

# The Blackwell Companion to Law and Society

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*Edited by*

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 **Blackwell  
Publishing**

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## Consciousness and Ideology

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From their roots in nineteenth-century social theory, consciousness and ideology have had an uneasy relationship. As initially conceived, consciousness and ideology were opposed to one another. Whereas ideology represented the concealment of power, consciousness entailed its unmasking. In this classical tradition, both concepts were ideational. Ideology was associated with systems of beliefs that naturalized inequality. Consciousness, by contrast, was the awareness, held by individual subjects, that these beliefs were distorted, partial, and interested. So perfect was this opposition that the phrase "*false* consciousness" came to be synonymous with ideology, a conceptual inversion that created identity.

As the concepts have developed during the twentieth century, ideology and consciousness are no longer understood to be necessarily opposed to one another. As with so many other conceptual couplets (structure/agency or power/resistance), elements that were initially conceived of as distinctive and opposed have been construed as internal components of a larger process of social construction. For instance, while there is still much that is contested about the nature and meaning of ideology, there is an emerging consensus over what it is *not*. Few contemporary sociolegal scholars would claim that ideology is a grand set of ideas that in its seamless coherence imposes belief. It is not, in other words, a system of ideas that strictly determines what people think, that is, their consciousness, false or otherwise. In fact, the most promising reformulations of ideology propose that it is not a body of abstracted ideas at all (static, coherent, or otherwise). Rather, ideology is a complex process "by which meaning is produced, challenged, reproduced, [and] transformed" (Barrett, 1980; 97; see also Bahktin, 1987; Billig, 1991; Steinberg, 1991, 1999). Construed as a process, ideology shapes social life, not because it prevents thinking (by programming or deceiving people into a state of resignation or complacency), but because ideology actively invites thinking. In order to remain viable, ideology has to be lived, worked out, and worked on. It has to be expressed and applied and challenged. People have to use it to make sense of their lives and the

world around them. In order to be a source of meaning and sense making, ideology must be polysemic, open, varied, and complex. Without these qualities, it would be useless and wither; or it would become a source of derision, fear, or ridicule. It would, in short, cease to be ideological.

Consciousness likewise figures prominently in this process of social construction. First, it too has been expanded to denote more than ideas that individual knowers have about power and inequality. Consciousness represents participation in the production of the very social structures that generate the degree and types of inequality existing in a society (Ewick and Silbey, 1997). In this sense, legal consciousness entails both thinking and acting: telling stories, complaining, lumping grievances, working, marrying, divorcing, suing a neighbor, or refusing to call the police. Through the circuitry of social practice, the boundary between structure and agency is blurred. With this blurring, consciousness is dislodged from the mind of an individual knower insofar as knowing always entails the invocation of cultural schemas and deployment of differentially available resources. It, in other words, emerges out of, even as it shapes, social structures.

Presented in this way, ideology and consciousness appear as similar, if not the same. Both are dynamic, cultural productions that have no virtual existence outside or apart from the words, deeds, and interactions that constitute social life. However, there remains a single crucial difference between consciousness and ideology. That difference is power. Ideology articulates power insofar as it embodies what Dorothy Smith has called procedures for "not knowing." This conceptualization of ideology actually retains an element of concealment. But, emerging out of a constitutive theory of law, this understanding of ideology deftly avoids making any claims about a foundational truth that can be opposed to ideology. Ideology, it is proposed, inheres in the *processes* or form of concealment, rather than in the *content* of that which is concealed.

In this essay, I will explore recent empirical research on consciousness and ideology in order to examine the various "procedures for not knowing" that comprise legal ideologies and assess the utility of these conceptual reformulations for socio-legal studies.

### CLASSICAL AND CONTEMPORARY FORMULATIONS OF IDEOLOGY AND CONSCIOUSNESS

The starting point for most discussions of ideology and consciousness is typically the Marxist formulation of the terms. In the *German Ideology* (1970), Marx and Engels characterize ideology as a form of cognitive distortion, a false or illusory representation of the real. In this rendering, ideology is equated with the realm of the ideal. Ideologies operate to explain history according to philosophy and religious systems. Accordingly, they disguise the material interests embedded in the operation of society. Ideology thus operates to prevent men and women from perceiving the real conditions of existence, or their own "real" interests as they might find expression in those conditions.

