility for regulating state interaction with Native American tribes; and, even within the U.S. Constitution, Native Americans are accorded a distinct and, with respect to other tribes, undifferentiated status.[7]   And yet, each of the tribes labeled and treated in this essentially uniform fashion exists (or, at least, existed) as a distinct indigenous national group, differentiated from other native groups geographically, culturally, linguistically, and in terms of social and political organization. The notion of the Native American as a type of person, or as an aspect of one's social identity, is the product of the historical fact of two large, heterogeneous, and previously removed populations, the European and the North American, converging, and the social, including legal, classifications that resulted from those encounters.[8]   The Native American social status and identity, along with that of the disabled and the citizenry, and indeed any number of other social identity types, is, in part, an effect of law.

As early as 1981 and as part of his Storrs Lectures at Yale Law School, Clifford Geertz had already indicated the importance of adopting a constitutive perspective toward law. "[L]aw," Geertz said, "rather than a mere technical add-on to a morally (or immorally) finished society, is . . . an active part of it . . . [l]aw, even so technocratized a variety as our own, is, in a word, constructive; in another, constitutive; in a third, formational."[9] From Geertz's perspective, the then predominant, essentially descriptive conception of culture as a relatively static inventory of norms and traditions was insufficiently complex, insufficiently interactive. Geertz and those who came after taught that culture, including legal institutions, should be conceptualized as a far more dynamic social phenomenon, continuously forming and being formed by human thought and social behavior.[10]   Hence, just as it

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7. *See, e.g.,* U.S. CONST. art. I, § 2, cl. 3 (taxation); Joane Nagel, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 3 (1996).

8. *See, e.g.,* Nagel, *supra* note 7, at 3.

9. Clifford   Geertz,   LOCAL   KNOWLEDGE: FURTHER   ESSAYS   IN INTERPRETIVE ANTHROPOLOGY 218 (1983).

10. *See, e.g.,* Nagel, *supra* note 7, at 44 ("That culture provides a blueprint for action is only one side of the culture-agency coin stamped by symbolic conceptions of culture; the other side of that coin depicts human action as forging culture itself.").

is, at some level, human agency that sanctions and constructs legally differentiated treatment of citizens and aliens, the able-bodied and the disabled, and Native and other Americans, the legal institution of such differentiated cultural positions in turn reinforces and further constructs the social identities of the individuals so described. According to this view, colorfully described by Naomi Mezey as "the dance of mutual constructedness," legal institutions play a vital role in shaping individuals and communities, and individuals and communities in turn shape the law.[11] We may in truth determine the content of our law, but our law will also play a significant role in determining who and what we are.

Even more ominously, because we so readily internalize legally constructed categories, values, and definitions, we are rarely specifically conscious of their influence on our perceptions.[12] In this sense, constitutive theory is related to the critical legal studies movement, though arguably more as sibling than as descendant.[13] The most fundamental commonality in the two traditions, owing to their common derivation from legal realism more generally, is their rejection of a purely internal approach to conceptualizing law. In the wake of realism's challenge to legal formalism, critical legal scholars argued that the allegedly authoritative principles said to underlie law are not only practically but also necessarily internally inconsistent and that legal decisions are, therefore, inevitably exercises in political power.[14] Yet, where critical legal studies grew out of realism's rejection of legal objectivity, constitutive theory developed from the felt need of sociolegal scholars to further conceptualize law's role within social life.[15] And while critical legal studies was nearly everywhere criticized for its incessant tendency toward abstraction, constitutive theory is nearly always introduced within a particular social context.

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11. Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145, 152 (2001).

12. *See* Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1171 (2002) (remarking on the "subtle ways in which law operates to construct our understanding of the world and what we take to be the 'natural' order of things").

13. On the critical legal studies movement, see generally Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

14. *See, e.g.*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998); Roberto Mangabeira Unger, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

15. *See* Hunt, *supra* note 1, at 304.

Yet, while the constitutive approach to understanding the relationship between law and social identity has been applied now in a substantial variety of contexts, from disability to indigenous cultural groups to citizenship, race, and colonialism, and so on, there remains within sociolegal scholarship only the most limited sense of how, why, and to what extent legal institutions actually constitute aspects of our social identities.[16] In large part, this gulf in the literature seems to be the result of the apparent boundaries of the respective disciplines within which these theories typically are developed and articulated. Whereas the influence of legal institutions on social identity has been almost exclusively the province of sociolegal studies, the nature of human social identity and the social cognitive processes that give rise to social identity have been studied most extensively from within the fields of cultural sociology and social and cognitive psychology. In order to more fully discern the social cognitive mechanisms that enable legal institutions to constitute aspects of our social identities, then, this article suggests the need for a turn toward these other disciplines. As social psychologist Karmela Liebkind has suggested:

> The nature of the reality we are trying to understand is not dependent on the *ad hoc* division of academic disciplines . . . if the domain of ethnic identity is ever to become illuminated by the joint efforts of different social and behavioural sciences, some amount of theoretical and empirical coordination and cooperation is imperative, thus cutting across the territorial chauvinism of the various disciplines participating in this venture. Social psychologists definitely need to know, not only what sociology and psychology, but also what anthropology, philosophy, and political science have to say about ethnic identity.[17]

The reverse obviously is true as well. Sociolegal scholars stand to gain from learning what social and cognitive psychology have to say about identity, and, given the rate at which we in the legal academy have become interested in pursuing the influence of legal institutions on social identity, perhaps even more so. If we

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16. *See, e.g.*, Engel & Munger, *supra* note 2 (disability); Lopez, *supra* note 1 (race); Nagel, *supra* note 7 (cultural groups); Ramos, *supra* note 2 (colonialism); Smith, *supra* note 3 (citizenship).

17. Karmela Liebkind, *Ethnic Identity—Challenging the Boundaries of Social Psychology*, *in* SOCIAL PSYCHOLOGY OF IDENTITY AND THE SELF CONCEPT 147, 179 (Glynis M. Breakwell ed., 1992) (citation omitted).

are ever to truly understand the relationship between law and social identity, the disciplinary walls need to come down.

Previously, I have contended that legal institutions participate in the construction of social identity types through processes of categorization that are intrinsic to the operation of a legal system.[18] Legal rules, in virtue of their generality, necessarily categorize persons, and when the investitive criteria that serve as the bases for legal categorization reflect socially salient characteristics, aspects of human social identity are reinforced and often further constructed.[19] Clearly, however, not every legal rule will influence social identity in a meaningful way—not every legal categorization will turn on socially salient criteria. Why, then, are some laws constitutive of social identity, while others are not? What is it that makes certain legally investitive criteria, such as disability, citizenship, and one's status as a Native American, socially salient, while so many other legal statuses are constitutively inconsequential? Further, law is surely not the only social institution constitutive of identity. How does law correspond with other agents of socialization, such as schools, the family, and the media, that serve further to constitute collective social identity types? Even more fundamentally, what is the essential nature of a social category, and how does that nature relate to the categories constructed by legal institutions? And why should law categorize persons? Is it because of the oft-repeated virtues of legal generality and formal justice (e.g., fairness, equality, predictability), or might legal categorization, along with its virtues, be at least partially an effect of deeper cognitive processes?

This article represents a preliminary attempt to answer these and related questions, and thereby to comprehend on a deeper level the interactive constitutive relationship between law and social identity. Legal institutions, sociolegal research has shown, play a role in the constitution of social identities. But social identity itself is the consequence of a complex arrangement of sociological, social, and cognitive psychological phenomena. Hence, a deeper and more complete understanding of law's constitutive influence requires bridging advances in sociolegal studies to research in these related fields. To that end, Part II, just below, relates the processes of legal categorization to human cognitive categorization of the social world, suggesting that the categorization of persons that results from law should be associated with, and indeed be

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18. *See* Eric J. Mitnick, *Constitutive Rights*, 20 O.J.L.S. 185, 193–200 (2000).

19. *See* Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215, 220–22 (2004).

conceptualized as partially derivative of, social cognitive categorization. Part III then considers the essential nature of social categories, drawing an analogy between, on one hand, traditional and contemporary conceptions of such categories within cognitive psychology and, on the other, the doctrines of legal formalism and realism. Part IV takes up the question of the nature of social identity and asks why it is that legal institutions constitute the particular collective identity types that they do constitute, turning for a preliminary answer to treatments of the function of social salience within social and cognitive psychology. Part V explores the processes of legal and other social labeling that result in the construction of collective identity types, describing in particular law's role in that process as an agent of socialization. In conclusion, the article locates law within an array of other socially constitutive institutions and it points the way toward further interdisciplinary research regarding the role of legal institutions in the constitution of social identity. For, in virtue of the recent efforts of sociolegal scholars, we now know that law is not only an aspect but also an engine of culture. Understanding the inner workings of that engine, however, will require a sustained turn toward the theory of social cognition.

II. LEGAL CATEGORIZATION AND SOCIAL COGNITION

Rawls tells us that the concept of justice concerns the proper distribution of benefits and obligations across persons in society.[20] The concept of justice provides us with a formula, the formula of formal justice, the purpose of which is to arrive at an appropriate balance among competing claims: like cases are to be treated alike, and different cases are to be treated differently. The doctrine of formal justice is expressed in law in virtue of law's generality, or law's rule-oriented nature.[21] As Rawls says, "Formal justice . . . becomes the rule of law when applied to the legal system."[22] In the legislative context, this generality is normally apparent from the outset, as a legislative rule will vest rights or impose obligations upon a class of persons by describing in advance the characteristics that compose the class. Though the class described by the legislative rule will rarely be universal, it must always be universalizable; that is, while formal justice does not mandate that every person be accorded precisely the same legal rights and duties, it does require that all persons under relevantly similar

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20. *See* John Rawls, A THEORY OF JUSTICE 5–10 (rev. ed. 1971).
21. *See* Lon L. Fuller, THE MORALITY OF LAW 46–49 (1964).
22. Rawls, *supra* note 20, at 235.

conditions be accorded the same rights and duties.[23]   The generality of adjudication, on the other hand, may only appear with time as a series of individual cases between particular parties are decided and as a rule of law evolves into being.   Yet, both legislation, in its more immediate sense, and adjudication, over time, are designed to treat similar cases similarly.

Notice, then, that one fundamental consequence of the rule of law will be the categorization of persons within a given legal system.   Examples abound, of course, insofar as legal rules are endemic and categorization is intrinsic to law.   In the legislative context, consider the class of individuals over forty years of age, each member of which holds a right in our legal system to be free of discrimination in employment decisions on the basis of their age;[24] or the class of persons with a physical or mental impairment that substantially limits a major life activity, each of whom is invested by statute with a right against similar forms of discrimination on the basis of disability;[25] or members of various trades and professions, such as doctors and electricians, each of whom may be obligated by state law to fulfill certification and other similar requirements.[26]   Each of these legislative rights and obligations vest in individuals, and yet their legislative generality entails the classification of persons according to legally investitive criteria.[27]

Within adjudication as well, the categorization of persons is inherent, though, as mentioned above, it may become apparent only sequentially.   Whether interpreting legislative provisions or founding common law rights and duties, formal justice requires that adjudicative bodies reason analogically and thereby afford similar subsequent cases like treatment.   Hence, if a court determines that procreation is a major life activity such that a person incapable of giving birth should be considered disabled for statutory purposes, the court may not later deny that same legal status to other claimants deemed similarly incapable.   Or, if a court imposes a duty in common law tort on psychotherapists to warn potential victims of their patients, the court may not, consistent

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23.   *See* Fuller, *supra* note 21, at 47 ("[T]he desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names.").

