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Journal

Identities, 2(1-2)

ISSN

1070-289X

Authors

Collier, Jane F

Maurer, Bill

Suarez-Navaz, Liliana

Publication Date

1995

DOI

10.1080/1070289x.1997.9962524

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Sanctioned Identities: Legal Constructions of Modern Personhood

Jane F. Collier, Bill Maurer, and Liliana Suárez-Navaz

Studies of identity politics have often overlooked the role of bourgeois law in eliciting and confirming people's experience of themselves as persons with inherent qualities that they have a right to express. By constituting people as proprietors of their persons and capacities, bourgeois law requires those who come before it to display difference. Yet bourgeois law disclaims its role in producing difference, for by declaring all men equal before the law, it constitutes differences as developed outside its purview. Although the cultural logic of bourgeois law encourages people to imagine themselves as unique persons with rights, people achieve rights only through specific historical struggles.

Key words identities, law, social contract, personhood, modernity.

Studies of postmodernism, globalization, and postcoloniality have been concerned with the construction, negotiation, and fragmentation of identities.¹ For the most part, these studies have neglected the role that Western legal practices play in globalizing processes, in the breakup of old orders and the identities founded on them, and in the imagination of new orders and identities. Yet, as suggested by the papers that follow, Western legalism exerts a deep, if contradictory, influence on the invention and expression of modern identities, particularly as these are contested in legal settings.

Studies of identity tend to focus on differences among people and peoples that come to appear self-evident. Identity appears to be constituted through difference, yet it also implies sameness in two senses: those sharing an identity are the same, and all humans are similar in having identities. Sameness and difference are, of course, central concepts in Western legal thought. Although identities have many sources and the historical roots of any particular identity are complex, Western law provides an increasingly transnational forum for eliciting and negotiating expressions of identity.

Throughout this paper, we use the term "bourgeois law" to refer to the legal concepts and practices developed since the eighteenth century in Europe and its colo-

Identities, Vol. 2(1-2), pp. 1-27

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under the Gordon and Breach Publishers imprint
Originally printed in Malaysia
Reprinted in India, 1997

nies that are presently spreading around the globe. We chose this term in order to call attention to the deep historical connection between the development of capitalism and the development of a legal system designed not—as under feudalism—to enforce God’s laws on earth but to enforce the rule of laws created by “men” for “men.” Although other scholars, particularly those in critical legal studies (e.g. Tushnet 1983; Gordon 1984; Hunt 1993) have used terms such as “liberalism” or “liberal legalism,” we prefer the Soviet scholar E. Pashukanis’ term, “bourgeois law” (1989), because it identifies the primary creator and beneficiary of law as an individual who “owns” property, even if only in “his” person. Moreover, the term “bourgeois law” encompasses such possible opposites of “liberalism” as “conservatism,” “libertarianism,” and “socialist legalism,” even as it includes variant traditions such as “Common,” “Civil,” and “Socialist” legal systems.²

Bourgeois law, by requiring equal treatment for all subjects, appears to ignore differences that exist before or outside of law. Yet, we suggest, bourgeois legality plays a major role in producing such differences. It does so, however, in two contradictory ways. First, by declaring everyone equal before the law, it constructs a realm outside of law where inequality flourishes. The ideal of equal treatment before the law not only makes it difficult for law to address, and thus to redress, the differences in power and privilege that law defines as occurring outside of or before it, but legal processes actually enforce and confirm inequalities among people and peoples in the process. Second, bourgeois law demands difference even as it disclaims it, both soliciting expressions of difference and enforcing the right of people to express their differences even as law requires people to stress their similarities in order to enjoy equality. By treating those who share an identity as equals, law casts as unequal those who do not share that identity. At the same time, law constitutes all people as having identities of various sorts that they should be equally free to express without hurt or hindrance.

In focusing on the constitutive power of bourgeois legal processes, we draw on Foucault’s discussion of power as productive of subjectivities and identities (see Hunt 1993; Fitzpatrick 1992). Foucault, of course, did not treat law as productive. Rather, he cast legal power as repressive, in contrast to the productive power of disciplines such as medicine (1973), psychoanalysis (1978), and criminology (1977). His influential equation of law with repressive sanctions may have contributed to the tendency of contemporary scholars to exclude law from most studies of identity formation. But we feel that his analysis of disciplinary power offers tools for understanding how interactions in legal settings, like the “normalizing technologies” he analyzes, call forth the very differences law claims to erase. We thus write about law as if it were an agent capable of action. We recognize, of course, that only people act. But because people often act under conditions not of their own choosing, it seems worthwhile to explore the constraints and incentives experienced by those who find themselves enmeshed in the webs of meaning spun by practitioners of bourgeois law.

Law’s role in eliciting apparently natural identities has been hard to discern, because supposedly inborn qualities are both defined and experienced as inherent and immutable, in contrast to class interests, which, at least in the twentieth cen-

tury, are easily perceived as structured by social processes. For example, the apparent historical shift from struggles based on economic interests to struggles based on sex, race, and cultural heritage has often been characterized as a shift from social movements based on "objective" class relations to ones based on "subjective" identities (e.g., S. Hall 1991). The distinction between "subjective" and "objective" seems misleading, for the demands voiced by participants in many of the new social movements have been prompted by the historical reality of their subordination and their practical need for change. But the "objective/subjective" distinction does identify a shift in focus, both in the ostensible bases of political organizing and in scholarly attention. Recent studies of identity and difference have looked at sexuality, gender, race, nationality, and other identities that appear essential and "subjective." For people living in the twentieth century, one's position as a worker or capitalist in the class hierarchy seems open to change in a way that one's race, sex, parentage, or place of birth does not—at least, not without intervention against a seemingly natural order of things.

The essays collected here all deal with legal constructions of naturalized identities. In this introductory essay, we explore why and how bourgeois law encourages people both to have and to express inner qualities that law defines—and people tend to experience—as innate or inherent.

THE STRUCTURE/AGENCY DICHOTOMY

Before proceeding to discuss bourgeois law's role in eliciting naturalized identities, we explore our relationship as authors to the processes we want to understand. The same bourgeois legality that shapes the options and knowledges of the people anthropologists study also shapes our conclusions as social scientists. In particular, an examination of law can help us to understand why the dichotomy between structure and agency keeps recurring in debates among social scientists over how to explain the patterns of behavior they observe. Because bourgeois legal theory imagines that people have identities and wills that are shaped outside of or prior to social processes, to argue that peoples' preferences are structured by social forces appears to deny them freedom and agency. But, at the same time, to focus on agency at the expense of structure denies our knowledge as social scientists that preferences and wills are invented and experienced in social contexts.³

This tension between structure and agency has shaped debates in the anthropology of law. Comaroff and Roberts (1981) identified two competing approaches, a "rule-centered paradigm" associated with Radcliffe-Brown's (1952) assumption that social order results from enforced rules, and a "processual paradigm" associated with Malinowski's (1926) vision that order results from the cumulative choices of self-interested individuals. In the 1950s, the structure vs. process debate was carried on between Max Gluckman (1955), who stressed rules, and Paul Bohannan (1957), who argued that anthropologists must examine the cultural understandings of choice making individuals. And, in the 1960s, E. A. Hoebel's (1954) call for extracting rules from judicial decisions was replaced by Laura Nader's (1965) call for analyses of the "disputing process." In 1981, Comaroff and Roberts

tried to merge the two paradigms. Observing that rules and processes are mutually constructing, they called for the absorption of legal anthropology into the analysis of encompassing socio-cultural systems. Despite their efforts, however, Comaroff and Roberts did not succeed in forestalling others' efforts to distinguish between rule-oriented and process-oriented analytic strategies (see Just 1992).

