

What's Law Got to Do with It? Cultural Logics and the Formation of Social Subjects

1. Introduction

Societies are complex systems – or clusters of interacting systems – that reproduce themselves: their culture, their practices, and their structures. Most, if not all, societies reproduce profound injustice. Two questions I will discuss today:

- a) How and why do oppressive systems reproduce themselves, even when the participants are committed to justice and recognize that the system is unjust.
- b) How can the process of social reproduction be effectively disrupted and replaced so that better systems emerge?

Note: I am not doing normative theory here. I am asking about the process of social reproduction: How do we make a homeostatic social system more just?

II. Social Reproduction

In principle, social reproduction theory considers how any social formation reproduces itself; in practice, the theory has developed as a critical response to a Marxian model that focuses on the economy. Modern social processes not only reproduce class exploitation, but race and sex (etc.) oppression; and the processes in question work not only through wage labor contracts, but through social practices that produce and maintain life, and create and distribute forms of non-economic value. Understanding social systems and their reproduction is important in order to change them.

A. Structures are the Skeletons of Systems

A system is a set of things working together in a way that forms a whole. There are different ways to model the relationship between systems and structures. I think of structures as networks of relations that hold between nodes, and systems are dynamic, historically specific, instantiation of structures.

Complex systems, in contrast to *simple systems*, are not straightforwardly decomposable into independent parts, the operations on the parts are not necessarily linear, and they are self-organizing and stable due to feedback loops (Ladyman et al 2013). Complex systems can appear chaotic because the interactions between the parts are non-linear and unpredictable. But nevertheless, the whole displays patterns and regularities.

Understanding societies as complex systems is important for three reasons.

i) In complex systems, the structure and environment of the system can impose constraints on components in a way that shapes them to fit the structure (think of adaptation in ecosystems).

ii) A complex system isn't decomposable into sub-systems or modules that behave independently of each other. Instead, the components of the system depend for their capacities on other components, in ways that involve feedback loops.

iii) Complex systems are self-organizing and homeostatic. They maintain themselves without central authority. As a result, they are difficult to disrupt, but because they are non-linear, small changes can cascade and have a big effect.

It is helpful to distinguish systems and structures because systems overlap and interact with each other, and the consequences of this interaction matter for evaluating and intervening in the structures, e.g., is the practice of marriage, itself, a problem, or is it a problem when instantiated in *this* system.

Take away: Structures are parts of complex overlapping systems that affect how they are sustained.

B. Social Relations are Established and Maintained in Social Practices

Social structures are networks of relations. Such relations, in turn, are formed in social practices. On my account (at least in the central cases):

Social practices are patterns of learned behavior that enable us [living beings] to coordinate as members of a group in creating, using, distributing, managing, maintaining, and eliminating a resource(s), due to mutual responsiveness to each other's behavior and the resource(s) in question, as interpreted through shared meanings, i.e., the cultural technē.

Resources are things taken to have (+/-) value. Elements of a *cultural technē* will include: simple signals (pink means girl); default assumptions (marriage is between one man and one woman); narrative tropes; common metaphor and metonymy (man : woman :: reason : passion).

On this view:

i) Sociality is not unique to humans. It is grounded in social learning rather than collective intentionality. Language is not needed.

ii) Practices are not rule-governed. And they are not driven or manifested by purely cognitive processes; they have affective dimensions.

iii) Practices emerge in response to both the material world and others with whom coordination is needed. They have material components, e.g., eating a meal is a practice that involves food.

iv) An ideology is a cultural technē “gone wrong” – it distorts our appreciation of what’s valuable, or distributes what’s valuable in unjust ways, or organizes us in ways that are wrongful or harmful.

Take Away: Social structures are not all institutional. They are formed through the social learning and the complex interaction between agents, culture, and the material world.

C. Structural Stability

Why are systems – especially unjust systems – so stable? Cailin O’Connor (2019) provides some insight. She asks: what are the minimal conditions under which social inequality would emerge and be stable? Consider (2019, 39):

Correlative problems: the best solution has us all do the same thing (drive on the right);

Complementary problems: the best solution requires us to act differently, but in sync, e.g., ballroom dancing (“step forward if you are a woman and back if you are a man”).