24.   *See* 29 U.S.C. § 623 (2000).

25.   *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–13 (2000).

26.   *See, e.g.,* CAL. LAB. CODE § 3099.2 (West 2003) (certification of electricians).

27.   For an extended discussion of the relationship between formal justice and legal categorization, see Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409 (1999).

with formal justice, later absolve a particular psychotherapist of that obligation, at least without a basis for that differentiation that then should initiate a new rule and a new prospective classification.

Legal rules, then, in light of formal justice, categorize persons. But why should they do this? The precept of formal justice, along with the doctrine of legal generality, is commonly justified with reference to principles of impartiality, formal equality, and freedom.[28] And, in truth, it is not difficult to see that the precept does exclude certain forms of procedural injustice. Within legislation, generality ensures that no individual is legislatively singled out either for pain or benefit and so endeavors to treat persons impartially and as equals. In its adjudicative aspect, law's generality strives to place the burden of decision on the rule rather than on the arbiter and so promotes fairness and individual freedom by constraining official discretion and oppression. Further, to the extent that legal rules are laid down in advance and made known, individuals and organizations may better organize their lives and enterprises and, in that sense too, liberty may be increased.[29] Of course, formal justice remains merely an ideal or a morality of aspiration.[30] Indeed, more ink has been spilled disproving the reality of legal formalism than ever was used in its name.[31] Moreover, even when functioning, the precept provides no assurance of substantive justice since its application will, of course, turn on what a legal system takes to be relevant similarities and differences among persons.[32] Still, "we can say," together

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28. *See, e.g.,* John Finnis, NATURAL LAW AND NATURAL RIGHTS 273 (1980) ("The fundamental point of [the rule of law] is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The Rule of Law is thus among the requirements of justice or fairness."); Gerald F. Gaus, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 199 (1996) ("Citizens are to be treated equally unless relevant grounds can be demonstrated for unequal treatment."); Friedrich A. Hayek, THE CONSTITUTION OF LIBERTY 153 (1960) ("The conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free.").

29. *See* Rawls, *supra* note 20, at 239 ("[When] the boundaries of our liberty are uncertain . . . liberty is restricted by a reasonable fear of its exercise.").

30. *See* Fuller, *supra* note 21, at 170.

31. The reference here is to the well-known critiques of legal formalism within legal scholarship, including those variously on offer in the schools of legal realism, critical legal studies, and critical race theory.

32. *See, e.g.,* Neil MacCormick, *Natural Law and the Separation of Law and Morals, in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105, 122 (Robert P. George ed., 1992) ("[L]egal generality can in principle be as well

with Rawls, "that, other things equal, one legal order is more justly administered than another if it more perfectly fulfills the precepts of the rule of law."[33]

Hence, even if we are uncertain about human manipulation of law's generality or about the doctrine's lack of substantive content, we can grasp the reality of legal categorization and comprehend the moral attraction of formal justice. The virtues of fairness, freedom, and equality, advanced by formal justice, are central to any meaningfully liberal legal system. But, again, is this *why* we categorize? To begin to think further about this question, let me introduce a brief story from my own life. One Sunday afternoon on a visit to Central Park in New York City, I walked with my then twenty-month-old son along a path near a reservoir. At one point, my son dropped a piece of a large pretzel I had purchased for him on the ground, and almost immediately a small group of pigeons gathered, attempting to tear the piece of pretzel apart. My son pointed at the pigeons, turned to me, and proudly said, "duckie." I laughed and then corrected my son. "*Pigeon,*" I said, "those are pigeons." For the rest of the day, whenever we saw a group of pigeons walking about, my son would point at the group and say, "pin." At that moment, for him at least, the category of virtually all winged creatures that were in the habit of walking around parks taking food from humans had just been expanded from one to two types. There were "duckies," and there were "pin."

My son's early experience of birds is, of course, a perfectly ordinary example of the sort of human childhood development that occurs everywhere, everyday. And that is precisely the point. We naturally think in terms of categories—not only children as they are developing, but all human beings as we experience the social world. Simply look out a window and try to avoid the process of categorization. I suspect you will find it nearly impossible. We inherently categorize nearly everything we perceive, from cars to trees to buildings to people. In his seminal work on *The Nature of Prejudice*, Gordon Allport had cause to consider this process:

> A million events befall us every day. We cannot handle so many events. If we think of them at all, we type them. Open-mindedness is considered to be a virtue. But, strictly speaking, it cannot occur. A new experience *must* be

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observed by those whose laws wreak great substantive injustice as by those whose laws are in substance as just as can possibly be.").

33.   Rawls, *supra* note 20, at 236.

redacted into old categories. We cannot handle each event freshly in its own right.[34]

Today, many of the same insights that animated Allport's study are stimulating research advancements within the branches of sociology and social and cognitive psychology concerned with social cognition.[35] As described by social psychologist Judith Howard:

> Social cognition is a theory of how we store and process information. Social cognition has close roots to psychology and a reliance on experimental laboratory methodologies. Several central assumptions underlie social cognitive theories of identity: that human cognitive capacities are limited; that, therefore, we process information as cognitive misers, streamlining information to manage the demands of everyday interaction; that, following from this need for cognitive efficiency, we categorize information about people, objects, and situations before we engage memory or inferential processes.[36]

As Allport suggested several decades ago, and as cognitive psychologists continue to demonstrate experimentally today, social stimuli would overwhelm the human brain were it not for our inherent tendency to categorize our perceptions of the world and draw inferences from the classes that result. Our cognitive categories are thought to be maintained mentally as abstract structures, or "schemas."[37] Such cognitive schemas are composed of generalized characteristics, such as traits or behaviors, descriptive of the constituents of any given cognitive category. As human beings encounter the social world, our perceptions are filtered through these mechanisms of social cognition, these cognitive categories and schemas, that we all reflexively develop. In this way, then, our cognitive categories and associated schemas dramatically influence the ways in which we interpret, process, and use social and self information and they do so largely on a subconscious level. As an example, consider the social category of doctors. We all have a somewhat different schema, or a series of

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34. Gordon W. Allport, THE NATURE OF PREJUDICE 20 (25th anniv. ed. 1979).

35. *See* Gordon B. Moskowitz, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS vii (2005).

36. Judith A. Howard, *Social Psychology of Identities*, 26 ANN. REV. SOC. 367, 368 (2000).

37. On cognitive schemas generally, see Moskowitz, *supra* note 35, at 155–63.

overlapping schemas, associated with our cognitive category of doctors. Upon encountering relevant doctor-related stimuli in the world, our doctor schema enables our minds to summon a series of traits and behaviors we associate with members of this social cognitive category. The same holds true for innumerable other cognitive categories. We all subconsciously maintain schemas for our cognitive categories of academics, taxicab drivers, Catholics, women, and so on. Schemas such as these serve, in conjunction with the cognitive processes of categorization for which they provide an organizational structure, as instinctive mental shortcuts, enabling human beings to navigate our otherwise overwhelmingly complex social and inner worlds.

Some theorists of social cognition have speculated, as does Judith Howard above, that our reflexive mental processes that serve to construct cognitive categories and associated schemas are a reflection of adaptive cognitive efficiency. Yet, other cognitive psychologists, through experimentation, seemingly have demonstrated that we operate mentally according to the same processes of categorization even in circumstances where stimuli are limited and the resources for drawing fine distinctions abound.[38] This is the basis for the notion, presently foundational within social cognition theory, that human beings are "cognitive misers." Hence, it could be that by functioning mentally in virtue of generalization and inference, we are simply economically seeking to conserve our cognitive faculties, a trait that in turn reflects an evolutionary adaptation maximizing the prospects for human survival in a hostile world. On the other hand, social cognitive experimentation seems to demonstrate "that people are simply lazy . . . [r]esponding with minimal effort when it is possible to act in a mindful, deliberate, and systematic fashion would seem to be better characterized as acting in a fashion that is stingy and miserly in the use of their cognitive abilities."[39]

Whether it is in virtue of efficiency or apathy, social cognition theory shows that it simply is the case that our mental capacities, including especially our working memory, are subject to critical limitations in social perception. When this limited capacity is combined with what Walter Lippmann referred to as "the great blooming, buzzing confusion of the outer world,"[40] the result, as we have seen, is an inherent tendency toward generalization, and with it, categorization. Notice, then, the strong parallel between social cognition theory and the functioning of formal justice.

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38. *See id.* at 174–78.
39. *Id.* at 177.
40. *Id.* at 173 (quoting Walter Lippmann, PUBLIC OPINION 55 (1922)).

Formal justice mandates the classification of persons according to legally relevant characteristics. Social cognition theory provides evidence that the classification of persons is in fact an innate aspect of brain functioning. The legal-institutional parsing of relevant similarities and differences among persons does indeed serve the goals of fairness and predictability identified above, but the cause of this process may, at least in part, lie deep within our own cognitive makeup. Indeed, it might be fair to say that we "do" formal justice—that we treat similarly situated people similarly and differently situated people differently—not, at the most fundamental level, because it is fair or just or conducive to freedom or predictability but because that is simply how our brains function. It might even be possible that we consider the process of formal justice fair because we innately perceive the social world through the lens of social categories.

III. THE NATURE OF SOCIAL CATEGORIES: FUZZY SETS AND LEGAL INDETERMINACY

Social cognition theory is important not merely because it aids our understanding of why we categorize persons but also because it reveals significantly how we categorize, or the mechanisms and tendencies underlying the processes of social classification and identification. Before we can begin to consider their construction, however, we shall need first to gain a clearer understanding of the nature of social categories. As defined by Gordon Moskowitz, "A category is a grouping of similar objects/people in memory—a grouping based on the important or essential features that define the class of things constituting the category."[41] There are two aspects to this definition that are worthy of some attention here. The first, which to some extent we have been assuming all along, is that cognitive categories relate not merely to objects but also to people. When we glance out our window, we see not only different types of motor vehicles, buildings, and trees; we are also apt to see different "types" of people. The existence of these different types of people is, of course, largely the result of the shared social classifications that we have, over time, collectively come to construct.

As with objects, when we encounter a new person, we encounter an entity with certain physical properties or an entity of a certain form, even a certain color. And as with object perception, upon encountering a person, we need to mentally process the nature of the entity that stands before us to try to understand its

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41. *Id.* at 111.

function in our lives and discern in what ways we are to react to it. Of course, person perception also differs significantly from object perception, in large part because persons *behave* in ways intended to affect us.[42]   A person might approach us seeming somewhat melancholy, which might cause us to categorize him as depressed, and from which we might infer that his approach signals an appeal for comfort, concern, or cheer. Or a person might come across as wildly uninhibited and flirtatious, which might cause us to categorize him as promiscuous, and from which we might infer that his approach signals an amorous interest. A typical object, of course, can be neither depressed nor interested in romance.