Rules vs. process debates reflect the fact that the two poles of structure and agency are as available to anthropologists studying law as they are to people involved in events defined as legal. Both are realizable in practice. As Fitzpatrick observed, law has force because it "actually does (at least in part) what its ideology represents" (1980:32). On the one hand, bourgeois law is constructed as a system of rules that people are required to obey whatever their personal desires. On the other hand, bourgeois law solicits expressions of individual intention or will, particularly in private contracts that legal agencies enforce.

We do not propose to overcome the structure/agency dichotomy. Rather, drawing on our own and others' analyses of law's role in constructing the modern Western conception of the rights-bearing individual (Fitzpatrick 1992; Hunt 1993), we propose to examine this opposition. Sharon Stephens, commenting on Sherry Ortner's (1984) endorsement of practice theory, argues that anthropological debates over structure oriented approaches versus more practice centered ones must be placed in their social and historical contexts. Otherwise, she maintains, "we are likely to posit as foundations of a 'general, unified practice theory' forms of 'system and practice' that are really more specific to our own world" (Stephens 1989:70):

...any general theory of practice seeking to bring together system and action sets out with a whole world of assumptions about what they are and how they differ, about the boundaries between external structure and internal being, form and content, objects and subjects, that theoretically blinds us to radically different cultural worlds (Stephens 1989:71).

Proponents of Critical Legal Theory, who expose the contradictory premises of bourgeois legality, are often asked by scholars opposed to their project to explain what they propose to put in law's place. Such opponents, however, miss the point. As Fischl (1992) observes, asking what should be put in law's place presupposes a place for law in society (see also Strathern 1984). "Law" and "society," like "society" and "individual," must be seen as constituted by and constituting the set of problems that suggest the categories used to study them (Bourdieu 1977). As social scientists, we are always positioned actors rather than detached observers in the processes we analyze. The kinds of questions we are called upon to pose both reflect and reproduce broader assumptions of the bourgeois societies in which most of us live.

THE CULTURAL LOGIC OF BOURGEOIS LAW

In this section, we explore the role of the bourgeois law in eliciting, shaping, and elaborating identities based on supposedly natural qualities, such as sex, sexuality, race, and heritage. We focus on the cultural logic entailed in Western bourgeois

legal thought, concentrating on the contradictions it contains. Although we recognize that the logical possibilities of a legal discourse can be realized only in the concrete behaviors of historical agents, acting in accordance with their own purposes and understandings, we postpone until the next section our discussion of people's invocations of bourgeois law in specific historical struggles.⁴

Bourgeois law has long been recognized as an integral component of the cultural logic of capitalism, and many authors have explored the apparent contradiction between bourgeois law's stress on equality and the class inequalities central to capitalist production (Macpherson 1962; Marshall 1964; Thompson 1975; Gordon 1984; Bowles and Gintis 1986). We too will begin our discussion of bourgeois law by considering its role in eliciting and validating economic interests, exploring the apparent contradiction between legal equality and class inequality. Our purpose, however, is less to discuss class relations than to argue that the possibility of multiple, apparently natural, identities was inherent in the cultural logic of bourgeois legality since its inception. Bourgeois law validated and required "natural" identities, even for people involved in overt struggles stressing identities based on socially constructed economic interests. Following Corrigan and Sayer—who look at "the meaning of state activities, forms, routines and rituals" to understand "the constitution and regulation of social identities" (1985:2)—we trace the role of bourgeois law in calling forth identities that appear normal, natural, and prior to political and economic forces. In particular, we argue that the constitutive logic of bourgeois legality constructs the subject of law both as an abstract individual, equal to and indistinguishable from other abstract individuals, and as the bearer of a unique and natural self.

During the seventeenth century, in the midst of political crisis and religious civil wars, Thomas Hobbes articulated what was to become a central tenet of Social Contract theory and the foundation of bourgeois law: that "Nature hath made all men ... equall" (1991:86). This idea, of course, contrasted with the medieval Christian notion that all men, while perhaps equal as souls before God, were accorded different social statuses, with different legally enforced rights and privileges, in a hierarchically ordered society.

Hobbes also articulated a new idea of the person—as an individual who was "essentially the proprietor of his own person or capacities, owing nothing to society for them" (Macpherson 1962:3). This modern concept of the person made possible a different understanding of the relationship between social status and individual ability. Whereas people in medieval times were (supposedly) assigned a social status by God, which they could fulfill well or badly according to their inner abilities, modern individuals (supposedly) acquired their own social statuses, with their economic and social privileges determined by their inner capabilities and the uses to which they chose to put them. The notion of the individual as proprietor of "his" person and capacities, while related to the Medieval Christian mind/body distinction, was nevertheless fundamentally different. Under medieval theology, the body was inclined to sinful lusts, while the mind, endowed by God with free will, allowed individuals to choose between self-indulgence and obeying God. The person imagined by Hobbes, in contrast, conceived of the body as a resource, the repository of capacities and abilities to be used for self advance-

ment in a world where fulfilling God's purposes and satisfying personal desires were no longer in conflict (see Weber 1958; Foucault 1973:197; 1977:135; Hirschman 1977; Comaroff 1989:665).

Macpherson observed that Hobbes' modern concept of the person was modelled on the actual possessive market society coming into being during the seventeenth century in Britain. Hobbes' notion of personhood arose, Macpherson suggested, because at the time he was writing "the relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realizing their full potentialities, was read back into the nature of the individual" (1962:3).⁵

While also stressing the relationship between the development of capitalist relations and the possessive individual, Pashukanis observed that bourgeois law did not simply cast people as proprietors of their persons and capacities. Rather, the laws that arose with, and made possible, capitalist market relations both granted and required individuals to have a will.

After he has become slavishly dependent on economic relations, which arise behind his back in the shape of the law of value, the economically active subject—now as a legal subject—acquires, in compensation as it were, a rare gift: a will, juridically constituted, which makes him absolutely free and equal to other owners of commodities like himself (Pashukanis 1989:114).

Furthermore, Pashukanis suggested that bourgeois law, by endowing individuals with wills, presupposed the conflicts that legal regulations were designed to manage. He observed that,

A basic prerequisite for legal regulation is...the conflict of private interests. This is both the logical premise of the legal form and the actual origin of the development of the legal superstructure. (Pashukanis 1989:81).

Pashukanis used an example drawn from the management of railroads to illustrate his contention that "Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interests begin" (1989:81). He contrasted "the legal norms governing the railways' liability [which] are predicated on private claims, private, differentiated interests," with "the technical norms of rail traffic [which] presuppose the common aim of, say, maximum efficiency of the enterprise" (1989:81).