Overcoming the ideological, for Marx, required a "study of actuality," or the empirical examination of the practical relations of everyday life. Such a study would explode the illusion of the ideal, revealing the embedded material interests that obscured the so-called actual. From the point of view of historical subjects of such

ideologies, this would lead to class consciousness, or an appreciation and realization of these interests. Laboring under the illusions offered by religion and philosophy was, by contrast, to have false consciousness. Thus, for Marx, consciousness either sustained (false) or penetrated (class) ideology.

In contemporary sociolegal research, ideology and consciousness remain robust and central concepts. Indeed, given the focus of sociolegal scholars on power, culture, language, and ideas, the concepts are indispensable. And, although there are few strict adherents to classical Marxist formulation of the terms, aspects of this view of ideology and consciousness appear in many contemporary sociolegal accounts. Some contemporary Marxist structuralism, for instance, treats ideas, including cultural symbols and narratives, as a superstructural residue of material conditions that serves the interests of the elites.

Following from this perspective, law and legal consciousness are considered epiphenomena insofar as a particular social and economic structure is understood to produce a corresponding or appropriate legal order, including legal subjects. Work in this tradition often describes how the needs of capitalist production and reproduction mold legal behavior and consciousness. Studies focus on the production and practice of law, its accommodation to class interests, and the inequities that result.

For instance, Chambliss (1964) links the emergence, dormancy, and reemergence of the law of vagrancy to the changing needs of a ruling class. He describes how a decline in labor supply and the consequent pressure for increasing wages following the Black Death was opposed by the landed gentry through the passage of laws against vagrancy. These laws prohibited travel from one community to another, thus tying laborers to the land. As feudalism broke down, such laws were no longer needed and remained largely unenforced for the following century. Eventually, in the sixteenth century during a period of expanding trade, vagrancy laws were resurrected and revised to function as vehicles for policing and regulating the public roads where commercial traffic in goods and persons had become common. Whereas initially the focus of the statutes was on the "idle" and "those refusing labor," in the sixteenth century their emphasis was on "vagabonds" and "rogues." As the needs of the economic system and the material interests of the ruling class changed, so too did the law of vagrancy.

Late twentieth-century sociolegal scholars largely rejected this version of ideology as merely an epiphenomenal expression of underlying class domination, identifying a number of problems with the concept. Perhaps most troublesome has been the Marxist legacy of ideology as illusion or as a form of "false consciousness" (Hunt, 1985). The main reason for contemporary unease with the idea of false consciousness has been the rejection or questioning of the existence of an underlying truth, in an Enlightenment sense of an objective reality. Indeed, many of the dualities that characterized the ideological critiques of the nineteenth and early twentieth century (science/ideology, real/ideal, subject/object) have been disputed or rejected by contemporary scholars. Most significantly, they have rejected the possibility of a system of ideas and symbolic forms that misrepresents a social reality that exists prior to or independently from those ideas (Thompson, 1990).

A corollary of this criticism, insofar as it questions the notion of distortion or concealment, is the charge that ideology as false consciousness misrepresents or underestimates the degree to which subjects see through prevailing power relations. Subjects are instead reconceived of as being conscious of the power relations that

suffuse their everyday social interactions. This insight has led sociolegal scholars to examine the consciousness of legal subjects as a terrain of struggle, contestation, inventiveness and resistance, rather than as a repository of ideological representations received from above. Legal subjects are seen as being much more actively engaged in ideological processes of both reproduction and resistance. In interactions with legal authorities as well as with one another, individuals invoke, comment upon, reject, and revise the symbolic meanings that comprise the ideological. In doing so, they creatively constitute – sometimes knowingly and sometimes unknowingly – the situated power relations within which they act (Bumiller, 1988; Ewick and Silbey, 1995, 1997; Sarat, 1990; Scott, 1985, 1990).

Finally, scholars have reconsidered the relationship of ideology to dominant classes. Empirical analysis of law creation, interpretation and enforcement has demonstrated that ideology is not aligned in an a priori way with a particular or single set of dominant interests and imposed downward upon the masses. This is to say, no particular set of ideas is ideological, per se. According to Hunt (1985: 16), “The class dimension of ideology is not an intrinsic property of words or concepts, but instead arises from the way in which ideological elements are combined and interrelated. Ideologies are not to be treated ‘as if they were political number plates worn by social classes on their backs’ (Poulantzas, 1975).”