Person perception also differs significantly from object perception in terms of the consequences of any serious misperception. If we are mistaken, either in our classification of a particular person, or in ascribing a characteristic to an entire category of people, the result may be undeserved social stigma or harmful stereotypes. Indeed, the possibility of such mis- or irrational categorization brings to the fore the second important aspect of our definition of a category; that is, that a category is a "grouping based on the *important* or *essential* features that define the class of things constituting the category."[43]   In his study of prejudice, Allport, following the so-called "classical view" of social classification, approached the idea that categories are defined through their essential features by distinguishing rational from irrational categories.[44] Consider, for example, the category of automobiles. According to Allport, we might quite rationally say that all automobiles exhibit (or, at least, at some point did exhibit) the potential for ground transport upon a wheel base. Some automobiles will also contain powerful engines while others will be less aggressive; some will be quite large while others are relatively small, and so on. To say, however, that all automobiles are large or powerful or, for that matter, green, would be irrational, since these aspects are not essential to the category.[45] And so with categories of people. We know that there are Jews and Christians and Muslims; we know that there are lawyers and dentists and acrobats; we know that there are goths and punks and preppies. Each person category, regardless of its derivation, will have, according to Allport, some essential or defining characteristics, though it will often be difficult to discern precisely what these

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42. On the similarities and differences between object and person perception, see id. at 16–20.
43. *Id.* at 111 (emphasis added).
44. Allport, *supra* note 34, at 22–23; Moskowitz, *supra* note 35, at 114.
45. *See* Moskowitz, *supra* note 35, at 171.

essential characteristics might be. Take, for example, the category of Muslims, the defining characteristic of which likely relates to one's association with a particular religious tradition.[46] Beyond this religious affiliation, there is probably no other essential characteristic that accurately describes the category. Yet, there may exist any number of ascriptively derived characteristics irrationally associated with the category; for example, that Muslims tend to be dangerous, or even terroristic. Such an ascription in the categorization of persons obviously can result in treacherous social stigmas or stereotypes in a sense unparalleled in the irrational categorization of non-social objects.

Allport's perspective on the nature and origins of stigma and stereotype has remained highly influential within social and cognitive psychology. Yet, his more rigorous view of the nature of categories as embodying certain essential characteristics, without which the category simply would not exist, has given way to a more subtle conception of constitutive or defining categorical characteristics. Indeed, the distinction between Allport's classical view of the nature of social categories and its more modern counterpart tracks, in a certain fashion, the distinction between legal formalism and legal realism. To be a member of a social category, under Allport's classical conception, an individual would need to possess or display each and every characteristic deemed essential to the category. Moreover, as each such defining characteristic would be deemed essential, each would also be considered equally critical to membership.[47] More recent developments in cognitive and experimental psychology, however, have demonstrated that both of these assumptions are problematic. First, note that one consequence of the classical perspective should be that every member of a particular social category should be essentially identical to, or interchangeable with, every other member of the category according to the characteristic deemed essential. Yet, it simply is not the case that every member of a socially recognizable category will be uniformly descriptive of the category. As Moskowitz suggests, "not all African Americans are equally representative of the category 'African Americans.' Tiger Woods is classified by most people as a member of the category . . . but he is not perhaps as representative of the group as other famous members of the category one could imagine, such as Jesse Jackson."[48]

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46. *See* Allport, *supra* note 34, at 171–72 (making this point with respect to the person category of Jews).
47. *See* Moskowitz, *supra* note 35, at 114.
48. *Id.*

Second, more recent experimentation in social cognition seems to have belied the notion that categories can be described in terms of necessary or essential traits. For instance, in one well-known set of experiments, the cognitive psychologist Eleanor Rosch put a series of statements to research participants in the form, "X is a Y," where X stood for some species that varied in the extent to which the species was an obvious example of the static category Y; for example, "A cardinal is a bird," as opposed to, "An ostrich is a bird."[49]   The participants were asked to respond simply by designating each statement as true or false. However, the true indicator relied upon by Rosch in the study was not whether the participants responded correctly but rather *how long* it took the participants to respond. Rosch hypothesized that if categories possess essential elements, then there should be no appreciable difference in response time as the variable X is revised. Every species X either is or is not a member of category Y, and if there is a certain set of essential characteristics that describes Y's membership, then cognitive processing time should be essentially equivalent across all Xs.   The experiment consistently demonstrated, however, that there was in fact a meaningful time lag as the indicated species became a less typical representative of the category.

Rosch's and similar studies have caused an evolution in the way that cognitive psychologists view the nature of categories. Rather than conceptualizing categories as constituted by essential criteria, the absence of any of which precludes membership in the category, modern social cognition theory describes categories in more fluid terms. A category does indeed possess a set of "important," if not wholly "essential," characteristics that define its membership, but not every important or defining characteristic need be present for an accurate categorization to occur. Moskowitz provides an illuminating illustration: "Your mental image of a chair is likely to have a back. But if you were to take away the back, the object would still retain its category membership. If you were to remove the arms, once again, the object would remain a chair."[50] Yet, as the object displays more of the important or defining categorical attributes, or as the object approaches the cognitive paradigm that may lie at its center, the accuracy of the categorization becomes more and more apparent.

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49. *See* Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL. 192 (1975); Eleanor Rosch, *Natural Categories*, 4 COGNITIVE PSYCHOL. 329 (1973). These studies are described and analyzed in Moskowitz, *supra* note 35, at 115.
50. Moskowitz, *supra* note 35, at 116.

And, once again, as with categories of objects, so with categories of people. For instance, what traits must one display to be considered Asian? Clearly, physical attributes may play some role, but so might history, geography, language, culture, and so on. Hence, an individual who lives in Minneapolis and was born of a Korean mother and a Norwegian father might accurately be described as "Asian," and so might the child of an Israeli mother and a Pakistani father, but surely there also exist other individuals more representative of the social category "Asian," at least in its American conception. The social category lacks essential characteristics, but as an individual displays or exhibits more of the important or defining categorical attributes, his membership in the category becomes more obvious.

Note, then, the sense in which the more recent developments in cognitive psychology have demonstrated that *categories themselves* will be indeterminate, for this bears critically on the processes that give rise to such categories, including the processes that give rise to categories of human beings. As we move from the center of a category to its periphery, we encounter characteristics that are marginally less crucial to category membership. So, for example, the criterion "grows from a seed" is more central to and definitive of the category trees than is "bears fruit" or "has leaves," since we pretty clearly would want to both exclude tomato plants but include pine trees in the category trees. Yet, both "bears fruit" and "has leaves" are helpful in filling out our description of the category trees; they are peripheral rather than central category criteria.[51] This conceptualization of categories as possessing both central and peripheral criteria results in what is essentially a spatial metaphor, or a cognitive psychological mapping of categories, that reflects a social world of overlapping categories with relatively indistinct borders. As Moskowitz describes it:

> If each category contains some features that reside at the periphery, it is reasonable to assume that overlap of different categories is likely to occur, and that this will be especially likely to occur at the border between the categories, where the two peripheries meet and the less central features are shared. That is, each category has its boundaries, since it is defined by a set of properties that are more or less central. The qualities that define a category and the boundaries that limit membership in a category are "fuzzy," in that they lack discrete and clear demarcations.[52]

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51. *Id.* at 115–16.
52. *Id.*

The categories remain within this conception, but their form becomes slightly more amorphous, their limits less definite. As a result, membership itself becomes less certain or more in need of interpretation. Indeed, as presaged above, the modern conception in cognitive psychology of categories as "fuzzy sets" contrasts with the classical conception of categories as constituted by certain essential characteristics in a fashion that effectively parallels the distinction in American jurisprudence between legal formalism and legal realism.

In brief, legal formalism stands for the proposition that particular legal controversies can often be resolved merely through reference to, and mechanical deduction from, authoritative legal resources. Legal realism, on the other hand, doubts that this is so, maintaining instead that most legal reasoning simply masks what are in fact controversial and indeterminate questions of moral value or public policy.[53] In other words, formalism describes legal analysis that moves easily and determinately from category to judgment, and legal realism is skeptical both of the existence of such categories and of the motivations for the judgments that result.

One well-known case provides a good illustration from which to appreciate the principal difference between these two perspectives on law. *United States v. E.C. Knight*[54] was decided toward the end of the nineteenth century, during a period in which legal formalism was dominant in American legal thought. In *E.C. Knight*, the Supreme Court decided that the Sherman Antitrust Act should be deemed inapplicable to a potential monopoly involved in the manufacture of sugar.[55] The majority reasoned that, pursuant to the Constitution's Commerce Clause, the federal government had authority only to regulate "commerce" in sugar and not its "manufacture."[56] In so doing, the Court divided regulatory authority between the federal and state governments on the basis of a formalist, or categorical, analysis: activities that fell within the category "commerce" came within the control of the federal government, whereas conduct that could be classified merely as

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53. This is, of course, the "sound bite" version of a distinction that has occupied generations of legal theorists. For a more detailed description of what is involved in a claim of legal formalism, see Martin Stone, *Formalism, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166–205 (Jules Coleman & Scott Shapiro eds., 2002); and on legal realism, see Brian Bix, JURISPRUDENCE: THEORY AND CONTEXT 177–87 (3d ed. 2004).

54. 156 U.S. 1 (1895).

55. *Id.* at 17–18.

56. *Id.* at 13–14. For the text of the Commerce Clause, see U.S. CONST. art. I, § 8, cl. 3.

"manufacture" fell without "commerce," and so lied within the sphere of the several states.[57] Most critically, the Court treated its categorization of sugar refining as manufacturing rather than as commerce as if that conclusion simply followed mechanically from categorical criteria. "Commerce," the Court reasoned, "succeeds to manufacture, and is not a part of it."[58] In contrast, a realist jurist might have noted the conspicuous, and indeed massive, impact that the American Sugar Refining Company's ninety-eight percent monopoly in sugar refining would surely have on interstate commerce in that good.[59] The legal formalist majority in *E.C. Knight* sought to justify its decision by claiming that it was simply proceeding deductively from category to conclusion, whereas the realist perspective would regard both manufacturing and commerce not as precise categories but as "fuzzy sets," leaving a substantial degree of room for interpretation and policy-making.

Once we combine the idea that law categorizes persons with the understanding that social categories are themselves largely indeterminate, it is no great distance to see how it is that legal institutions will, at times, play a substantial role in influencing aspects of our social identities. To see why this is so, consider one prominent piece of legislation, the Americans with Disabilities Act ("ADA").[60] The ADA seeks to limit discrimination in the workplace and in the provision of public services and accommodations on the basis of an individual's disability. Above, we observed that the ADA's investitive generality necessarily engenders a class of rights-bearers.[61] Here, notice too that the class engendered by the ADA, composed as it is by, and of, individual human beings, is also a cognitive social category. According to the classical view of social categorization, there should be some essential criteria that describe the category of "disabled" persons. And, indeed, the Act contains investitive criteria that, in an effort to serve formal justice and legal generality, seek to describe the class of rights-bearers in specific terms. As we have seen, the ADA affords a right against discrimination to persons who exhibit "a physical or mental impairment that substantially limits one or more major life

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57. *See E.C. Knight*, 156 U.S. at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.").
58. *Id.*
59. *See* Bix, *supra* note 53, at 179.
60. 42 U.S.C. § 12182 (2000).
61. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–13 (2000).

activities."[62]   How successful is the right, then, in articulating
determinate criteria?