Building on Pashukanis' insight that bourgeois law requires conflicting interests, we suggest that at least three different types of conflicting interests can be discerned as implicit in the logic of Social Contract theory. First, there are economic interests that conflict because they are identical. When Hobbes imagined competition as natural and inevitable, he assumed that men's interests would conflict because, in a world of scarcity, each man's attempt to acquire "gain, safety, and reputation" would necessarily conflict with others' attempts to do likewise (1991:88). Hobbes' competitors all wanted the same things because, in Hobbes' day, only men of property were considered as equals under the law. Those without property were dependents within the households of property owners, lacking

propriatorship of their persons and capacities. Consequently, the interests of dependents could not (in theory) conflict with those of free men. Yet, of course, at least some dependents realized that their lack of property was socially determined, and that their economic interests conflicted with those of their patrons and employers. Class interests, created by laws that protect the rights of property owners, thus constitute the second type of conflicting interests implicit in liberal legal theory. Apparently natural interests—often experienced as needs—constitute the third type. Although such interests have often been cast as the basis for affiliation and cooperation among people differentiated by such characteristics as age, sex, race, and heritage, they also provide a basis for conflict (as has always been recognized by at least some of those who were legally defined as not “men”).

These three types of conflicting “interests” correlate loosely with the three types of “rights” discussed by T. H. Marshall in his influential essay on modern citizenship (1964). Marshall observed that the “civil element” of citizenship corresponded to “the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice” (1964:71). These were the rights needed by men of property to regulate the conflicts that arose among them. Not surprisingly, Marshall assigned the formative period of these rights to the eighteenth century.

Second, Marshall characterized the “political element” of citizenship as “the right to participate in the exercise of political power as a member of a body invested with political authority or as an elector of the members of such a body” (1964:72). He associated the formative period of this right with the nineteenth century and the expansion of the franchise to previously excluded groups (1964:77). By this time, industrialization in England had encouraged wage earning men to think of themselves as proprietors of their labor power whose wages reflected the uses they made of their abilities to produce valuable goods. As proprietors of their persons and capacities, wage earners understandably came to see their interests as conflicting with the interests of proprietors who owned the machines with which they worked (see Willis 1990; Gordon and Fraser 1994). Class conscious workers could not be satisfied with civil liberties alone. They needed the power to participate in making the laws that would regulate working conditions and employment contracts.

Marshall’s third element of citizenship, the “social,” is the most problematic from our point of view. By “social element” he meant “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of the civilized being according to the standards prevailing in the society” (1964:72). For Marshall, the social element was about fostering national integration through ameliorating the worst inequalities of class relations and by educating people to participate in national society. Marshall thought that the social programs of modern welfare states were meeting the demands of previously marginalized and excluded groups for access to knowledge, social security, unemployment compensation, medical care, etc.

We, however, note that at least some of those encouraged to share fully in the social heritage rapidly recognized that the privileges enjoyed by “civilized beings” required the subordination of people like themselves. While demanding

economic and educational opportunities, many women and members of minority groups—whose personal services and restricted options made it possible for privileged men to imagine themselves solely responsible for this successes—insisted on the right to differ from elite customs without penalty. Rather than aspiring to live the life of the civilized being according to prevailing standards, such people began to demand the right to develop their own capacities and heritages.

But how did people come to imagine that they had natural capacities and cultural heritages that required expression free from social interference? In medieval Christian thought, natural and social laws were one. God authored both: He endowed humans with natural attributes and He established laws regulating social interaction. When Hobbes (and later Rousseau) declared that all “men” were equal by Nature, however, they constituted a realm of Nature apart from, and prior to, the laws men made to regulate themselves. The persons imagined by Hobbes may have owed nothing to society for their capacities, but they were constituted by a Nature now endowed with creative abilities whose laws could be discovered through scientific experiments (Latour 1993).

Feminist scholars concerned with the social construction of supposedly natural differences have explored the role of the political processes, particularly Social Contract theory, in creating the concept of a private sphere governed by principles beyond human control, such as the laws of God or nature. A cursory examination of Western history suggests that although a conceptual opposition between public and private spheres long predates the development of capitalism and bourgeois democracies, the triumph of Social Contract theories over political theories of divinely ordained kingship transformed the public/private contrast from one of scale to one of kind. Philosophical justifications for monarchies, for example, tended to posit similarities between state and home: patriarchal sires ruled kingdoms that were larger versions of the homes that fathers commanded. Indeed, kings were “fathers” to their people. Philosophical justifications for parliamentary democracies, in contrast, tended to distinguish a public sphere of contractual agreements from homes based on bonds established outside of or prior to human laws.

Carol Pateman (1988) has argued convincingly that the philosophers of the Social Contract, who declared that “men of reason” have to govern themselves rather than submitting to kings, never imagined that their propertyless dependents—wives, children, clients, servants, slaves—should participate as equals in determining the rules governing domestic enterprises. Social Contract theorists wanted to preserve patriarchy in their homes and estates even as they contested it in the polity. As a result, the Social Contract theorists who claimed agreement based on universal reason for the public sphere simultaneously constituted the private sphere as a realm of difference and emotions, where people expressed their individual abilities, needs, desires, passions, sentiments, and cultural traditions.⁶

Since the invention of Social Contract theory, people have argued over where to draw the line between public and private, between legally mandated relationships, legally enforced private contracts, and free choices. Feminist scholars have understandably focused on Social Contract theory’s role in creating private homes where gender inequalities reflect supposedly natural capacities. But the

seventeenth and eighteenth century inventors of Social Contract theory were less interested in distinguishing homes from politics than in creating a market unfettered by royal monopolies, aristocratic privileges, and guild restrictions. In constituting the market as a private space, however, where people were free to buy and sell without government interference, Social Contract theorists established it as a place for eliciting and confirming "natural" differences among producers of marketable goods and services.

During the nineteenth century, for example, John Stuart Mill argued that allowing people to express their "natural" differences unhindered by law, would lead to the more efficient use of human capacities.

The fruit of a thousand years of experience is, that things in which the individual is the person directly interested, never go right but as they are left to his [sic] own discretion; and that any regulation of them by authority, except to protect the rights of others, is sure to be mischievous (1984:109)

"Nobody," he continued, "thinks it necessary to make a law that only a strong-armed man shall be a blacksmith. Freedom and competition suffice to make blacksmiths strong armed men, because the weak-armed can earn more by engaging in occupations for which they are more fit" (1984:110). Mill's blacksmithing example aptly demonstrates how bourgeois law, by pretending to refrain from interference in the job market, not only constitutes men as owing nothing to society for capacities such as strong arms, but requires would-be workers to come up with natural capacities for selling to employers.⁷ The example is particularly telling, given that in Mill's day, throughout most of the world, blacksmithing was, in fact, an inherited occupation in which young men developed strong arms as they learned the trade.

Karl Marx also considered the relationship between labor market participation and workers' innate capacities. While sharing Mill's assumption that productive work should allow men to realize and develop their personal potentials, Marx argued that participating in the capitalist labor market diminished workers' abilities rather than enhancing them. Marx commented wryly that once people sold their labor in the market, their lives apart from alienated labor were reduced to biological functions by the time-clock of industrial capitalism. The worker who sells his labor, Marx wrote, "no longer feels himself to be freely active in any but his animal functions—eating, drinking, procreating, or at most in his dwelling and in dressing-up, etc." (1984:74). Marx clearly disparaged these "animal functions," believing that humans realize their humanity by transforming nature rather than by enacting it, but his observation nevertheless captures the experience of people living in market societies who are not fortunate enough to perform highly rewarding and rewarded work. As Marx observed, "The worker only feels himself outside his work, and in his work feels outside himself" (1984:74).