One solution to the problems associated with the concept of ideology as epiphenomenal illusion has been to abandon the notion of ideology as “ruling idea,” and simply equate it with “idea,” or to be more precise, contested idea. Ideology loses its pejorative connotation and assumes a more neutral and descriptive bent. In this formulation, ideology becomes synonymous with “system of ideas,” “system of symbols,” or “system of beliefs.” Ideology is seen as animating social action, but it is not aligned with any *particular* type of action, political project, or set interests. Ideology, here, assumes a pluralist and democratic quality. What is achieved by democratizing ideology is a recasting of subjects as conscious actors who are active in the process of making sense of the world and their experiences. For instance, Sally Merry has characterized ideology as a

set of symbols and meanings by which individuals make sense of their world and their experience, suggesting that it is neither false nor true, but one of a range of ways of making the world coherent. Cultures provide multiple and competing sets of symbolic forms and meanings from which individuals choose. These symbolic systems are subject to redefinition through experience and changes in the social system itself. (Merry 1985: 61)

While this move avoids some of the pitfalls associated with earlier uses of the ideology, it falls headlong into a number of others. Most notably, this approach to ideology neutralizes the term by severing its connection to power and subordination. Unfortunately, stripping ideology of its negative aspects leaves unanswered many of the problems that it was initially formulated to draw attention to, questions such as domination, inequality, and social reproduction. For instance, in her critique of this approach, Silbey (1998) observes that focusing on the freely choosing subjects fails to take into account the ways in which power and privilege are embedded in institutions and language: “Unfortunately, the emphasis on the choosing subjects selecting from tool kits of available symbols, metaphors, and strategies elides the actions of collectivities seeking to privilege their vision of the world as reality, and the efforts of others in turn to find the means to resist such attempts” (p. 282).

Adopting a definition of ideology that equates it with a "system of beliefs" relieves many of the tensions that inhere in the classical concept of ideology. But the solution comes at a high price. Ideology loses most of its critical capacity, and thus its usefulness as a social scientific concept.

More recently, efforts have been made to salvage the critical capacity of the term and not abdicate its association with power. These reformulations retain the idea that ideologies legitimate and reproduce social inequality, without making any explicit assertion that (1) there is a real underlying truth that is being obscured, (2) subjects' consciousness is passively and automatically reflective of ruling ideologies, or (3) ideologies are necessarily aligned with the interests of one class. The most promising of these formulations have conceived of ideologies as operating not by concealing or masking the truth, but through the artful *production* of truth.

### IDEOLOGY AND DISCOURSE: THE ARTFUL PRODUCTION OF TRUTH

Reformulating ideology in such a way as to recognize it as a creative and constitutive process parallels Foucault's reconceptualization of power (1977). Whereas Foucault asks us to consider power as a productive capacity, a similar claim has been made about ideology. Rather than focus on it as a *camera obscura*, it is increasingly understood to be a lens, providing not just an (inverted) vision of the real but actually producing the real. This claim grows out of the social constructivist or constitutive theory of social life. Within this framework, consciousness and ideology are understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making.

This view of ideology recognizes that it does not simply operate alongside domination; it is not simply a tool to be used to hide or create a distraction from the real. Rather the social meanings that we define as ideological are constitutive of domination. We can thus define ideology as "the ways in which meaning serves, in particular circumstances, to establish and sustain relations of power which are systematically asymmetrical" (Thompson, 1990: 7).

It is important to note that, in this definition, ideology is not defined by its content. It can only be recognized within particular sociohistorical contexts and, more specifically, by its operation within those contexts. In short, ideologies are known in terms of their effects. A particular set of meanings can only be said to be ideological insofar as it "serves" power (Thompson, 1990). The emphasis is thus on the active verb *serve*, reminding us that ideological analysis can only take place by examining the particular situational contexts in which struggles over meaning occur and paying attention to how those struggles contingently stabilize power.