In fact, all three aspects of the ADA's definition of disability
clearly leave a significant amount of room for interpretation and
further policy-making. Hence, HIV infection has been determined
to constitute a "physical impairment," as has psoriasis and
tendonitis, but a ruptured aortic aneurysm has not.[63] And sleeping,
working, caring for oneself, and having sex have been deemed
"major life activities," but awareness, driving to work, household
cleaning, and reproduction generally have not.[64] And, further,
whether any such major life activity is "substantially" limited by a
confirmed physical or mental impairment remains an additional
necessary inquiry, such that while "remembering" might be a
major life activity, the capacity to overcome mere "glitches" in
thinking following a stroke would render that limitation too
insubstantial to trigger the ADA's protections.[65]

Now, my intent here certainly is not to wade into the modern
debate between legal formalists and legal realists over the
indeterminacy of legal rules.[66] Nor is it even truly controversial,
from either of these perspectives, that legislation will frequently
be, at least in part, open-textured.[67] The point here is that although
formal justice does indeed engender categories of persons, most of
the time the social categories described by legal rules will in fact
be fuzzy sets. In light of the necessarily imprecise borders of
social categories constructed through law and in light of the
existence not only of essential but also numerous important

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62.   42 U.S.C. § 12102(2)(A) (2000).
63.   *See* Bragdon v. Abbott, 524 U.S. 624 (1998) (HIV); Chanda v.
Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000) (tendonitis); Cehrs v. Ne. Ohio
Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998) (psoriasis); DeJoy v.
Comcast Cable Commc'ns., 968 F. Supp. 963 (D.N.J. 1997) (aortic aneurysm).
64.   *See e.g.*, Marinelli v. City of Erie, 216 F.3d 354 (3d Cir. 2000) (general
housework and cleaning); McAlindin v. County of San Diego, 192 F.3d 1226
(9th Cir. 1999) (sleeping; sexual relations); Deas v. River West, L.P., 152 F.3d
471 (5th Cir. 1998) (awareness); Salamo Martinez v. Celulares Telefonica, Inc.,
272 F. Supp. 2d 144 (D.P.R. 2003) (driving to work); Kidwell v. Board of
County Comm'rs, 40 F. Supp. 2d 1201 (D. Kan. 1999) (working; caring for
oneself); Zatarain v. WDSU-Television, 881 F. Supp. 240 (E.D. La. 1995)
(reproduction is not a "major life activity"). *But see* Pacourek v. Inland Steel
Co., 916 F. Supp. 797 (N.D. Ill. 1996) (reproduction is a "major life activity").
65.   Hill v. Steven Motors, Inc., 228 F. Supp. 2d 1247, 1254–55 (D. Kan.
2002) (even if remembering is a "major life activity," mere glitches in thinking
after suffering stroke deemed insubstantial).
66.   For modern explications of legal formalism, see, e.g., Frederick
Schauer, *Formalism*, 97 YALE L.J. 509 (1988), and Ernest J. Weinrib, *Legal
Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).
67.   *See* H.L.A. Hart, THE CONCEPT OF LAW 127–28 (2d ed. 1997).

peripheral investitive criteria for inclusion in the sets engendered by legal rights, legal actors will possess a significant degree of flexibility and influence in discerning similarities and differences among rights-claimants. And this will be true, of course, not only of the judicial and administrative actors charged with interpreting and applying legislative pronouncements but also of the legislators themselves, in whom responsibility has been placed for setting, if not the precise boundaries of the categories of rights-bearers, then at least their more general outlines. As similarities and differences among rights-claimants are discerned by legal actors, and as the contours of social categories are influenced by legal institutions, the prospect for the legal constitution of social identity is raised.

IV. THE NATURE OF SOCIAL IDENTITY AND THE FUNCTION OF SOCIAL SALIENCE

In our contemporary, rapidly and continually evolving pluralistic societies, issues concerning social identity have become increasingly prominent in public life and civic debate. It was not always this way, however. In earlier centuries, social life and group status were generally more constant, with one's social identity largely settled from birth, and with little space for meaningful self-invention thereafter. Our contemporary emphasis on social identity has often been linked to the sorts of epic social and political shifts, described by writers such as de Tocqueville and Louis Hartz, from fixed statuses broadly to freedom of contract.[68] Yet, analyses such as these tend to neglect the persistent nature of inegalitarian ascriptive statuses, including those manifestly at large at the time of both de Tocqueville's and Hartz's writings, that continue to restrain lives even today.[69] Perhaps, along with factors associated with the increasing heterogeneity of modern society, it has been the *promise* of freedom, the enhanced *possibility* of individual self-invention, even if it remains just out of reach, that has brought social identity so prominently to the fore in recent decades. Whatever its cause, the notion of social identity has come to dominate our contemporary conceptions of who and what we are, our most

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68. *See* Louis Hartz, THE LIBERAL TRADITION IN AMERICA (1955); Alexis de Tocqueville, DEMOCRACY IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (J.P. Mayer ed., 2d ed. 1988).

69. *See* Smith, *supra* note 3, at 20–26.

fundamental beliefs about our selves and our place among our fellow members of our societies.[70]

The modern notion of a collective identity has roots in nineteenth and early twentieth century sociological conceptions of collective social phenomena, such as Marx's evocation of a "class consciousness," Durkheim's suggestion of a "collective conscience," and Weber's methodological use of *verstehen*, or the need for a deeper, more contextual understanding of purposive human social behavior.[71]   In these ways, the idea of collective identity emphasizes, in an extremely broad manner, essential connections and congruencies across persons within a given society, culture, or political system—connections that figure on virtually the deepest levels imaginable. More recently, however, these structural or essentialist accounts of collective identity have given way to narrower and more socially variable conceptions of collective identities as sources for the various constituent aspects of our social selves.   Our collective identities today are still perceived as powerful constitutive agents that shape social and self-perceptions in dramatic ways but they are also viewed more as social artifacts, or the product of interactive social forces, including law.

Law, in its most general instantiation, presumes that there is a universal human nature, marking an essential moral equivalence across all persons. It is partly on this basis that rights, variously termed natural, human, or general, may be said to be grounded. Yet, even such ostensibly universal rights are, upon further examination, far less so, and in this way contribute to the constitution of differentiated social identities.[72]   One approach to discerning the nature of social identity derives from this contrast between the innate characteristics of a purportedly universal human nature and the more fragmented aspects of our social selves.   In this sense, our social identity is conceptualized as a sequence of symbolic components constructed atop, and supplementing, our common basic natures. Social symbols such as these, whether voluntarily adopted or imposed from without, serve in combination to distinguish us from most others. They signify to the world and to ourselves who and what we are in virtue of our membership in a variety of social groups. The sociologist Norbert Wiley, for example, describes the idea of social identity as

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70. On the rise of interest in social identity more generally, see Howard, *supra* note 36, at 367–68.
71. *See* Karen Cerulo, *Identity Construction: New Issues, New Directions*, 23 ANN. REV. SOC. 385, 386 (1997).
72. *See* Mitnick, *supra* note 18, at 194.

representing "long-term, abiding qualities which, despite their importance, are not features of human nature as such. Identities individuate and allow us to recognize individuals, categories, groups, and types of individuals."[73]

Social identity has been studied most attentively from within the fields of sociology and psychology, and sociological and psychological conceptions of the idea differ in important ways. As one might expect, most fundamentally, the sociological perspective looks at the notion of social identity from the view of society and focuses especially on the groups and categories that provide social labels for their members.[74] The psychological conception, on the other hand, focuses on the individual's social memberships from the individual's own perspective—that is, on the understanding one takes of and from one's membership in various social groups.[75] In the former conception, then, it is external social identification and our reaction to such labeling that is the predominant consideration. On this view, we are the person we are *socially* acknowledged as being, though we may be, at least, partially successful in countering unwanted social definitions. In the latter conception, social identity is frequently appraised through reference to one's "self-concept," with a particular emphasis on the ways in which the individual's *internal* self-conception is cognitively constructed in light of one's social memberships. At the same time, though, there is a significant degree of convergence between the two perspectives, especially in virtue of the mutually recognized influence that external social labeling has on the individual's internal self-concept.

Social identity is also usefully conceptualized in contrast to personal identity. Note, however, that by invoking "personal identity," we might be appealing to more than one conception of the idea. In its more dated connotation, roughly that generally in use prior to the second World War and indeed still operative today within the discipline of the philosophy of mind, the idea of personal identity is concerned especially with the question of the continuity of the individual over time. This is consistent, of course, with one of the primary meanings of the term "identity," an

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73. Norbert Wiley, *The Politics of Identity in American History*, in SOCIAL THEORY AND THE POLITICS OF IDENTITY 130 (Craig Calhoun ed., 1994).

74. See especially the seminal work of Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). Also see the helpful discussion in Timothy J. Owens, *Self and Identity*, in HANDBOOK OF SOCIAL PSYCHOLOGY 205, 224 (John Delamater ed., 2003).

75. Here, see especially the seminal work done by Henri Tajfel, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY (1981), also discussed in Owens, *supra* note 74, at 224.

essential sameness across different contexts. Hence, references to
personal identity are sometimes intended to raise "the question of
the sameness, or identity, of a substance, continuant, or thing,
through different changes in time and space."[76] It is, though, an
alternative sense of the term "personal identity" to which writers in
political and social theory commonly make reference today. As
Joseph Raz has written:

> When talking of "identity" I do not mean the term in the
> sense in which it fixes the limits of the continuity of an
> object, or an object of a kind: is this pile of timber which
> made up Theseus' boat Theseus' boat still? We mean the
> identity revealed in answers to the question who am I?[77]

It is this latter sense of personal identity, this sense of identity
as composed of elements of our larger selves rather than the sense
of identity concerned with the endurance of an entity through time,
that is most effective in providing the sort of contrast helpful in
revealing the nature of social identity. As Anthony Appiah has
suggested:

> Each person's individual identity is seen as having two
> major dimensions. There is a collective dimension, the
> intersection of their collective identities, and there is a
> personal dimension, consisting of other socially or morally
> important features—intelligence, charm, wit, cupidity—that
> are not themselves the basis of forms of collective identity.[78]

Appiah's reference here to the collective dimension of an
individual's identity is intended to elicit reflection upon those
aspects of one's social identity—e.g., race, gender, ethnicity—that
figure so prominently in legal and political discourse today. The
personal dimension of individual identity pertains to characteristics
of that which we might more commonly designate our individual
personalities, such as a person's penchant for being charming or

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76. John Rawls, POLITICAL LIBERALISM 32 n.34 (1993). *See also* Kwame
Anthony Appiah, THE ETHICS OF IDENTITY 283 n.6 (2005).
77. Joseph Raz, VALUE, RESPECT, AND ATTACHMENT 33 (2001).
78. Kwame Anthony Appiah, *Identity, Authenticity and Survival:
Multicultural Societies and Social Reproduction, in* MULTICULTURALISM:
EXAMINING THE POLITICS OF RELIGION 151 (Charles Taylor ed., 1994). For a
similar perspective, operative in social psychology, see Glynis M. Breakwell,
Introduction to SOCIAL PSYCHOLOGY OF IDENTITY AND THE SELF CONCEPT 3–4
(Glynis M. Breakwell ed., 1992) ("Personal identity is that part of the self
concept which is unique to the individual, a product of purposive action. Social
identity, in contrast, is that part of the self concept derived from group and
category memberships.").

witty. Put another way, social identity arises and is defined in virtue of our social memberships, whereas personal identity is composed of the sort of idiosyncratic traits that serve to differentiate us as individuals.[79]   Hence, where social identity provides bases upon which our common human nature might be supplemented, thereby differentiating categories of persons in socially meaningful ways, personal identity ensures that members of collectivities, despite their common and deeply constitutive affiliations, nonetheless remain differentiated and unique individuals. This, in combination with the realization that individual members commonly differ in their relations with even the most intensely constitutive social categories, ultimately belies essentialist conceptions of social identity.[80]

The list of collective identity types by now is a common one. Throughout the literatures on identity in cultural studies, law, political science, religion, sociology, social psychology, etc., the list remains essentially the same: race, gender, ethnicity, sexuality, class, religion, age, nationality, and, more recently, disability. At times, depending upon the particular discipline and the author's specific predilections, identities related to social movements, geography, and even technology might enter the frame as well.[81] Why these identity types? Why are we so likely to be identified, and to identify ourselves, in terms of our race, ethnicity, gender, and so on? Why not the size of our ear lobes, our eye color, or, for that matter, our weakness at the prospect of chocolate ice cream? What is it that makes socially salient human characteristics socially salient? As we have said, not all legal rules are constitutive of human social identity; only those rules, the investitive criteria of which correspond to socially salient characteristics, may be said to be constitutive in a meaningful sense. Hence, attempting to decipher the enigma of social salience will be critical if we are to discern the basis for law's constitutive influence.