Although Marx and Mill disagreed over how participation in the capitalist labor market led workers to develop a sense of themselves as possessors of capacities for which they owed nothing to society, we feel that their analyses, taken together, capture the double process by which bourgeois law, through disclaiming regulation of the market, elicits and confirms supposedly natural differences. When law

claims to leave buyers and sellers free to negotiate the best bargain they can, it encourages sellers of labor power to imagine both that their earnings reflect the value of their personal capacities and that, when they are not working for money, they must be doing things that they, as individuals, *want* to do. During the twentieth century, the leisure-time "residual selves" identified by Marx have become ever more significant, due to the growth of consumer markets fueled by an advertising industry that asks people to represent themselves as individuals with natural preferences whose choices of consumer goods reflect, even as they produce, their personal and group characteristics. This dialectical relationship between markets and representations has been read back into human nature. It has become self-evident to people living in developed capitalist contexts that they simply "have" identities.

Writing during the nineteenth century, both Mill and Marx focused on the supposedly natural capacities of white, male workers who were agitating to obtain the franchise. Twentieth century authors, however, have observed that racial and gender differences, imagined as natural, were central to constituting this white male worker (Willis 1990; Roediger 1991; C. Hall 1994). Roediger argues that "working class formation and the systematic development of a sense of whiteness went hand in hand for the US white working class" in the Northern states before the Civil War (1991:8). And Catherine Hall (1994) notes that the British Parliament considered the Reform Act of 1867, which granted the franchise to "independent" white working class men in Britain, at the same time that it discussed two other items: establishing direct Crown control of Jamaica and Mill's proposal to extend the franchise to women. Hall's analysis suggests that when Parliament removed property ownership as the basis for distinguishing between citizens who could vote and subjects who could not, the distinction came to be drawn on the basis of apparently natural, inherent differences, such as gender, race, and level of civilization. On a broader level, Said (1993) has pointed out the importance of colonial subjects for constituting Westerners' sense of themselves as superior people. The possibility of exclusion on the basis of supposedly natural characteristics was, of course, inherent in Hobbes' first formulation bourgeois law. Once all "men" are declared "equal," then those who are manifestly not equal cannot be "men" (Fitzpatrick 1992).

In this section, we have explored how bourgeois legality conjures up abstract legal subjects by calling forth persons with different and sometimes conflicting "natural" capacities and desires. We have also demonstrated how bourgeois law proceeds to define this subject as prior to, or constructed outside of, legal relations. Bourgeois law, however, does more than require people to exhibit natural differences; it provides a context for people to imagine that they have the *right* to differ and to demand that legal forums enforce that right.

Unlike monarchical theorists, for whom God's laws, administered and enforced by God's anointed, organized relations throughout the social hierarchy, the inventors of Social Contract theory imagined that participants in political and economic contracts should be free to act as they preferred except in those areas where they contracted away that freedom. By imagining that "all men" were free to do as they wished except as they consented to contracts, Social Contract theorists envisioned

a realm where individuals should be able to realize their desires without interference from the state or powerful others.

Moreover, the inventors of Social Contract theory demanded that the state protect their "right" to act as they wished in areas not regulated by contracts. Hobbes, for example, imagined that possessive individuals agreed to enter the Social Contract only because they needed a strong state to prevent other people from infringing on the freedom of individuals to enjoy life and property. And more than a century later, Mill argued that protecting the rights of others was the only legitimate justification for imposing legal restrictions on people's freedom to buy and sell in the market. Over time, as political movements have successfully expanded the realm of legal regulation by extending the franchise to formerly excluded groups, the sphere of freedom from regulation has shrunk from domestic enterprises, to homes stripped of productive activities, to single consumers (see Strathern 1992). Nevertheless, the idea that "autonomous" individuals should be free to realize their desires without interference retains its force as a powerful image of emancipation.

Freedom, however, is a two-edged sword. If people are free to act as they wish, they become responsible for the consequences of their actions (Musheno, this volume). In core capitalist nations, whose wealth was increasing at the same time as their need for docile workers, the helping professions arose to take over the management of homes and individuals who failed to use their freedom appropriately (Foucault 1977; 1978; see also Merry and Moore in this volume). The example of what happens to failed individuals, such as criminals, the insane, welfare mothers, drug addicts, and homeless people, not only encourages supposedly normal people to discipline themselves (Fitzpatrick 1992; Musheno this volume), but makes freedom appear ever more precious and emancipation an ever more desirable goal.

THE PRACTICE OF BOURGEOIS LAW

As we have seen, the cultural logic inherent in bourgeois law presupposes the legal subject as both an abstract individual and as the possessor of inherent capacities that he or she has the right to express as long as their expression does not interfere with the freedom of others to do likewise. Bourgeois law also presupposes the existence of a sphere free from legal regulations and state enforced contracts where individuals acquire and express their supposedly natural characteristics. But the *practice* of law, as people invoke it in ongoing processes of conflict and negotiation, constitutes to a great extent what is defined as "inside" individuals and where the line is drawn between the regulated and the unregulated. Fitzpatrick, for example, observed that "law is not concerned to predefine or to regulate comprehensively the position of the individual but, rather, to provide a generalized frame in which individuals are free to find themselves and to create relations with each other which the state will enforce" (1980:29-30)—and, we would add, protect from interference by outsiders. Thus, we cannot assume an historical or geographical homogeneity either in people's "inner selves" or in the

way public and private have been conceived. As Somers observes, the rights conferred by bourgeois law cannot be seen as "'ready-made' by the state and attached to individual persons." Rather, law's effects depend "on the local contexts—the social and political place—in which they are activated" (1993:589).⁸

Since the invention of Social Contract theory in the seventeenth century, its privileged advocates have faced the problem of accounting for the discrepancy between the ideal of formal legal equality and the fact of inequalities in possessions and life chances among supposedly equal persons (Stolcke 1993:19). A recurrent mechanism used by bourgeois elites for legitimizing inequality has been to treat differences as natural rather than socially produced. By using their political and economic power to assert that differences, such as those based on age, sex, sexuality, race, parentage, tradition, culture, or place of birth, are developed and expressed outside the arena regulated by law, bourgeois elites have perpetuated both the idea of an abstract, equal, individual, able to compete rationally in the market and express emotion at home, and the idea that existing inequalities represent, not the outcome of economic and political discrimination, but differences in natural abilities and freely chosen preferences.

Over time, however, challenges by oppressed peoples (and occasional excesses by power holders) have encouraged bourgeois elites to adjust their rationalizations for inequality, shifting favored explanations for oppressed people's predicament from their lack of education, to their biological deficiencies, to their different cultural traditions. During the eighteenth century, when divinely ordained kings still ruled in Europe and European colonizers hoped to encourage productivity in their colonies abroad, bourgeois elites tended to cast themselves as liberators and modernizers who offered equality to those willing and able to accept education and respond rationally to market incentives. Fitzpatrick (1992), drawing on Michel Foucault's analysis of shifts in Western thought (1970), suggested that Enlightenment thinkers, when developing their classificatory grids, invented the Man of Reason through conjuring up his opposite. By constructing "savages" as promiscuous, propertyless, lawless, and unfree, they endowed "rational man" with morality, property, law, and autonomy.