Focusing on ideology as a process of meaning making necessarily implicates an examination of discourse, or "the process and product of socially situated and institutionally ordered ways people communicate their representations of lived and imagined realities" (Steinberg, 1999: 743). Generated through discourse, ideology is interactive and embedded in particular social contexts (see Bakhtin, 1987; Umphreys, 1999). Being interactive suggests that the meanings produced through this process are never singular or fixed, but are continually available for interpretive

innovation, or deployment in new settings or for unanticipated purposes. Being socially situated, however, suggests that the possibilities for meaning making are, while open, also constrained. In part, the constraints reflect past discursive practices that have become institutionalized. Rules of evidence and cross-examination in a criminal trial illustrate such institutionalized constraints. Constraints may also reflect the sedimentation of meaning that is imported into any given setting. As Bakhtin observed:

The living utterance, having taken meaning and shape at a particular historical moment in a socially specific environment, cannot fail to brush up against thousands of living dialogic threads, woven by socio-ideologic consciousness around the object of the utterance, it cannot fail to become an active participant in social dialogue. And not all words for just anyone submit equally easily to appropriation . . . many words stubbornly resist, other remain alien. (Bakhtin, 1987: 276)

The fact that some words resist appropriation, or remain alien, suggests that past struggles over the word have privileged some meanings and suppressed others. Observing that discourse is principally organized around practices of exclusion, Mills writes, "Whilst what it is possible to say seems self-evident and natural, this naturalness is a result of what has been excluded, that which is almost unsayable" (1997: 12). It is generally recognized that, while the particular content of ideology cannot be specified ahead of time, its effects will be to make that which is arbitrary appear inevitable and natural. In this way, the contingency of power and hierarchy are stabilized through the processes of "not knowing," an essential part of the artful production of truth.

Law is, of course, an ideological discourse par excellent in that it is in the business of meaning making. As many scholars have noted, the law shapes our lives in ways that are rarely recognized. It invests us with identities and subjectivities, it shapes the physical and material world we live in, and it explicitly establishes rules and practices of other institutions. Finally, law is deliberately designed to operate as a "terrain of struggle." Much of the law – its organizations, professional practices, and rules of procedure – operates as an arena in which the dialogic conflicts are fought. Most importantly, however, presenting itself as a "referee" in these struggles, the legal system denies that it is an active or interested participant in the struggles. Thus, legal decisions and meanings are ideological precisely because they *appear* to be nonideological.

### MODES OF LEGAL IDEOLOGY

The reformulation of ideology as a process of meaning making that serves power has had significant empirical consequences and conceptual ramifications. It has led to a body of sociolegal research that considers the "ideological effects" of certain practices and discourses. The phrase "ideological effects" is a somewhat cumbersome locution, but one that usefully emphasizes and makes explicit the contingent and transactional nature of ideology. Moreover, an attention to ideological effects has directed attention away from content of ideology toward a specification of techniques and forms through which meaning is made and deployed in the service of power. What Ronen Shamir wrote generally of law and society research, we might say of law and ideology: "an important achievement of recent sociolegal scholarship

on law... is that it portrays the form of law, rather than its specific content, as the deeper layer of its mode of operation" (1996: 235).

John Thompson (1990) has identified five modes through which legal ideology operates and has linked each of these with typical forms of symbolic constructions, although he acknowledges that these forms of symbolic constructions may be associated with any or all of the various modes. Still, without making a claim about the exhaustivity or exclusivity of this catalog of forms, I would argue for the utility of such a typology. The analytic purchase of defining the form of ideology consists of its ability to specify *how* ideology artfully generates truth and creates ways of "not knowing" by suppressing alternative meanings, without reference to the content, or *what*, of ideology. This approach thus avoids some of the recurring problems of the concept, without sacrificing its critical role in explaining systematic asymmetries. Furthermore, by asking *how* ideology works we are denoting a process or a technique. Focusing on the various ideological forms invites us to examine the operation and effects of these techniques. It requires that we understand ideology and consciousness as ongoing participatory activities that over time constitute particular social and historical worlds.

### Legitimation

Prominent, and most familiar, among the ideological modes of operation is legitimation. Legal ideologies and corresponding legal consciousness are ways in which social organizations produce the means of authorizing, sustaining, and reproducing themselves. By focusing on the legitimating effects of law, research describes the ways in which law helps people see their worlds, private and public, as both natural and right. In short, ideologies legitimate systematic asymmetries by depicting situations as worthy of support.