We saw in the previous section that categorization is an endemic aspect of human social perception and cognition. We categorize virtually all aspects of our social world, including characteristics exhibited by our fellow human beings. Experiments undertaken by cognitive psychologists have demonstrated that

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79. On social identity as a cognitive schema, see Howard, *supra* note 36, at 368–69.

80. *See* Liebkind, *supra* note 17, at 159 ("[P]eople do not identify in an all or none fashion with the values and characteristics of various groups and individuals. They usually identify with some and dissociate themselves from others, i.e., they form only part-identifications with individuals and groups.").

81. *See* Cerulo, *supra* note 71, at 398 (technology); Howard, *supra* note 36, at 374–84 (social movements; geography).

certain types of human characteristics are more likely to initiate social categorization—that is, to be socially salient—than others. Moskowitz describes the nature of the human characteristics that have a greater tendency to grab our attention, and the concept of social salience, in the following way:

> Some information is prominent in the perceptual field and seems to leap out from the background/context, making it figural and attention-grabbing.   Its prominence in the context renders it able to capture attention and have a greater impact on our cognitive processing than stimuli (or features of stimuli) that are less prominent.   Such information is said to be salient, or to have increased salience . . . The concept of salience informs us that there are features of the things we observe, the "data" in our social world, that are more powerful at directing our attention and influencing our responses than others.[82]

Further, that which we perceive to be the cause of some event or circumstance—including which person or group of persons we perceive to be the cause, and, as a consequence, blame, for some poor state of affairs—is often largely a function of cognitive processes operating in reaction to the presence of socially salient characteristics.[83]   As Allport commented, "Even a fragment of visibility . . . focuses people's minds on the possibility that everything may be related to this fragment."[84]   The potential for dangerous stereotypes, scapegoating, and group prejudice are, then, manifest, as we ascribe responsibility on the basis of social salience.

Human beings, we have said, mentally cannot process the entirety of our perceptual field. Out of the nearly limitless data points that we encounter in any given social interaction, we will in reality have the capacity to attend to very few. How then do we cognitively select among such a wealth of sensory information? And, in particular, how do we do so with respect to characteristics of our fellow human beings? Borrowing from long recognized research on the role of salience in object perception, social and cognitive psychologists have demonstrated that certain types of features exhibited by persons have a tendency to capture our

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82. Moskowitz, *supra* note 35, at 53.
83. *Id.* at 54.
84. Allport, *supra* note 34, at 108–09.

attention and become socially salient.[85]   These features include properties such as the relative intensity or vividness with which a characteristic is displayed or a behavior performed, the contextual novelty of such a characteristic, and the extent to which particular behavior is norm-violative, threatening, or dangerous.[86]   Further, the capacity of a stimulus to form a unit with other stimuli tends to increase perceived salience and causal attribution. For instance, a Catholic politician viewed praying in church might cognitively be categorized as a Catholic given the contextual salience of religion but then later categorized as a politician when seen vigorously shaking hands with congregants after the service. In both such situations, either aspect of the individual's social identity might have been deemed salient, but that aspect that forms a unit with the individual's behavior will tend to become prominent and command attention.

The idea that we tend cognitively to categorize persons according to those characteristics that are most apt to capture our attention would seem to make sense of certain prominent social categories differentiated by marked, highly visual, physical traits. Skin color, which has long been taken as a basis for the social construction of racial classifications, is one obvious example.[87] Similarly, disabilities, differences in age and gender, and certain religious and ethnic customs, such as dress or patterns of speech, supply external, visual, and aural physical distinctions that may capture attention and so trigger categorization. Indeed, consider why it is that we are here able to jointly discuss and assess common social groups. This is possible only insofar as the categories that we come cognitively to construct may be shared across individuals within a given society or culture.[88] In part, this reflects the considerable role that physicality plays in the construction of social categories, since our external physical differences are available for all to see and (over)emphasize. Human physical characteristics, insofar as they are contextually

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85. On the properties of objects that capture attention, see Leo Postman, Jerome S. Bruner & Elliott McGinnies, *Personal Factors As Selective Factors in Perception*, 43 J. ABNORMAL & SOC. PSYCHOL. 142 (1948).

86. On the relationship between object and person perception and the social salience of human characteristics, see Moskowitz, *supra* note 35, at 54–60.

87. On the relationship between skin color and the construction of racial categories, see Amy Gutmann, *Responding to Racial Injustice, in* K. Anthony Appiah & Amy Gutmann, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 106, 112–18 (1996).

88. *See* Moskowitz, *supra* note 35, at 117–19. Moskowitz's point, though, is that social categories are shared not merely as a result of our common perception of physical traits but also in virtue of common cultural theories. *Id.* This point is expanded on below.

novel, become cognitively salient and thereby serve as the basis for social categorization that leads to the construction of social groups. Yet, while features like apparent contextual novelty might seem to explain the social cognitive salience of a physical trait like skin color, why then have social groups failed to form around other obvious physical differences, such as eye or hair color? Why is it that certain contextually novel human characteristics capture attention but not others? In fact, both lay and professional experimentation seem to have demonstrated the *potential* salience of virtually any apparent physical difference.

One well-known and highly controversial such experiment was conducted by Jane Elliott, an elementary school teacher in the small town of Riceville, Iowa, soon after the assassination of Martin Luther King, Jr.[89] In an effort to have her third grade students attempt truly to comprehend the nature of discrimination, Elliott divided her students into two groups differentiated according to the relatively meaningless criterion of eye color. Elliott then made that criterion socially meaningful. On alternate days, blue-eyed and brown-eyed members of the class were treated by Elliott and the rest of the class as either inferior or privileged categories of persons by, for example, segregating and "ghettoizing" the inferior set, marking the inferior set with special collars, permitting the privileged group to eat lunch first and denying the inferior group second servings, and otherwise suggesting that students who fell within the inferior category were of lesser intelligence and humanity than those in the superior set. The impact on Elliott's students was quite powerful, dramatically altering their conceptions of themselves in relation to their fellow students. For instance, when asked to describe his feelings as a member, first, of the privileged category, student Raymond Hansen said, "I felt like a king, like I ruled them brown-eyes. Like I was better than them. Happy." And later, Hansen, discussing his experience as a member of the inferior set, commented, "I felt down, unhappy, like I couldn't do anything, like I was tied up and couldn't get loose."[90] While her method was surely lacking in certain controls, the results of Elliott's classroom experiment compellingly demonstrate the extensive capacity for human social construction of collective identity types on the basis of highly apparent physical differences. Indeed, the social psychologists Judith Howard and Daniel Renfrow have suggested that Elliott's experiment effectively reveals the ways in which "characteristics

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89. For a helpful discussion of Elliott's experiment, see generally William Peters, A CLASS DIVIDED: THEN AND NOW (1987).

90. *Id.* at 78.

that have no inherent social meaning can become meaningful in particular social configurations, and they then may be used to define groups of people and used in making attributions about the members of those social groups."[91]

Certain studies conducted by social psychologists concerning social cognition of physical differences confirm these findings. In one such study, two bearded men, one with red hair and the other with brown, were videotaped in conversation.[92] The researchers placed wholly unrelated photographs behind each of the men. Videotapes of the conversation were shown to participants in the study, and the participants were then asked to recall features of the images in the photographs. The researchers' theory was that since red hair is a relatively novel characteristic, participants' attention, all things equal, should be captured more by the man with the red hair than by the man with the brown hair. The man with the red hair would be cognitively more salient, and participants would pay closer attention to the red-haired man and his surroundings and so would be more apt to recall aspects of the image in the photograph behind that man. The obvious question, of course, is how the experimenters determined that it was the man's hair color, rather than simply the nature of the images themselves, that served as the source of salience. This the researchers attempted to control by alternating whether the tape was shown in color or in black-and-white. They found that when the tape was shown in black-and-white, there were no significant differences in participants' recall of the images placed behind the two men; in other words, neither man or picture was especially salient. But when the tape was shown in color, participants indeed were able to recall features of the image placed behind the man with red hair with greater accuracy than the image placed behind the man with brown hair. The researchers concluded that the red-haired man's hair color was relatively novel and, on that basis, cognitively more salient, leading participants to attend more closely to his surroundings.[93]

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91.   Judith A. Howard & Daniel G. Renfrow, *Social Cognition, in* HANDBOOK OF SOCIAL PSYCHOLOGY 259, 272 (John Delamater ed., 2003).

92.   *See* Leslie Zebrowitz McArthur & Elise Ginsberg, *Causal Attribution to Salient Stimuli: An Investigation of Visual Fixation Mediators*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 547, 548 (1981). In addition to the videotape with contrasting hair color, the researchers also created and used two other videotapes. In the first of these, one actor wore a boldly striped shirt while the other wore a plain grey shirt, and in the other, one actor wore a leg brace while the other did not. *Id.* The findings on salience and causal attribution were comparable to those derived from the hair color video. *Id.* at 550.

93.   *See* Moskowitz, *supra* note 35, at 55–56. Surprisingly, no mention is made, either by Moskowitz or by the researchers themselves, of whether the

Experiments such as these appear to demonstrate that virtually any contextually novel and highly apparent physical human characteristic *might* become cognitively salient, serving as the trigger for social categorization, and in this way underlying, at least in part, the social construction of a collective identity group. The question that remains, however, is why certain physical traits, such as skin color, have served as the basis for the identification of social identity groups, and other traits, such as eye or hair color, have not.   This is the point at which, perhaps surprisingly, the theories involved in most of the literature concerned with the nature and construction of social identity seem to come to an end. The question is a compelling one, however. Physicality combined with contextual novelty clearly might serve as a basis upon which persons may be cognitively categorized, but other social factors must be involved if we are to explain the obvious differential salience of racial, gender, and other social identities.   What, in combination with highly apparent physical traits, causes the construction of social identity?

Those who do consider the question point alternatively to power relations among persons in society, deeply embedded cultural norms, and, relatedly, a history that, to some extent, may have been lost to time. For instance, with respect to the influence of power arrangements on the constitution of social salience, there is a still developing sociohistorical literature in the constructionist vein that proposes the dominance of elites in the conception and manipulation of collective identities and associated schemas.[94] Similarly, social psychologists interested especially in the derivation of collective identities based upon supposed racial differences have suggested the criticality of racist ideology to the social construction of racialized groups.[95]   The generation and sustainment of such ideology, they suggest, is a product of "power relationships and social practices that affect who is able to act on the basis of their category constructions, make them heard, and impose them on others."[96]   Hence, where the superior resources

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photographs themselves might have become more salient once they were shown in color. *See* McArthur & Ginsberg, *supra* note 92.