Because a lack of education can be easily remedied, however, its usefulness as an explanation for inequality tends to erode over time. Once schooling had been extended to women and poor people in industrializing countries and colonizers had performed their civilizing mission of providing churches, schools, and law courts to teach supposed savages how to marry monogamously, respect property, obey laws, and shun superstitions, bourgeois elites found it increasingly difficult to use lack of education as a justification for why oppressed peoples failed to acquire the privileges elites enjoyed. The nineteenth century thus witnessed a rise in racist and sexist explanations for inequality that attributed oppressed people's predicament to their biological deficiencies. Origin stories replaced the classificatory grids popular in the eighteenth century, as evolutionary myths of progress, particularly social Darwinism, gained popularity to explain both women's confinement to the home and the failure of most men in the world to achieve the privileges of industrial entrepreneurs. "Intractable racial [and gender] inferiority was seen as an outcome of evolution, not as something to be overcome by it" (Fitzpatrick

1992:97). At the end of the century, for example, Durkheim endorsed the argument of an evolutionist who claimed that women's brains had diminished in size as men's brains grew larger (1933:60).

During the nineteenth century heyday of evolutionary narratives, bourgeois elites tended to invoke cultural differences, not to justify inequality, but to demand self-government. The eighteenth century European philosophers who argued that men of reason must govern themselves rather than submit to divinely ordained kings may have imagined that all men of reason would reject traditional superstitions, particularly the idea of divinely ordained kingship. But nineteenth century nationalists, faced with Napoleon's efforts to impose a French version of human reason on conquered Germans, Italians, and Spaniards, rejected the implied opposition between reason and tradition. While agreeing that men of reason must govern themselves, they invoked cultural traditions to delimit the "nation" and to define the "selves" eligible to participate in governing it. This strategy of simultaneously claiming universal reason and cultural particularity allowed nationalists to demand self-government from both kings and foreign conquerors. It also encouraged bourgeois elites in colonized countries to demand independence from colonial rulers (Antonius 1938; James 1938; Chatterjee 1989).

In the twentieth century, however, privileged elites began invoking cultural differences rather than evolutionary biology to explain social inequality. As new states proliferated, proving the capacity of nonwhite peoples to govern themselves, and as industrializing nations drained resources from other world regions, widening the gap between overdeveloped and underdeveloped economies, elites in industrialized nations turned to cultural factors to explain the failure of new states to emulate the economic development of industrialized ones. National character studies flourished at midcentury.⁹ Political units came to be characterized by the cultural traditions that modernizers assumed accounted for the differences between nations that succeeded and those that failed to progress (e.g. Banfield 1958; Foster 1965). Not only did less developed nations come to be seen as having "ethnic customs" rather than the distinct "cultures" of overdeveloped nations, but the creation of multi-ethnic states from colonial empires after World War II cast competing ethnicities themselves as causes for underdevelopment (e.g., Geertz 1963). Bourgeois elites in industrialized countries also invoked cultural explanations to justify inequalities at home. They blamed poor minority populations and new immigrants for maintaining their cultural traditions rather than adopting mainstream values (e.g., Glazer and Moynihan 1963). They even found ways to portray women as having a different "culture" from the men they lived with (e.g. Gilligan 1982; Tannen 1990; see Gal 1991).

While those privileged by bourgeois law popularized explanations for inequality that located its source in the private sphere, prior to or outside of legally enforced relations, those harmed by bourgeois law have argued forcefully, and often successfully, that their supposed disabilities are enforced, if not always produced, by legal mechanisms. As early as the eighteenth century, for example, feminists asked why women remained slaves when men were declared free (Astell 1970:107). And, over time, the legally enforced "marriage contract" has been gradually revised, reflecting the success of women's movements in obtaining rights to

education, property, wages, the vote, and divorce. Labor movements in developed countries have also succeeded in rewriting employment contracts: the working conditions to which free individuals supposedly consented in the nineteenth century are no longer accepted as an expression of private interests sanctioned by law. And nationalist movements have succeeded in obtaining the liberation of many former colonies as well as rights to limited autonomy for groups within established nation-states.

The successes achieved by women's, labor, and nationalist movements reveal one aspect of the contradictory nature of bourgeois law: the fact that those who benefit from arguing that all men should be equal cannot afford to ignore the claims of those who argue that law is responsible for their failure to achieve equality. As E. P. Thompson observed when writing about the eighteenth century, bourgeois law "imposed, again and again, inhibitions upon the actions of the rulers" even as it favored those in power by protecting and extending their property rights (1975:264). In the centuries that followed, rulers found themselves, again and again, constrained by law to go against their own interests, granting to previously excluded groups the political and economic privileges that elites would have preferred to restrict to their own class, race, and sex.

The papers gathered here tend to focus on another aspect of bourgeois law's contradictory nature: the fact that bourgeois law requires those who come before it to have interests and capacities supposedly formed outside of, or prior to, legal relations. Those who invoke bourgeois law to obtain benefits previously denied them, or who find themselves shunted into legal forums, are put into the position—whether they will it or not—of asking for the freedom to realize their inner capacities and desires without hindrance from others. Whatever the forces leading people to imagine that they have identities, and whether or not people approve of the idea that individuals should express (rather than repress) their inner natures, the spread of bourgeois law around the world, backed by the weapons and wealth of overdeveloped nation-states, has made these ideas difficult for people anywhere to ignore.

Several of the papers collected here deal with the contradictions in bourgeois law surrounding women's place. As discussed earlier, the cultural logic of Social Contract theory requires a private sphere where men are free to express their desires and emotions, protected by law from interference by outsiders. Men's freedom to have homes, however, has always rested on the obligation of unfree people to provide domestic services (Pateman 1988). Over time, as industrialization encouraged (or compelled) propertyless people to sell their labor power in the market, and turned households from units of production into units of consumption, the number of unfree laborers within households steadily decreased (see Gordon and Fraser 1994). By the middle of the nineteenth century, those who remained at home, at least within the growing middle class in industrializing countries, were people who appeared doomed to dependence by their biology: those too young or infirm for employers to hire and adult women who were obligated by law to provide domestic services for family members without remuneration.

Women and men have, of course, often preferred bourgeois domestic arrangements over other options. But law has never allowed them to explore alternatives

to heterosexual marriage. It has consistently refused to recognize the domestic agreements of same-sex or multiple partners. Homosexuality among men has been outlawed, while homosexuality among women has been declared unthinkable.¹⁰ Women have been forced to choose male partners by legal institutions that enforce women's economic dependence and condone male violence (Rich 1986).

Within the heterosexual home, bourgeois law has enforced women's obligation to provide domestic services for family members without remuneration. Although women have often preferred unpaid work at home to paid work in the marketplace, the law has never allowed wives and mothers the choice not to perform unpaid domestic labor (see Weitzman 1981). Until recently, wives were required to keep their husband's houses, and even today, police arrest the mothers, rather than the fathers, of abandoned babies. Nor has bourgeois law allowed wives to receive payment for their services as long as they remain married. Legal institutions refuse to enforce contracts negotiated between spouses, defining as prostitution, and therefore illegal, any contract that entails a woman's agreement to perform wifely services for regular wages. During the eighteenth century, when households were productive units, there was a clear distinction between wives and prostitutes: wives worked for the household, prostitutes did not. But as industrialization removed paid work from the home, making women's housework appear valueless, the distinction blurred: both wives and prostitutes appeared to provide "love" (i.e., sex) in return for a share of a man's paycheck. Ironically, legal efforts to distinguish between marriage and prostitution, by forbidding wives to demand payment from husbands, eroded another distinction: that between wives and slaves. During the nineteenth century, and continuing into the twentieth, both men and women have worked to distinguish marriage from prostitution and slavery, primarily by representing marriage as a contract to which women freely consent.