A principle strategy of legitimation, at least since the last century, is *rationalization*, or the application of logic and a positivist epistemology such that the resulting relations of power appear inevitable, and thus inarguable. For example, in their examination of a moral panic over mugging that occurred in England during the 1970s, Hall, Critcher, Jefferson, Clarke, and Roberts attach considerable significance to the use of statistics by politicians and journalists: "Statistics – whether crime rates or opinion polls – have an ideological function: they appear to *ground* free floating and controversial impressions in the hard, incontrovertible soil of numbers. Both the media and the public have enormous respect for 'the fact' – *hard facts*. And there is no fact so 'hard' as a number..." (Hall et al., 1978: 9; italics in original). Similarly, Jonathan Simon (1988) has written of the ideological effects of "actuarial practices" whereby the collection of data and use of seemingly neutral statistical techniques create categories of persons who then become the object of social control. Thus women, by virtue of their longer life expectancy compared to men, become a category for setting insurance premiums; or high rate offenders give rise to a typical profile, which becomes the basis for criminal justice policy. Moreover, because these techniques create subpopulations based on statistical features of a population, rather than on interactive communities, these practices disable traditional forms of resistance and collective protest. Most significantly, these techniques are politically powerful, in part, because they seem to be unconnected to political projects, and are lodged squarely in rational analysis of data. Simon observes:

Actuarial techniques play a central role in a proliferating set of social practices. They are at the same time a regime of truth, a way of exercising power, and a method of ordering social life. Actuarial practices have not seemed very important nor attracted much interest from social observers in part because they are already so familiar, and in part because they fit so unobtrusively into various substantive projects (e.g. educating, hiring, premium setting) in which they are subordinated as a means to an end. Yet this unobtrusiveness is precisely why they have become so important; they make power more effective and efficient by diminishing its political and moral fallout. (1988: 772)

Appeals to legitimacy are also couched in claims to *universalization*, whereby situations that benefit a class of individuals or groups are depicted as benefiting or as available to all. Whereas actuarial practices create distinctions that seem inevitable and thus legitimate, *universalization* achieves a similar outcome by denying difference. Balbus, for example, argues that certain features of liberal law, such as the highly prized claims to formal equality and procedural justice, serve to buttress and legitimate the inequality of the existing economic order. The formal equality instantiated in due process rights provides "a stable and apparently neutral framework from which bourgeois class interests in accumulation and profit maximization can flourish"; but due process and formal equality also help convince the "propertyless that they have the legal right and, hence, the real opportunity of rising into the bourgeoisie" (Balbus, 1973: 6).

*Narrative* is also a powerful technique of legitimation. By presenting events in the form of a story, depictions of the world are embedded in plots that unfold in a particular and inevitable chain of events leading to a moral claim about meaning. Research in a variety of settings has demonstrated the ideology effects of narrative by illustrating how stories can contribute to the reproduction of existing structures of meaning and power.

It is the narrative form, rather than the content of any particular story, that constitutes the principle means through which narratives operate ideologically. First, the ideological effects of narrative inhere in narratives' ability to colonize consciousness. Well-plotted stories cohere by relating various (selectively appropriated) events and details into a temporally organized whole. The coherent whole, the configuration of events and characters arranged in believable plots, preempts alternative stories. The events seem to speak for themselves. Narratives also sustain power relations to the extent that they conceal the social organization of their production and plausibility. Narratives embody general understandings of the world that by their deployment and repetition come to constitute and sustain the lifeworld. Yet because narratives depict specific persons existing in particular social, physical, and historical locations, those general understandings often remain unacknowledged. By failing to make these manifest, narratives draw on unexamined assumptions and causal claims without displaying these assumptions and claims or laying them open to challenge or testing.

### Dissimulation

Power is not only served through legitimation. It may also be served through deception. Thompson's use of deception as a mode of ideological operation appears to replicate the false consciousness misstep of earlier formulations. Yet, as he persuasively points out, so intent were social theorists on severing the connection between ideology with falsity that they may have ignored the fact that, although not

a defining characteristic, deception can be mobilized to sustain domination and relationships of power. Dissimulation represents the techniques of concealment and distortion that may be used to this end. Through such discursive strategies as euphemism, displacement, and trope, meaning is deployed to distort or obscure an alternative truth.