94. For a review of this literature, see Cerulo, *supra* note 71, at 390. Though it is not typically advanced in relation to collective identities, this theme would also be consistent with much of the work published within critical legal studies. For an overview, see generally Kelman, *supra* note 13.

95. *See, e.g.,* Howard, *supra* note 36, at 386 (citing Nicholas Hopkins, Steven Reicher & Mark Levine, *On the Parallels Between Social Cognition and the "New Racism,"* 36 BRIT. J. SOC. PSYCHOL. 305 (1997)).

96. *Id.*

enjoyed by members of dominant groups may enhance their own capacity for autonomous self-construction, that material and political superiority also provides the ascendant category with "the discursive power to define, locate, and order" the social identities of members of dominated groups.[97]   Personal aspects of identity, thus, may become more salient for members of privileged groups, but externally defined social group memberships remain most critical for socially subordinated persons, both in defining their social identities and their own self-concepts.   In short, as Howard and Renfrow suggest, "power based upon social position has a major impact on social and self-categorizations."[98]

Beyond, or in combination with, physicality and power arrangements, history and culture may also be critical determinants of social salience.   As noted above, in part due to our common perception of external physical traits, social categories tend to be shared.   But such categories are also common across people in a given society or culture in virtue of the theories inculcated and the narratives taught to individuals by their cultures.   Allport, for instance, tells the story of a small, remote Guatemalan community in which there existed an extreme, almost mythic, form of anti-Semitism, despite the fact that not a single resident of the community had ever come into contact with a Jewish person:

> How did the Jew-is-to-be-hated category grow up?   In the first place, the community was strongly Catholic.   Teachers had told the residents that the Jews were Christ-killers.   It also so happened that in the local culture was an old pagan myth about a devil who killed a god.   Thus two powerfully emotional ideas converged and created a hostile prejudgment of Jews.[99]

Whether or not Allport's tale is apocryphal, it illustrates the deep sense in which socially salient differences may be culturally constructed.   If we find skin color, gender, nationality, religion, and the like to be socially salient, this will be due, in part, to the presence of contextually novel physical differences among persons and power imbalances used to emphasize and exploit those differences.   But it will also be due, in no small measure, to the myths and narratives, the structural and symbolic resources, of families, tribes, and broader cultural groups.   The cultural construction of social salience thus reflects the possibility of a collective form of self-determination as any given ethnic, religious,

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97.   Howard & Renfrow, *supra* note 91, at 273.
98.   *Id.*
99.   Allport, *supra* note 34, at 22.

or other cultural group, consciously or unconsciously, differentiates itself from broader social categories. Of course, cultural or collective self-determination is no guarantee of individual autonomy. With the socially constitutive capacity of culture comes the continued prospect of ascription and domination, now simply refocused at the cultural group level. Cultural elites or majorities often have the power to shape internally salient differences among group members, and vulnerable individuals or sub-groups may be unfairly labeled and subordinated in the process.[100] Both as to elites and subordinated cultural group members, though, the crucial point here is that socially salient differences among persons are, in significant part, a consequence of culturally constructed theories and narratives.

Cultural differences that influence human perceptions of social salience may be based on relatively recent religious or political schisms or other social divarications, or they may derive from events and circumstances now lost to the haze of time. The historically more ancient bases for cultural variation are sometimes referred to as "deep history" or "deep culture," reflecting the long entrenched and seemingly innate cultural characteristics ingrained within language, certain religious beliefs, and views of the world and the nature of human existence.[101] Along these lines, the broad, and much remarked upon, distinction between Eastern and Western cultures offers an illustration. Suk Chang, for instance, describes Asian cultural conceptions of the self in far more relational terms than we are accustomed to in Western societies.[102] Where Western cultures tend to foster individualistic thinking and virtues, the socially salient aspects of human life in Eastern cultures tend more toward relations with families, communities, nature, and the universe. Indeed, the very notion of an individual human identity in its Western conception may be absent in Eastern and other cultural contexts.[103] Such far-reaching and deeply embedded differences as these arise primarily from an ancient past about which we can only speculate, and yet deep cultural differences continue to influence our contemporary perceptions of social salience in dramatic ways.

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100. On the vulnerability of cultural sub-groups, especially women and children, see generally Ayelet Shachar, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001).

101. On the nature and effects of "deep culture," see Liebkind, *supra* note 17, at 149.

102. *See* Suk C. Chang, *The Self: A Nodal Issue in Culture and Psyche—An Eastern Perspective*, 36 AM. J. PSYCHOTHERAPY 67 (1982).

103. *See* Liebkind, *supra* note 17, at 149.

Within cognitive psychology, deep cultural differences, such as the Eastern-Western cultural divide referenced in the previous paragraph, are sometimes thought to result not merely in varied interpretations of social circumstances and human behavior but, more fundamentally, in different cognitive styles through which those interpretations arise.[104]   If this is the case, it may be that profound differences in culture result in materially different modes of human social cognition, thereby rendering even our most basic mechanisms for discerning social salience sensitive to cultural variation.   In a recent archival study, Michael Morris and Kaiping Peng suggest that Western cultures, with their powerful, nearly endemic emphasis on the democratic and autonomous nature of human beings, produce in their citizens cognitive orientations particularly sensitive to these values.[105]   As a result, Morris and Peng contend, persons raised within a more individualistic cultural environment will be more likely to perceive individual traits and dispositions as the primary causes of human behavior.[106] Individuals who develop cognitively within Eastern cultures, on the other hand, where social relations and collective virtues are more prominent, will acquire a more collectivist cognitive style and so will tend to discern explanations for human behavior in social terms.[107]   In an effort to discern the influence of cultural difference along these lines, Morris and Peng observed the ways in which acts of murder were described in two newspapers.[108]   The newspapers were based in the same city, but served different readerships—American and Chinese.   Where the American reporter's account of the murder emphasized the particular characteristics and nature of the individual murderer, the Chinese reporter's account focused more intently on the social circumstances surrounding the murder.[109]   According to Morris and Peng, the different emphases displayed in the newspaper reports reflect the way in which cultural differences may influence social cognition and attribution.[110]   Cognitive styles developed within different cultural contexts appear to alter the way in which human beings perceive, construe, and categorize the social

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104. *See* Moskowitz, *supra* note 35, at 117–19.

105. Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949 (1994).

106. *Id.* at 958–62.

107. *Id.*

108. *Id.*

109. *Id.* at 962.

110. *Id.* at 961.

world.[111]   The cognitive schemas with which we approach and frame the world would seem to be, in significant part, a bequest from our religions, our cultures, and our ancestors.

Social salience, then, is a consequence of a number of complex and interrelated cognitive and social factors. Physicality, power relations, cultural differences, and deep history all may play a role in the construction of collective identity types. Moreover, social salience, and social group membership, is self-sustaining, to a great extent. Once a human characteristic becomes socially salient, the characteristic will then carry information that will be perceived as useful in drawing inferences and planning behavior within any given social system.   If cognitively we operate by virtue of categorization and inference, then naturally we will have a tendency to focus on those features around which inferences abound.   So, for instance, since skin color has been a socially salient characteristic for so long, and a great deal of social information (i.e., stereotypes) has therefore become attached to the characteristic, cognitively we will attend to differences in skin color much more regularly and with greater intensity than we will an information-poor trait such as eye or hair color.   "Some features, such as race and gender," Moskowitz has written, "have natural informational value because of a rich history of stereotypes and beliefs and inferences that perceivers feel they can lean on."[112] Another way of putting this is that a socially salient feature's very utility as a socially salient feature will capture our attention, thereby reinforcing the feature's social salience.   Where, as so often with skin color, the socially salient information is false and oppressive, a vicious cycle of subordination results.

By the time a social or cultural characteristic such as race, gender, or disability is brought into service as a legally investitive criterion, the characteristic typically will have long been socially salient.   Indeed,   the   embedment   of   a   social   or   cultural characteristic within a particular legal rule may be viewed as a long-fought-for achievement, as with certain cultural rights of recognition and rights granted to persons with disabilities. On the other hand, inegalitarian ascriptive labels have also often found a too congenial home in law, and it has in many cases taken centuries to disengage an individual's legal status from these oppressive categories. In both of these cases, however, legal actors and institutions have taken those characteristics that have become socially salient in light of physical differences and power relations among persons, and by virtue of cultural forces and deep history,

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111.   Moskowitz, *supra* note 35, at 118.
112.   *Id.* at 64.

and have reinforced their social salience by setting them down as legal rights and corresponding burdens; by making them, that is, legally salient. Further, as a social and cultural practice in its own right, the law functions also as an agent of socialization or as a social mechanism enabling the spread and further construction of social conceptions regarding the categories of persons described by legal rules. It is to this process that we now turn.

V. SOCIAL LABELING AND LAW AS AN AGENT OF SOCIALIZATION

In describing the nature of categories, we have said that there are not merely categories of objects but categories of persons as well. These social categories are well-known to us and play a substantial role in our everyday lives. Indeed, it has long been customary to think of these social categories—whether composed in light of nationality, religion, sexuality, race, etc.—as representing different types of people. That this sort of social classification is commonplace appears beyond question, but what does it mean to say that there are different "types" of people? According to which social processes do these different types emerge? And what role does law play in their emergence?

Recently, the first two of these questions have garnered considerable attention, particularly within cultural, identity, and lesbian and gay studies. Theorists writing from within these literatures suggest that the primary commonality among different types of persons is that each has been stamped with a particular *label*, or a social marker identifying an aspect of one's social identity. In his book, *The Ethics of Identity*, Anthony Appiah describes the structure of social identity by means of a three-part theory of social labeling.[113] According to Appiah's model, the first requirement for the construction of a collective social identity is the existence of a "social conception" about a particular collective of persons.[114] Such a social conception will only develop where there are "terms in public discourse that are used to pick out the bearers of the identity by way of criteria of ascription, so that some people are recognized as members of the group."[115] In other words, the first requirement for the presence of a meaningful social identity is a socially available and widely recognized social label that has been or is in the process of being attached to some collective of persons. The social label may come from within the collective itself, as with certain religious or cultural groups, or it

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113. Appiah, *supra* note 78, at 65–71.
114. *Id.* at 67.
115. *Id.* at 66–67.

may develop around an external social consensus that the persons who fall within a particular class are alike in certain ways, either in terms of their appearance, their presumed behavior, or other socially detectable tendencies. These notions regarding classes of persons are, of course, stereotypes about the members of various groups, and the stereotypes are often inaccurate and can be tremendously injurious. Further, in the same way that we described the essential nature of social categories above as "fuzzy sets," social labels need not apply in any determinate fashion to any expressly defined set of persons to be meaningful. As Appiah says:

> For a social conception to exist, it is enough that there be a rough overlap in the classes . . . so there need be no precisely agreed boundaries, no determinate extension; nor is it necessary that the stereotypes or criteria of ascription be identical for all users of the term.[116]

Hence, a social label may apply even where the social conception of the persons to whom the label is applied varies according to the bearers of the conception, perhaps in light of differences in social status or simply different life experiences leading to the development of different cognitive schema. For instance, one's conception of being Mormon, gay, or African-American may entail very different meanings for the bearers of these labels than it would for persons outside these social classifications. There will also typically be a measure of disagreement regarding the content of the social label even *among* the bearers of any particular label. As a brief thought experiment, imagine for a moment that you were asked to describe the artist Marc Chagall. Assuming the name is familiar, perhaps a colorful, somewhat surreal image of nineteenth or early twentieth century Russian-Jewish village life would flood your mind, or you might visualize some particularly vivid biblical or folkloric imagery. If you were like me—that is, if you shared my cognitive schema—probably you would begin by describing Chagall as one of the most famous Jewish artists of the modern era. Each of these four descriptive terms—famous, Jewish, artist, and modern—describes a type of person. Notice, though, that none has anything approaching a determinate meaning. There will rarely be uniformity regarding what it means to be famous, Jewish, an artist, or modern, even among persons to whom we might regularly attach these social labels. But neither the indeterminacy concerning the relative variation in the social conception of classes

116. *Id.* at 67.

of persons nor their frequent derivation from inaccurate stereotypes makes the social label itself any less potent or consequential. It simply means, first, that just as the categories of persons within society are best characterized as fuzzy, so too are the social labels used to describe them, and second, that social labels frequently function in an ascriptively inegalitarian fashion.