For at least the past 150 years, most of the cultural and social institutions in industrial societies have represented (good) women as freely choosing love over money, power, ambition, and other goals that have been culturally assigned to men. The medieval Christian concept of women as inferior men has given way to the concept of women as men's opposites—equal but different (Laquer 1990; Alonso, this volume). The institutions of industrial society have also constructed Western women as free by representing women elsewhere as enslaved. Bourgeois law played a major role in this dual process. By gradually granting Western women some of the rights men enjoyed, particularly concerning property, wages, and the vote, law helped to portray Western women as men's equals. At the same time it helped to construct the enslaved, non-Western woman by discovering, and outlawing, practices that appeared to limit women's ability to consent, such as child marriage, arranged marriages, and polygamy (which, Westerners assumed, inhibited the development of intimacy between spouses).

By the mid-nineteenth century, Western elites were treating women's status as a key indicator of a people's civilization. John Stuart Mill observed that because "every step in [mankind's] improvement has been so invariably accompanied by a step made in raising the social position of women, ... historians and philosophers have been led to adopt their elevation or debasement as on the whole the surest test and most correct measure of the civilization of a people or an age" (1984:111).

Not surprisingly, bourgeois elites in colonized countries, whose women were being described by colonizers as enslaved and oppressed, responded to this denigration of their culture by portraying their women as freer and more virtuous than sexualized and infantilized Western women (Chatterjee 1989).

In her contribution to this collection, Ana Alonso discusses the criminalization of domestic violence in late nineteenth century northern Mexico, describing it as part of the liberals' nationalist program to replace older, patrimonial forms of authority with new, legal rational ones designed to foster capitalist economic development. The liberals who redefined wife-beating as assault also divested the Catholic church of its former power to regulate marriage and educate children. Alonso observes that when Mexican liberals redefined the family, they did so not only in opposition to older, patrimonial forms of family authority, but also in implied opposition to the customs of Indian "savages." Yet, Alonso observes, the liberal reforms criminalizing domestic violence did not free wives from the authority of their husbands. Rather, the courts hearing domestic violence cases required abused wives not to want freedom from marital subservience, but husbands who ruled their families through reason rather than by force.

Feminists have long recognized the limits of women's consent in the context of state support for patriarchal power. But feminists' efforts to empower women also run afoul of the contradiction in bourgeois legality resulting from law's failure to recognize inequalities supposedly constructed outside its realm. In another paper examining cases of domestic violence, Sally Merry shows how the inability of a court in Hawaii to recognize class inequalities undermines the effectiveness of feminist inspired legal efforts to aid abused wives. The court tries to help battered women by sponsoring support groups in which women learn to blame their husbands rather than themselves for the beatings they receive. But if poor women who come before the court learn that they have a right to live without fear of male assault, the court's refusal to recognize class differences condemns poor women to an impossible choice. If they leave their abusive husbands, they must rely for support on a state that is increasingly reluctant to aid single mothers. But if they return to their abusive husbands, the court blames the women for failing to act as autonomous agents. Class inequalities also limit the court's ability to shape men's behavior. Although the court requires men to attend a therapeutic program designed to teach them how to manage their anger, men resist the message. Displaced from their former jobs by the decline of a hierarchical plantation economy, men lack the economic resources to claim the patriarchal authority accorded steady breadwinners. Their relapses into violence allow the state to justify increasing surveillance of their homes and communities.

Erin Moore's paper focuses on a different manifestation of the contradiction in bourgeois law between protecting families and protecting women's freedom to choose. Analyzing cases that came before the U.S. Supreme Court, she observes that laws controlling reproduction, particularly those regulating abortion, could not take the form of equal protection or civil rights because only women become pregnant and bear children. Through its decisions in two key cases, *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court narrowed the private sphere of protected "free" choices from the patient-doctor relationship to the indi-

vidual woman, to—potentially—the fetus. When the Supreme Court in the Casey decision gave pregnant women the freedom to “make mistakes” (i.e., to abort) before their embryos became viable, it constituted women as autonomous decision-makers but also as potential subjects of disciplinary processes (such as required delays or counseling) to ensure that they decided “correctly.” Moore’s paper, like Merry’s, thus reveals the interpenetration of legal and therapeutic discourses. By constituting people as “free” to choose, courts justify the use of disciplinary techniques to ensure that people fulfill their responsibilities as rights-bearing citizens.

Merry’s and Moore’s papers also explore the role of bourgeois law in constituting victims of oppression as responsible for their problems. By supposedly allowing women with abusive husbands or unwanted pregnancies to make their own choices, the law disclaims responsibility for any subsequent physical or emotional abuse the women endure. Michael Musheno’s paper extends this analysis by exploring how nation-states in which everyone is supposed to be equal before the law not only manage to construct some people as less equal than others but also to discourage political action based on unequal treatment. Focusing on two groups of marginalized people living with HIV, gay men and women who inject themselves with drugs, he explores similarities and differences in their responses to the discrimination they experience as carriers of a dreaded disease. The men, because they had been wage-earning taxpayers, expected law to enforce their rights. The women, as recipients of state aid with its accompanying surveillance, feared the disciplinary power of state agencies. Musheno shows how legal and therapeutic discourses work together to encourage both the men and the women to accept personal responsibility for the “risky” behaviors that exposed them to HIV, leading them to pursue individual rather than group remedies for the discrimination they experience.

The last two papers in this collection, by Coutin and Chock and by Maurer, deal with cultural rather than supposed biological differences, exploring the contradiction in bourgeois law between universal human rights and state sovereignty (see Bosniak 1991; Berman 1993). On the one hand, bourgeois law grants all “men” equal rights to life and property while, on the other, it allocates enforcement of these rights to nation states, which are allowed to restrict protection to citizens. Kristeva observes that individual rights and state sovereignty were indissolubly linked in the “Declaration of the Rights of Man and Citizen” adopted by the French National Assembly in 1789, one of the founding documents of bourgeois law.

Basing itself on a universal human nature that the Enlightenment learned to conceive and to respect, the *Declaration* shifts from the universal notion—‘men’—to the ‘political associations’ that must preserve their rights, and encounters the historical reality of the ‘essential political association,’ which turns out to be the *nation* (1991:148, emphasis hers).

Since the invention of Social Contract theory, states adopting bourgeois law have always contained populations differing in cultural heritage. The British state based in England, for example, ruled over Scotland, Wales, and Ireland. France included Normandy and Brittany, as well as portions of the Basque country and Catalonia, and the United States claimed dominion over Native Americans and slaves from Africa as well as over European populations of diverse languages and

religious preferences. During the nineteenth century, cultural heterogeneity increased as industrialization attracted foreign workers to manufacturing regions and fostered the importation of unfree labor to regions supplying raw materials. In the twentieth century, as economic imperialism has replaced the straightforward political domination of colonialism, migrants from poor nations and former colonies have been moving to industrialized nations in search of jobs.¹¹

Over the past three centuries, as citizenship rights were extended to propertyless men, racial and ethnic minorities, and women, certified membership in a minority group, or recent entry into a state, has become a salient criterion for identifying the amount and kind of state protection an individual enjoys. In the twentieth century, industrialized states in particular have proliferated legal categories of persons based on gender, race, birth, parentage, physical ability, and supposed cultural differences. Ironically, the heritable, legally enforced status distinctions that Enlightenment thinkers hoped to abolish by declaring all "men" equal before the law have reappeared with a vengeance. Instead of creating and policing such categories as rulers, nobles, clergy, and serfs, modern affirmative action laws define and enforce gender, racial, and ethnic boundaries, while modern immigration laws create and police such categories as citizens, legal immigrants, resident aliens, refugees, asylum seekers, guest workers, and illegal aliens.