In her analysis of language and ideology in South Africa and the United States, Mertz (1988) illustrates the operation of dissimulation in the official account of the system of South African apartheid. Paying close attention to the words, phrases, and texts used to describe the unjust history of white supremacy and black disenfranchisement, Mertz observes that "complex and ambiguous situations are glossed authoritatively in single words; difficult political decisions and situations are expressed as simple and straightforward. Problems are not even acknowledged; instead, declarative and assertive language is used to describe the setting as the government wishes it to be seen" (1998: 671). She illustrates this by citing a government publication.

The Government of the RSA (Republic of South Africa) is intensely aware of the special problems that are created by an historical heritage that has placed the White nation in a position of trusteeship over various underdeveloped Bantu people. In an artificially integrated unified state, the Bantu would, as a result of their enormous backlog in comparison with the Whites, be doomed to become a backward proletariat. . . . However, by creating for each Bantu people the opportunity to grow into an independent nation in a geopolitically acknowledged sphere of influence. . . . the possibility that the divergent interests of the groups concerned will lead to a continual political struggle for power is obviated. (Mertz, 1988: 670).

The parallels to Israeli depictions of Bedouin settlements in the Negev are striking. In his analysis of Bedouins under the law of Israel, Shamir (1996) cites a judicial opinion denying the petitioners' claims that a historical injustice had been committed. The opinion ends with an account of the situation that denies injustice in the present by alluding to a history of primitiveness and backwardness and offers aid, indeed salvation, through the promise of law's order.

Under the circumstances, and with an overall perspective of the historical developments that the Bedouins in this area experience, it is difficult not to sympathize with these people and to feel a desire to help them in their distress, and it seems that this is also the sentiment of the authorities. . . . But this sentiment cannot drive us to allow the existence of constructions that were illegally constructed or to order the authorities not to implement the law. (1996: 251)

In each example, a history of oppression is glossed over with phrases like "white political *leadership*," or "the historical *developments* that the Bedouins experience." In each example, systematic government policies designed to disenfranchise South African Blacks or Bedouin nomads, are presented in the language of *trusteeship* or a *desire to help*. In each example, the order imposed by the law is offered as an alternative to chaos or *continual struggle*.

*Displacement* is another discursive strategy designed to dissimulate, without necessarily deceiving. The strategy of displacement consists of invoking meaning associated with one object, or developed in one context, to another object or context. Referring again to Hall et al.'s history of moral panic in *Policing the Crisis*,

the authors assign paramount importance to the transplantation of the idea of mugging from its American context. The imported term carried a host of additional associations and references that generated an abundance of meaning. Without the supplement of associations – including the ideas of general social crisis and rising crime rate of the United States – the panic, and the ensuing government campaign, might never have occurred.

It is crucial to reiterate the point that euphemism or displacement, as well as other rhetorical devices such as trope, do not represent the falsification or covering up of truth. In other words, they are ideological, not because they destroy or conceal truth, but because they generate meaning. Through the creation of meaning they come to constitute the situations and relationships they depict. Subjugated, Bantu remain in “underdeveloped” homelands. Denied their ownership claims, Bedouin remain “uprooted.” Framed within the American example, a cluster of petty crimes generates moral and social panic. Ideologies, Greenhouse (1988) wrote, are thus self-fulfilling. Therein lies their capacity to serve power.

### Unification and fragmentation

Although Thompson presents unification and fragmentation as separate, they can be arguably collapsed into a single category or mode. In one way or another, the processes denoted by unification and fragmentation entail the symbolic construction of social entities through the drawing of boundaries. Those boundaries, once drawn, create the effect of within-group homogeneity and between-group difference. In particular instances, the creation of groups and persons that result from this process inhibit the possibilities of discursive challenge that might otherwise develop across groups. In other instances, the boundaries enhance conflict and dispute between the constructed groups, deflecting efforts to resist power-holders. Finally, when the groups are arranged in a hierarchy of value, the resulting categories come to legitimate differential treatment that preserves inequality.