In conjunction with the development of a social conception with respect to some class of persons and the application to that class of a social label, "the second element of a social identity," according to Appiah's model, "is the internalization of those labels as parts of the individual identities of at least some of those who bear the label."[117] It is tempting to conceptualize Appiah's first two elements sequentially, such that a social conception along with a social label descriptive of the conception is developed first, and then subsequently internalized by those to whom the label is applied. This sequential conceptualization of the process of social identity formation is likely largely faithful to the social construction of racial identities, for example. The social salience of a subordinated racial group probably does emanate, at least initially, from outside the group to whom the social label is attached, and only subsequently does the label and its (typically stigmatic) content become internalized.[118] Yet, the internalization of a social label need not follow in any precise way the development of a social conception with respect to that label; Appiah's elements, at least as I interpret them, need not be sequential. Where the essence of a social label is derived internally or constructed and then projected (intentionally or unintentionally) from within the collective itself, the internalization of a label ("we are X") may actually precede and may even instigate the development of a social conception ("you are X") regarding the collective. Again, the paradigmatic collective in the United States is a religious group. It seems unlikely, for example, that Amish practitioners' sense of their own social identity became internalized only once a more general social consensus regarding what it means to be Amish came to exist. Instead, the Amish identity springs primarily from the religious and traditional values that its members have come to affirm.[119] Of course, the very existence of the Amish as a religious group in the United States is

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117. *Id.* at 68.
118. *See, e.g.*, Amy Gutmann, IDENTITY IN DEMOCRACY 117 (2003) (describing race as an ascriptive status).
119. *See, e.g.*, Donald B. Kraybill, *Negotiating with Caesar, in* THE AMISH AND THE STATE 3, 7–15 (Donald B. Kraybill ed., 1993) (describing Amish traditions).

a result of broader social forces, particularly religious persecution that led to wide-scale emigration from Europe in the mid-sixteenth and early seventeenth centuries.[120]   Further, once a social conception regarding such a collective exists, its content, along with the meaning signified by its social label, may evolve in a way that leads also to an evolution in the substance of the identity characteristics internalized by the labeled members. Hence, what it means to be Amish within a broader heterogeneous society, even for the members of an Old Order sect, is subject to adjustment or even transformation as a result of changes in both internal collective and external social conceptions. The broader process of constructing social labels and the internalization of the content of those labels most often proceeds interactively and in tandem, rather than in a unilinear or sequential pattern.

As an individual to whom a social label has been attached internalizes the label, it becomes for him a part of who he is, an element of his identity that influences certain aspects of his social life.   Recalling the idea of the artist as a social category, an individual so labeled may feel compelled, in light of his internalization of the social label, to act in the world *as* an artist; to support the arts, perhaps, or to attempt to be creative in other facets of his life.   Similarly, a farmer might, in light of social norms associated with the label "farmer," consciously seek to avoid appearing weak or lazy in public. Or perhaps she would come to the aid of a fellow farmer suffering drought merely because he is in need and he is a farmer. Firemen, especially after the events of September 11, 2001, are often perceived as brave and heroic; miners present a social image of struggle and loss; academics, an image of intelligence but impracticality. And returning once again to the Old Order Amish, the core of the religious group's value structure is grounded in a sense of *Gelassenheit*, or submissiveness.   This value structure thus informs the Amish identity in ways that make a difference to their daily lives: the Amish are taught to be deferential, obedient, and content with simplicity and self-denial. "The religious meaning of Gelassenheit expresses itself in a quiet and reserved personality and places the needs of others above the self. Gelassenheit nurtures a subdued self—gentle handshakes, lower voices, slower strides—a life etched with modesty and reserve."[121] With the internalization of social labels comes self-identification as labeled, and this self-identification helps to shape one's place in the world, and, in the process, even partially to define one's self.

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120. *Id.* at 6.
121. *Id.* at 12–13.

"The final element of a social identity," Appiah suggests, "is the existence of patterns of behavior toward Ls [where L stands for labeled persons], such that Ls are sometimes *treated as Ls.*"[122] This seems essentially the mirror opposite of Appiah's second *identification-as* element. Whereas the internalization of a social label reflects one's self-identification as labeled, the treatment-as element focuses upon the external social response to, and reinforcement of, that label. As above, the relationship between this and the other elements in Appiah's model is best conceptualized as interactive and multi-linear rather than as sequential. Certainly, the third element may help facilitate the second—treatment-as-labeled clearly may promote the internalization of a social label. The third element might also influence the content of the first element since treatment-as-labeled may stimulate movement in the underlying social conception itself, in either oppressive or progressive directions. For example, the notion of treatment-as-labeled likely brings almost immediately to mind discriminatory social practices associated with an individual's race, gender, sexual orientation, nationality, etc. Hence, the discriminatory treatment of a Muslim, specifically in light of her religious affiliation, might lead the person treated-as-labeled (element 3) further to internalize the Muslim aspect of her social identity (element 2). This sort of treatment-as-labeled (element 3) may also cause a transformation in the broader social conception of Muslims (element 1). This might happen, first, in a malevolent sense by signaling one segment of the population's sense of how Muslims should be treated. But then, second, it might also cause a change in the underlying social conception of Muslims in a more benevolent sense by shedding light on oppressive practices. Certain images broadcast of the treatment of civil rights protestors in the southern United States in the 1950s and 1960s seemed to have similar effects.

One way to conceptualize the core methodological idea of the sort of labeling theory explored here—the idea that the creation of a social label occurs simultaneously with the social invention of types of persons—is in terms of the approach that Ian Hacking has designated "dynamic nominalism."[123] In admittedly oversimplified terms, a nominalist would view our generalizing about various categories of objects and persons as entirely the result of human social thought; for example, the only true

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122. Appiah, *supra* note 78, at 68.
123. *See* Ian Hacking, *Making Up People, in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 78 (Edward Stein ed., 1992).

commonality among the objects in our category "trees," according to a thorough-going nominalism, is the fact that we have come collectively to describe all such objects as "trees." In contrast, a realist would point out that all of the objects that fall within our category of trees do, in fact, emerge from a seed; realism views general categories as having an actual existence or as being grounded in reality. Hacking, in describing a "dynamic nominalism," seeks to provide an alternative both to conventional nominalism, to the extent that it envisions fixed or static categories, and to traditional realism. "The claim of dynamic nominalism," Hacking writes, "is not that there was a kind of person who came increasingly to be recognized by bureaucrats or by students of human nature but rather that a kind of person came into being at the same time as the kind itself was being invented."[124] As an example of the way in which social categories or "kinds of persons" are constructed through a process of dynamic nominalism, Hacking points in particular to the idea that there is a social category of gay persons, or a homosexual type. Same-gender sexual activity, we know, has existed throughout recorded human history, but most commentators within gay and lesbian studies agree that homosexuality as a social category, as a type of person, developed only once individuals engaged in same-gender sexual behavior began to be labeled as such within the last century or so.[125] Clearly, the invention of the social label was, in part, a response to social forces, including extreme prejudice, and to the real existence of differences in social or sexual interaction; nevertheless, the invention of the social label and category also simultaneously created a new way for people *to be.*[126]

In this respect, consider again the social category in the United States composed of Native Americans as well as the derivation of the social label "American Indians." As Joane Nagel explains it:

> At the time of the earliest European contact with North America, there were no American Indians. The aboriginal inhabitants of North America encountered by European travelers spoke myriad languages; possessed a wide variety of cultures; displayed a broad diversity of social, economic, and political organization; and had no conception of themselves as a single "race," group or people.[127]

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124. *Id.*
125. See especially the essays collected in THE MAKING OF THE MODERN HOMOSEXUAL (Kenneth Plummer ed., 1981).
126. Hacking, *supra* note 123, at 70 (emphasis added).
127. Nagel, *supra* note 7, at 3.

The Native American "type" of person arose as a result of a broad, continental population convergence and the social, including legal, classifications that resulted from those encounters. In fact, as most schoolchildren learn, the social label "American Indian" reveals more about the European explorers' true original objective (i.e., to locate a trade route to the East Indies) than it does about the ethnically diverse population to whom the label became attached.[128] Perhaps, had the European settlers perceived some incentive in differentiating among the hundreds of culturally, linguistically, politically, and geographically diverse tribes they encountered, the more general social classification would have been less prominent and less constitutive of tribe members' social identities. However, from the settlers' perspective, and perhaps also from that of the indigenous inhabitants, the vast bulk of the social, economic, and military interaction between the populations was viewed through the single dimension of land and resource allocation.[129] Hence, consistent with Hacking's view of dynamic nominalism, the creation of the social category and cultural label and the emergence of a collective identity appears to have occurred simultaneously. Ever since, being Native American, either as a result of self-identification or as a consequence of external social ascription, or both, simply has become one of the many ways for persons to be in North America.

We have, then, a basic model of the processes by which social identity is constituted and a sense of the interactive complexity of those processes. As Appiah says: "Where a classification of people as Ls [where, again, L stands for labeled persons] is associated with a *social conception* of Ls, some people *identify* as Ls, and people are sometimes *treated as* Ls, we have a paradigm of a social identity that matters for ethical and political life."[130] And it matters greatly because an individual's social identity resonates both in one's self-perception and during critical moments of social and political interaction. Yet, what role does *law* play in the constitution of social identities such as those we have encountered? I propose that law be viewed as one of many agents of socialization, or as a particular social medium through which ideas, including ideas about persons' social identities, can be constructed and spread throughout society. Although neglected, this idea is not a new one. Indeed, in his commentary on social life and politics in nineteenth century America, de Tocqueville may have been the first modern theorist to appreciate the socializing influence of law:

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128. *Id.*
129. *Id.*
130. Appiah, *supra* note 78, at 69.

So legal language is pretty well adopted into common speech; the spirit of the law, born in schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.