Bourgeois law has operated in at least two ways to shape the experiences of incorporated minorities and immigrant groups. First, as just noted, actual laws have shaped their possibilities. In the United States today, for example, laws define who counts as a member of minority groups for purposes of tribal membership, affirmative action, and so forth. Immigrants, too, are affected by laws governing who may migrate, how many may migrate, migrants' terms of employment, and where they can settle.

At the same time, law has constituted ethnic minorities and migrants as different from and incompatible with members of the dominant culture. Because bourgeois law imagines the parties who come before it as abstract persons who owe nothing to society for their capacities and desires, immigrants and ethnic minorities that have been excluded from full participation in national affairs can be seen as having retained their ethnic distinctiveness even if they are legal citizens. Although ethnicity in overdeveloped nations today may still be couched in racial idioms and derive its persuasiveness from racial classifications popular in the nineteenth century (e.g. Herrnstein and Murray 1994), Barker (1981) suggests that the essentialization of ethnicity as a primordial, interior, trait, appears to be replacing biological race as the most socially acceptable way to legitimate discrimination in nations where all citizens are supposed to be equal before the law.

The essentialization of ethnicity legitimizes discrimination in two ways. First, it allows national elites to blame oppressed minorities for their plight: ethnics "enjoy" lower standards of living because they are exercising their "right to difference." Second, it encourages national elites to develop a sense of their own culture as threatened. Gilroy, for example, offers an archaeology of "representations of black criminality" in Great Britain (1987:76), in which he argues that representations of blacks as law-breakers cannot be adequately analyzed without addressing the revival of a fundamentalist cultural "Britishness" in the context of large

immigrant populations and economic depression. In the nineteenth and early twentieth centuries, elites invoked the supposedly scientific discourse of biological race to justify forced sterilization and genocide as ways to maintain threatened racial purity. Today, attacks on immigrants, in particular, tend to be explained through appeals to an imagined cultural integrity that has been threatened by immigrants' and others' assertions of cultural difference. Apologists for attacks on immigrants argue that xenophobia is a natural response of host populations when their "tolerance threshold" to strangers is surpassed (Balibar 1991; Stolcke 1995). Supposed distinctions between "naturally" antagonistic and territorialized "cultures" are increasingly invoked to justify racist and xenophobic demands that "aliens" be sent "home" again—even if the supposed "aliens" are living in the only homes they have ever known.

Coutin and Chock, in their contribution to this collection, explore the mutual construction of national culture and inassimilable minorities by analyzing how newspapers reporting on the United States Immigration Reform and Control Act of 1986 sorted out the ambiguities surrounding immigrants' legal status. They observe that newspapers focused on differentiating types of persons rather than on exploring the political processes responsible for drawing the essentially arbitrary line between illegal immigrants who were eligible for amnesty and those who were not. Newspapers described those eligible for amnesty as sharing the mainstream values that supposedly made America great: hard work, honesty, and a drive to get ahead. Those destined to be deported, in contrast, were accused of dishonesty, wanting something for nothing, and refusing to learn English (even if their behaviors had been, in fact, indistinguishable from those offered amnesty). Coutin and Chock observe that by focusing on the character traits of immigrants, these representations not only hid the social, economic, and legal processes that had produced illegal immigrants and amnesty seekers in the first place but also constructed U.S. citizens as people who shared a culture of achievement and had thus "earned" the privileges they enjoyed.

Maurer locates legal efforts to distinguish citizens from non-citizens in a global context, exploring the historical construction of citizenship in the British Virgin Islands, a colony of Great Britain. In the late twentieth century, as markets for goods and capital become integrated while markets for labor become increasingly segmented, states are developing exclusionary laws to limit benefits to those who "belong." Maurer explains how laws separating citizens from immigrants in the British Virgin Islands protected and enhanced the growing wealth of those able to claim citizenship, denied economic benefits to those defined as immigrants, and allowed national elites to construct themselves as carriers and protectors of valued British culture. By passing laws that enabled them to prosecute those denied BVI citizenship as disrupters of law and order, people who enjoyed citizenship rights were able not only to develop a sense of themselves as Caribbean exponents of British law (an image that helped the Islands to attract international investors seeking tax havens), but also to lure investors by marketing their territory as one without racial, class, or ethnic conflicts (since over half of the people living there were immigrants, subjects to deportation if they dared to express dissent). While fears of deportation did discourage immigrants from protesting, Maurer observes

that the worldwide proliferation of status rights also encouraged immigrants to direct their energies less toward protesting conditions where they lived than toward accumulating the work permits, green cards, passports and other documents that would grant them mobility in transnational labor markets.

Because the papers gathered here focus on legal forums, this collection pays less attention to other cultural, economic, and political institutions that also shape people's self-understanding. Various authors, however, have explored how people experiencing oppression have used the language of cultural distinctiveness as a way of building communities and asserting their right to decide for themselves how they will live. Gilroy (1987), for example, argues that the construction of new black identities in contemporary Britain was an historical process in which ongoing conditions of domination interacted with culturally specific expressions of black difference.¹² Although Gilroy did not explore the role of law in constituting black identities, he did overcome the tendency of many social scientists to cast law as a rigid system of coercive rules. While showing that blacks recognized the repressive side of legal and police practices, he also observed that they had "no reluctance to use what constitutional and democratic residues [law] contained ... to reveal and then exploit the political dimensions of the legal process ... while combining this legal struggle with popular, local agitation and organizing of community support" (1987:93).

People's attempts to exploit the "constitutional and democratic residues" of bourgeois legal practices, however, often tend to recapitulate and naturalize the liberal categories freedom seekers contest, particularly the distinction between public and private spheres. Young, for example, has observed that bourgeois law requires those who come before it to represent themselves as abstract individuals: "in general, contemporary politics grants to all persons entrance into the public on condition that they do not claim special rights or needs, or call attention to their particular history or culture, and they keep their passions private" (1987:75). The papers collected here, however, observe that bourgeois law simultaneously requires people to have special needs, histories, cultures, and passions. Whether or not people actually experience themselves as having multiple identities, or even as having identities at all, bourgeois law compels those who come before it to have "potentialities" they want the freedom to express. At the same time, the proliferation of legal statuses linked to such supposedly natural characteristics as sex, sexuality, race, parentage, ethnicity, and place of birth has offered people willing to assert identities based on such characteristics access to legal forums with the political and economic power to affect social relationships.

Some social movements, however, are providing a critique of bourgeois legality. Coombe, writing about Canada, observes that for First Nations peoples who mobilize the concept of 'aboriginal title,' the "language of political liberalism" is subversive: "Economic liberalism presupposes the alienability of 'land' from social relationships, material culture, and cultural representations" (1993:14). Yet "'Aboriginal title' as a key element of *political* autonomy, reintegrates relations between meaningful space, social relationships, sacred objects, and significant texts that the colonial imaginary ripped asunder" (Coombe 1993:14, emphasis hers). Similarly, current efforts by minority peoples to argue for the cultural rights of groups,

such as the right to use their own language or to practise their religious customs, challenge the basic premise of bourgeois law that rights inhere in individuals.