We can see both fragmentation and unification operating simultaneously in the discursive struggle over the meaning of welfare. According to Williams (1998), with the passage of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act the federal entitlement to cash assistance for poor single-parent families was eliminated. Central to this political outcome was the rhetorical association of “entitlement” with the right of poor people to receive governmental benefits. Using the term entitlement to describe the transfer of benefits to the poor strongly implied that these payments were a legal innovation and distinct from the multitude of other entitlements guaranteed to all citizens by our legal system. Much of private law, contract, and tort law, for instance, is based on the legal concept of entitlement. The state, by establishing these seemingly neutral, market-structuring background rules, effectively creates and preserves inequality even as it denies doing so. Characterizing welfare “entitlements” as an aberration in American legal culture discursively produced an outgroup of welfare recipients whose dependency upon the state seemed to distinguish them from “hardworking” Americans (Williams, 1998: 579).

It is important to note that an extreme, or limiting, case of fragmentation is achieved when social action is understood in entirely individual and nonrelational terms. The individuation that underwrites capitalist economy in general, for instance, protects the resulting inequality and asymmetries in power by impeding the development of challenging groups such as labor unions. Thus by characterizing

wage earners as "independent" and "autonomous" (in a sense, constructing a boundary around the individual worker as the only real or authentic social entity) the law deflects attention from the structural inequities produced by the market. Following this line of reasoning, critical legal theorists have focused on the ideological effects of rights discourse in this regard. Observing that the recognition of legal rights is premised on such a radical individuation, they contend that liberal legal celebration of rights actually disempowers the individual. As Gordon notes,

[T]he rhetoric of rights can be dangerously double-edged, as the black civil rights movement has discovered. Floored entitlements can be turned into ceiling. Formal rights without practical enforceable content are easily substituted for real benefits. Anyway, the powerful can always assert counterrights (to vested property, to differential treatment according to "merit," . . .) to the rights of the disadvantaged. (Gordon, 1998: 657)

### Reification

A final mode of ideology that I would like to discuss in this essay is reification. In its various guises reification always involves the denial of "a social and historical character of social-historical phenomena" (Thompson, 1990: 65). Rather than perceive law and legality as a constellation of related actors and actions, objectified in particular material forms and enacted by historical subjects, it is perceived as existing "out of history." It is detached from human action and consciousness. A reified world provides a dehumanized vision. In such a vision, law may find expression in human action and intention; it may be "expressed" or "reflected" in a judge's pronouncement, a jury's verdict, or a jailer's keys, but it is only incidentally related to such enactments. The observable, discrete, and particular world of human social interaction becomes a vessel or container for the legal, which is understood to exist independently from these forms.

Reification is achieved through abstractions that aggregate concrete historical actors and actions into a transcendent entity detached from the original. The process is complete when the abstraction itself is concretized, endowed with the ontological independence of a thing that exists separately from the empirical manifestations that gave rise to it.

In his history of "the most famous tort case of modern times" (*Palsgraf v. Long Island Railroad Company*), John Noonan (1976) traces the processes of reification that shaped the selection of "facts" that led up to (i.e., "determined") the judicial decision. The appellate decision denied Mrs Palsgraf recovery for the injury she suffered when a scale toppled over and struck her on the platform of Long Island Railroad on a hot August morning in 1924. As the case was rendered in both judicial opinion and in subsequent commentary, no mention is ever made of Mrs Palsgraf's age, marital status, or occupation, of the extent of her injury, of its effect on her children, of the financial burden she suffered, of the defendant, its assets, of the legal ordeal Mrs Palsgraf endured, of the various counsel involved, or of the person of the judge (Benjamin Cardozo).

Instead, through the various decisions, arguments, and opinions that we call the legal process, an underlying rule was distilled from these events. "Many a common

law suit can be lifted from meanness up to dignity," Cardozo wrote, "if the great judge is by to see what is within." The "rule" that was distilled from the messy events of that August morning assumed the following form as it appeared in *Restatement of Torts* as an Illustration of Clause b of the rule:

A, a passenger of the X and Y Railway Company, is attempting to board a train while encumbered with a number of obviously fragile parcels. B, a trainman of the company, in assisting A does so in such a manner as to make it probable that A will drop one or more of the parcels. A drops a parcel which contains fireworks, although nothing in its appearance indicates this. The fireworks explode, injuring A's eyes. The railway company is not liable to A. (Noonan, 1976: 150)

As this example illustrates, much of the transformation involved in reification is achieved through textualization, or writing, inscription and other modes of encoding communication that permits its extraction, preservation, and retrieval separated from ongoing interaction. As Dorothy Smith observed, "texts speak in the absence of speakers" (Smith, 1990: 210). And it is this capacity that imparts to texts the power to transcend time, place, and social interaction, and, in so transcending, to seem to determine the actions of historical actors who are necessarily caught in place and time.