In the United States the lawyers constitute a power which is little dreaded and hardly noticed; it has no banner of its own; it adapts itself flexibly to the exigencies of the moment and lets itself be carried along unresistingly by every movement of the body social; but it enwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to his desire.[131]

In this regard, recall what we have said of the social construction of the Native American as a type of person. American Indian ethnicity, as we have seen, arises as a general social category out of numerous, unique indigenous cultures, and the U.S. government has entered into hundreds of treaties with distinct sovereign Indian nations. Despite this marked heterogeneity, legal institutions have viewed the different tribes and tribe members as similarly situated for purposes of a considerable number of their legal interests and obligations. This is neither surprising nor necessarily disadvantageous. It is simply the nature of law consistent with formal justice. The law is general, and, as a consequence, persons are categorized according to characteristics deemed relevant by legal decision-makers. With respect to this particular legal category, it is the Native American status itself that has been deemed relevant. Legislative universalizability has been expressed in this area through a general body of federal Indian law, including that which comprises a special volume of the U.S. Code.[132] Adjudicative decisions regarding tribes and tribe members persist as legal rules applicable to subsequent litigants and they do so specifically in light of the litigants' particular status as Native Americans. Tribes fall within the regulatory purview of a distinct administrative agency, the Bureau of Indian Affairs. And Native Americans are treated as one undifferentiated classification for constitutional purposes as well.[133]

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131. de Tocqueville, *supra* note 68, at 270.
132. *See* Nagel, *supra* note 7, at 8.
133. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (taxation).

It should, then, not be at all surprising that "American Indian" or "Native American" has come to be viewed as a way to be or as a distinct type of person in American society in ways that matter socially and politically. Why have so many of us come to believe that one's being Native American is an important aspect of the various tribe members' social identities? As Joane Nagel has indicated:

> If informal ethnic categories and meanings can shape the everyday experiences of minority groups, formal or official ethnic labels are all the more powerful sources of identity and social experience because they carry the imprimatur of the state. When mandatory ethnicity is official, the power of the ethnic ascription is vastly reinforced.[134]

The Native American social label and its corresponding collective identity has come so forcefully into view because the law categorizes indigenous cultures in this fashion, labels the collective "Indians," and indicates to every one of us that this is a salient distinction—a distinction that will matter legally, politically, and socially.

Indeed, the same might be said of any legal rule, the investitive criteria of which reflect differentiated, and socially salient, characteristics. Thus, disability and citizenship laws further constitute categories of persons, influencing the social identity and status of the individuals such laws describe. These legal rules reflect socially salient differences among persons, differences grounded in physicality and power relations, and, perhaps, differences that find their source in deep cultural and historical forces. Legal institutions, in this way, further construct applicable social labels, marking the disabled from the able-bodied, and the citizen from the resident or undocumented alien, and in the process they spread and further constitute social conceptions of the individuals such laws describe. So too do laws denying the institution of marriage to same-sex couples, as do such laws' pragmatic, though morally unsatisfactory, surrogates, which announce the constitution of a new and distinct form of social relationship, the civil union or domestic partnership.[135] These legal institutions function as agents of socialization, turning as they do on socially salient criteria, further constructing social labels, and thereby entrenching and constituting social perceptions, statuses, and identities.

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134. Nagel, *supra* note 7, at 27–28.
135. *See* William N. Eskridge, Jr., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 234–35 (2002).

Though there is almost always a moral undercurrent to laws that differentiate among classes of persons on the basis of socially salient traits, the conception of law as an agent of socialization is not offered here from any one normative perspective. While the exclusion of classes of persons on the basis of inegalitarian ascriptive statuses might indeed be morally unjustified, the bare notion that law functions in a socializing mode is a descriptive claim. Indeed, although historically legal differentiation could typically be associated with an illiberal agenda in the form of unequal treatment and potentially severe constraints on individual autonomy, there is no necessary connection between such differentiation and the violation of liberal democratic principles. For instance, cultural rights differentiate among persons on the basis of socially salient characteristics and so serve also to entrench, spread, and enable the further construction of social labels, statuses and identities. And yet this legal differentiation, although the subject of continuing controversy even with liberalism, frequently has been justified on liberal grounds.[136] Similarly, legally instituted programs of affirmative action serve as agents of socialization since they turn on socially salient differences, and yet many would argue that such socialization runs in a justifiably liberal and progressive direction.[137]

Hence, at least for present purposes, the commonality among these several seemingly disparate examples is not one to be found in moral argumentation. Instead, each represents an instance of legal investitive criteria reflecting differentiated and socially salient characteristics. As we have seen, such characteristics described by law, which become socially salient in virtue of physical and deep cultural differences, power relations among categories of persons, and broader historical forces, serve further to construct social labels, thereby enabling law's role as an agent of socialization. Oddly, most sociologists and social psychologists who study the social construction of identity largely have failed to take note of law's constitutive influence. Admittedly, there are numerous other social institutions that serve as agents of

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136. *See, e.g.*, Joseph H. Carens, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000); Will Kymlicka, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (arguing that minority cultural rights serve freedom and equality). *But see* Brian Barry, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001) (arguing that multicultural programs violate liberal principles).

137. *See, e.g.*, Appiah & Gutmann, *supra* note 87, at 131; Michel Rosenfeld, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 284–96 (1991).

socialization in a more immediate and powerful sense than do laws and legal institutions. Sociologists and social psychologists have focused primarily on the role of schools, the family, the media and popular culture, corporations and the market, and cultural, religious, and peer groups in the social construction, delineation, and dissemination of social identity. They have done so, however, without justification and almost to the complete exclusion of law.[138]

To be fair, though, the neglect has been mutual. Legal scholars interested in identity construction have been *at least* as inattentive to broader social institutions as sociologists and social psychologists have been to law. The growing literature on constitutive theory within the legal academy almost entirely neglects law's position *among* social institutions constitutive of human identity.[139] If pressed, however, it is doubtful that any serious legal commentator could believe that the law is as influential a socializing agent as the educational system, the mass media, or the family. Schools regularly evaluate children in comparison to their peers, categorizing individual students according to academic, athletic, and other performance measures in ways that deeply influence the students' self-perceptions and social identities. As one study found, when "students perceive that teachers have labeled them as 'underachievers' or 'slow learners,' they may be more likely to behave in ways that corroborate that perception; by contrast, students labeled 'gifted' or 'intelligent' may more readily embrace academic performance as an activity boosting their self-concepts."[140] And the educational system socializes in a vast array of non-performance based directions as well; for instance, by teaching children, in ways both explicit and implicit (and for better or worse) that gender, nationality, ethnicity, and other collective identities are salient social differences.

Likewise, the proliferation and successful penetration in contemporary society of mass media and advertising has proven an effective instrument of socialization. Adolescent self-conceptions in particular are swayed, and to some extent intentionally manipulated, through newspaper and magazine images and

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138. *See, e.g.*, Allport, *supra* note 34, at 211–12; Cerulo, *supra* note 71, at 387.

139. *See, e.g.*, Paul W. Kahn, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999).

140. Karen Lutfey & Jeylan T. Mortimer, *Development and Socialization Through the Adult Life Course*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 187 (John Delamater ed., 2003) (citing Robert Rosenthal & Lenore Jacobson, PYGMALION IN THE CLASSROOM (1968)).

articles, television shows, movies, and music.[141] Indeed, according to one researcher, individual adolescents serve as the audience for mass media an average of nearly seven hours a day.[142] Even if this finding exaggerates the real degree of adolescent attention to media, clearly a significantly lesser extent still permits for fashion magazines to shape especially girls' self-images, sneaker advertisements to provide points of identity reference especially for boys, and popular music to construct entire youth sub-cultures.[143] And, even beyond the socializing effects of schools and the media, perhaps no social institution is as effectively constitutive of human identity as the most basic social unit, the family. Parents and other relatives intensely influence childhood development in ways that extend well into adolescence and adulthood.[144] Our families determine, at least at the outset, our nationalities, religious and other cultural affiliations (or our lack thereof), social class, and even our life prospects and fundamental world-views. Though we may seek to distance ourselves from our native backgrounds in ways large and small, there is abundant evidence that social and cultural connections derived from familial sources remain persistent. As Michael Walzer has written, "identities are, mostly, the gifts of . . . parents."[145]

Hence, in comparison with other social institutions, law will generally play a secondary role in the socialization of persons and the construction of social identity. Even as an admittedly lesser partner in the social constructionist project, however, legal institutions remain constitutive of human identity in ways that matter greatly. Law inherently categorizes persons in the service of fairness, predictability, and freedom, and perhaps, on a deeper level, as a result of the fundamental processes of human social cognition. At a minimum, then, law functions in an institutionalizing and disseminating capacity, providing a mechanism for the entrenchment and further reinforcement of

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141. Donna Eder & Sandi Kawecka Nenga, *Socialization in Adolescence, in* HANDBOOK OF SOCIAL PSYCHOLOGY 173–74 (John Delamater ed., 2003).

142. *See* Donna Gaines, TEENAGE WASTELAND: SUBURBIA'S DEAD END KIDS (1991); Eder & Nenga, *supra* note 141, at 173 (citing Donald F. Roberts, *Media and Youth: Access, Exposure, and Privatization*, 27 J. ADOLESCENT HEALTH 8 (2000)).

143. *See* Eder & Nenga, *supra* note 141, at 173–74; Melissa A. Milkie, *Social Comparisons, Reflected Appraisals, and Mass Media: The Impact of Pervasive Beauty Images on Black and White Girls' Self-Concepts*, 62 SOC. PSYCHOL. Q. 190 (1999); Brian Wilson & Robert Sparks, *"It's Gotta Be the Shoes": Youth, Race, and Sneaker Commercials*, 13 SOC'Y SPORT J. 398 (1996).

144. *See* Lutfey & Mortimer, *supra* note 140, at 186–88.

145. Michael Walzer, *On Involuntary Association, in* FREEDOM OF ASSOCIATION 64, 65 (Amy Gutmann ed., 1998).

social identity differentiation emanating from social institutions other than law. Yet, law's constitutive influence is not limited to so passive a role. Social categories, including those categories constituted by legal institutions, are best conceptualized as fuzzy sets in light of their peripheral criteria and necessarily indistinct borders. This fuzziness, reflected also in the indeterminacy apparent in legal investitive criteria, creates additional room for the legal construction of social categories. In this way, law functions also in an interpretive and transformative capacity. Whenever a social category is to be institutionalized in law, it necessarily becomes subject to interpretation by legal institutions, both at the point of legislative entrenchment and, even more plainly, in the context of adjudication and administrative implementation.

Law, thus, provides more than an expedient means for the entrenchment and reinforcement of pre-existing social conceptions and social labels regarding the classes of persons sorted by legal institutions. It also serves, in its own right, as a source of further development of those conceptions and labels. Law and legal institutions constitute aspects of human social identity when the investitive criteria that serve as the bases for legal categorization reflect socially salient characteristics. The social salience of legally investitive criteria is a complex social cognitive phenomenon, grounded in a combination of physicality, power relationships, cultural differences, and deep history. Legal institutions reinforce the social salience of the human characteristics described by law and, in the process, further construct social labels attached to categories of persons. Members of the society at large, consciously or unconsciously, take notice of the social conceptions and labels propagated through the law, and individual members of the categories reflected and further constituted by legal institutions internalize their differentiated status. In this way, law serves as one of many institutional agents of socialization.

The path to understanding law's relationship with social identity is not constrained to the garden of sociolegal studies. That path has many branches and is far from being fully mapped. In the context of constitutive theory, this article has shown, sociolegal scholars have much to gain from encounters with cultural sociology and social and cognitive psychology. Law is indeed partially constitutive of who and what we are. But if we are ever truly to understand how and why legal institutions constitute us as they do, we must not permit the boundaries of our respective disciplines to limit the range of our thinking.