Bourgeois legality thus provides possibilities for people to undermine its constitutive assumptions. To the degree that bourgeois law presupposes subjects with different interests capable of articulating and contesting their concerns, it encourages subjects to come together and assert their rights: to claim that their equal rights have been denied them based on difference, to assert that their difference—in cultural heritage, for instance—obliges them to demand special rights, or even to design their own system of rights based on their difference. We have focused on the part that law and bourgeois legality play in encouraging people to be “free to find themselves” and thus to “realize” the “inner” qualities that distinguish them from others. The kinds of “selves” they are free to find are the basis of identity politics today.

While the papers included here describe specific instances of law’s contradictory role in constructing identities, they point to more general processes that are occurring wherever capitalist political and economic institutions authorize the invocation of bourgeois legal principles. Invocations of Western bourgeois law in localities where other traditions have dominated do not involve a simple confrontation between two systems of values: the West vs. the local. Rather, any encounter between legal traditions is shaped by contradictions within bourgeois law itself. We have focused on two such contradictions here. First, bourgeois law declares everyone equal before the law, but by doing so constructs a realm outside of law where inequality flourishes. Second, bourgeois law simultaneously demands and disclaims difference, requiring people to have unique identities and individual wills while compelling them to stress their similarities with other abstract bearers of legal rights if they wish to be treated as equals. These contradictions, we suggest, play an important role in the apparent proliferation of identities and in the scholarship developed to analyze them—including our own.

NOTES

Jane F. Collier, Bill Maurer, and Liliana Suárez Navaz
Department of Anthropology
Stanford University
Stanford, CA 94305–2145

JANE F. COLLIER is Professor of Anthropology at Stanford University. She has published *Law and Social Change in Zinacantan, Chiapas, Mexico* (Stanford University Press, 1973) and edited *History and Power in the Study of Law* with June Starr (Cornell University Press, 1989).

BILL MAURER is Lecturer in Anthropology at Stanford University. He has conducted research on law and the construction of identity in the British Virgin Islands and published articles in *The Law and Society Review* and *PoLAR: The Political and Legal Anthropology Review*.

LILIANA SUÁREZ NAVA is a doctoral candidate in the Department of Anthropology, Stanford University, conducting dissertation research on African migrant workers in Southern Spain as they are affected by the laws of Spain and the European Community.

Acknowledgements The papers collected here were presented at the 1992 meetings of the American Anthropological Association in a panel titled “Sanctioned Identities.” This introduction was written after that panel and reflects the ideas and suggestions expressed there. We are particularly grateful for the critical readings and comments of George Collier, Eve Darian-Smith, Peter Fitzpatrick, Nina Glick

Schiller, Saba Mahmood, Sally Merry, Michael Musheno, Renato Rosaldo, Chris Tennant, members of the 1992 panel, and the anonymous reviewers from *Identities*.

1. Examples of studies of postmodernism, globalization, and postcoloniality that focus on issues other than law include Anzaldúa (1987), Appadurai (1990), Chakrabarty (1992), Clifford (1988), Glick Schiller et al. (1992), Gupta and Ferguson (1992), S. Hall (1991), Harvey (1989), Haraway (1992), Kaplan (1987), Kearney (1991), Rosaldo (1989), and Rouse (1991). Similar studies that specifically address law include Amin (1987), Cohn (1989), Comaroff (1989), Coombe (1992; 1993), Fitzpatrick (1980; 1992), Gilroy (1987; 1990), Guha (1963), Lazarus-Black (1992), Merry (1991), Moore (1992), Vincent (1990), and contributors to Starr and Collier (1989).
2. Pashukanis included socialist legalism within bourgeois law. He argued that the USSR legal system of his time was also based on a concept of the individual as owner of "his" capacities, and was thus inextricably bound to a broader world view based on enhancing the capacities of individual humans rather than on fostering a new sense of personhood necessary for the communist millennium.
3. Studies of resistance, in particular, tend to focus on the everyday, small acts of defiance, on the subtle and nuanced responses and readings that people make of their structural positions, and on the refusals that flow from people's differences (Abu-Lughod 1990; Scott 1985).
4. We would like to sidestep the implied opposition between Charles Tilly's argument that "citizenship rights came into being because relatively organized members of the general population bargained with state authorities for several centuries" (1990:1) and Marshall's argument that "rights are not a proper matter for bargaining" (1964: 122). We believe that both are right. People acquired citizenship rights by fighting for them; but the political philosophy of Social Contract theory provided the cultural framework for people to imagine that citizenship rights were something it made sense to fight for.
5. Note that Macpherson (1962) seems to accept the idea that people already have "potentialities" that they may (or may not) be able to realize.
6. In trying to explain why divorce became harder to obtain in the years before World War I, Max Weber wrote, "the idea that the formal integrity of the family is a source of certain vaguely specified irrational values or is the supporting supra-individual bond for needful or weak individuals," "has become powerful through the very rationalization of life in the contractual society" (1967 [1925]:136).
7. In other words, we suggest that the "free" market required workers to come up with natural capacities in the same sense that Foucault (1978) suggests that psychoanalysis required its patients to come up with psyches.
8. Because the effects of law are always shaped by the particular local context in which legal rights are invoked, Somers (1993) prefers to treat modern citizenship as an "instituted process" rather than a "status". We prefer, instead, to treat law differently depending on whether we are analyzing its cultural logic—in which case we follow that logic in treating citizenship as a status—or its actual manifestations in history (see Coutin and Chock and Murer, this volume).
9. After World War II, evidence of Nazi racism also contributed to the discrediting of biological justifications for social inequality.
10. Martin and Lyon note that lesbianism was not proscribed by law in Victorian England. According to popular legend, this legal "oversight" was pointed out to Queen Victoria, "who decried the suggestion, dismissing the thought as impossible. 'Two ladies would never engage in such despicable acts'" (1972; 41–42, emphasis theirs).
11. Glick Schiller, et. al. (1992:1) have drawn our attention to "a new kind of migrating population," different from nineteenth century migrants, "composed of those whose networks, activities, and patterns of life encompass both their host and home societies". Changes in legal statutes may be partly responsible for this shift. The U.S. Hart-Celler immigration act of 1965, for example, favored close relatives and therefore may have encouraged migrants to the United States to retain close ties with kin in home countries. Passports and immigration quotas also stress the ties between migrants and homelands, forging strong links between peoples, cultures, and places (Gupta and Ferguson 1992).
12. in his analysis, Gilroy (1987) focuses on music and dance as cultural expressions that brought together communities of immigrants in England at the same time that they linked British "blacks" to

their counterparts in other areas of the world, such as the Caribbean, and to their imagined homelands in Africa and India. Although Gilroy never asked why black difference and identity should be constituted through music and dance, our analysis has suggested two ways in which bourgeois law might have contributed to the highlighting of these two potentialities. First, by refusing to regulate the free market, bourgeois law prompts alienated workers to feel most "themselves" in the private domain of cultural and subjective expressions (Marx 1984). Second, by promising to protect the right of equal citizens to express their inner desires as long as their expression does not infringe on the rights of others, bourgeois law encourages those who come before it to imagine that their desires emanate from their interior, real selves and to base their legal claims on the right to express cultural differences. It is also true that bourgeois states tend to react repressively toward groups who try to manifest their cultural differences outside the private sphere by engaging in political challenges to the state (Asad 1993).

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