Textuality, for instance, confers authority to the judge's printed opinion through the system of precedents. To bind current decisions by prior decisions, and to distinguish later precedents from earlier precedents, requires a record and the valorization of the record. "Lawyers are trained not even to think of the reality of the case and therefore, to pay attention to only the printed version of what occurred. As a result, over time, it has been forgotten that the printed opinion is only a representation of reality" (Katsh, 1989: 36).

Textuality also defines the grounds of participation in the modern trial. The textuality of law demands that "the trial's result must endure the way a written text endures," James Clifford observes in his account of the Mashpee Indian land claim trial. Plaintiffs "represent themselves through scripted exchanges with attorneys, in statements for the record," depositions become the grounds for interrogating and perhaps discrediting persons in proceedings witnessed. The law has come to reflect the "logic of literacy of the historical archive rather than of changing collective memory" (Clifford, 1988: 329).

This feature of law has consequences for the distribution of social power, or ideological effects. Strategically entering the law's text is problematic for those with few resources and little power. In his account of the Mashpee Indian trial, Clifford observes the contradiction that led to the denial of their land claim. Without an uninterrupted history of *documented* cultural practice, the Mashpee claim was rejected. Yet this rejection, premised as it was upon a highly textualized view of culture, was willfully blind to a century or more of adaptations and appropriations that were necessitated by their subordination within dominant white culture. The very cultural subordination that led to selectively abandoning aspects of their cultural practice and adopting white culture (i.e., speaking English, dressing in nontribal clothes, etc), disqualified the legitimacy of the Mashpee's claim of cultural integrity. Of course, had they been in a position to present their culture as a well-preserved museum archive, they would no doubt have had sufficient power to retain the lands they now claimed.

## CONCLUSION: REGAINING CONSCIOUSNESS

In the last few pages I have written a great deal about ideology and little about consciousness. In concluding, then, I will be explicit about the role of consciousness in the processes I have just outlined. Recall that in the classic understanding of consciousness and ideology, the concepts stood in a profound relation of tension to one another. Within a social world in which ideology prevailed, one lacked consciousness, or was falsely conscious. By contrast, developing class consciousness entailed overcoming ideology. Beginning with Marx himself, that simplistic view of the relationship has been abandoned. In contemporary usages, ideology is an effect, a contingent outcome of particular symbolic practices that generate meaning.

The emphasis in this conceptualization on the active production of meaning shifts our attention back to consciousness. Consciousness denotes participation in that process. The need to constantly remake the world derives from the fact that meanings are not fixed but are always dynamic. According to Steinberg (1991) the dynamism derives from two sources: first, meaning is never wholly fixed by the signs used to convey it. Because signs are polyphonic, when they are embedded in a new context, what they mean can be challenged and changed. Second, the meaning produced by signs is a result of their relationship to the larger discourse of which they are a part. They never float free of their history, or of future objectives.

Thus consciousness can neither overcome nor be colonized by ideology. Consciousness, construed as an active process of meaning making, produces, reproduces, or challenges ideology. Moreover, which of those various contingencies are realized can never be theoretically stated. The relationship between ideology, consciousness, and social structure is ultimately a result of particular social historical transactions and can only be known and understood empirically. South Africa is no longer under white rule. The Mashpee are once again in court. Reading John Noonan's account of *Palsgraf v. Long Island Railroad* generations of lawyers and judges know of details of Mrs Palsgraf's plight that were submerged in the judicial record. In short, defined as a form of sense making that serves power, ideology is lived, worked out, and worked on. It must be constantly invoked and applied and that means it is open to challenge and contest. People use ideological forms to make sense of their lives. And it is through that sense making that people produce not only those lives but also the specific structures within which they live.

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