Complementary problems are solved by establishing roles that are suitably related. But in addition to roles, we need to identify who functions in what role; we do this by relying on markers of social categories, (38-39). Moreover, there are advantages to having broad categories rather than specific categories for each practice, because this enables members of the group to build up broad competencies, form networks, and develop identities. But, O’Connor argues,

Once categories have been adopted, the cultural dynamics that lead to bargaining norms are radically changed. New norms that are inequitable, but not especially efficient, arise. And once they do, they can be self-perpetuating. In other words, the development of types sets the stage for serious inequity to spontaneously emerge and to persist between social groups” (2019, 4).

For example, if Alice and Bob are bargaining, and Alice is invested in the care of another, e.g., her infant, and Bob is not, Alice’s options are more limited than Bob’s, for Alice will not accept a bargain in which the dependent’s well-being is compromised. This is where a disagreement point becomes a threatpoint. In such bargaining contexts,

...power differentials between bargaining agents become salient. Suppose one player is able to issue a more credible threat than the other, for whatever

reason. Because the less powerful player now stands to lose more should the bargaining fail, the more powerful player derives an advantage. (117)

For example, the social division of labor has positioned women, as a whole, as caregivers and men not; this has the result that women are systematically disadvantaged, and “small differences of inequity between genders...can feed into...processes that generate more serious inequity” (118). Expanding on this, there are several sources of stability:

i) *Power:* Practices define roles that come with burdens and benefits. In doing so, they also distribute power, e.g., who has access to the valued stuff, who can produce it, own it, withhold it; and who is burdened with responsibility.

ii) *Intelligibility:* A cultural technē provides tools to make sense of ourselves, of others, and of the world. Action that conforms to one’s place in a social practice is intelligible to others; if one strays too far, one is misinterpreted, punished, or viewed as only a questionable member of the community. These are bad options.

iii) *Materiality:* Practices shape the material conditions in ways that resist change. Feedback loops in social niche construction shape our environment to accommodate our practices (transportation systems!). Even if we want and need to change our practices, it may not be feasible. (Cf. the ADA!)

Take-away: Practices are embedded in systems that create significant constraints and incentives to conform, even if we don’t want to or think it is best overall.

III. Social Change and the Law

Let us now turn to social change in pursuit of justice; how is systemic change possible? Given the account of practices I favor, to change a structure, we should change the practices that constitute the structure.

- We might change the material conditions, perhaps by intervening on the resource being managed (Impossible Burger! Curb cuts!).
- We might change the cultural technē, i.e., change social meanings (and their apparatuses) that provide tools to interpret and experience what is valuable, required, etc. (or not) and the corresponding scripts and default assumptions.

In small settings, e.g., a family, an individual may have the power to bring about such changes in the practices and interpersonal dynamics. But because resources and social meanings are not encapsulated, then even in a small well-defined context, broader social pressures will have a significant impact and make change

difficult. Law and politics are the most obvious sites for managing broad systems of coordination.

A. Law and Social Practices

Legal systems have many parts: the legislature, the judiciary, courts, attorneys, police, prisons, etc. It may be helpful to distinguish possible ways of understanding law and its place in social systems.

- Laws are a set of directives. They tell us what we can and can't do from the state's point of view. We learn the directives and act (or not) in accordance with them. In this sense, *law is part of the cultural technē*. It gives agents tools for interpreting actions as lawful or not; it provides norms for behavior.
- *Laws, legal documents, and the material infrastructure of law (prisons) are resources* – things of (+/-) value – that are created, managed, maintained and eliminated by legislative, judicial, executive, and other social practices.
- *Law is a set of practices* that specialists manage, and non-specialists get caught up in. In this latter sense, law is not the frame or material conditions for social agency, but is contested set of practices that manages freedom, money, and power.

Keeping in mind these senses of law, social justice efforts may target a particular law or set of laws, an interpretation of the law, the material reality of the legal apparatus, or the place of legal practice in society.

B. Law and Social Meanings

One primary strategy for bringing about greater social justice is to change laws (as directives) or their interpretation. However, because law is only one component of a complex system, the consequences of such initiatives are unpredictable and will only have an impact on the structure if they are meaningfully taken up in practices. (Consider Brown, or Roe.)

How is law taken up in culture? Lawrence Lessig (1995) has argued that law can fruitfully be used to shift social meaning. Both he and Anthony Appiah (2010) have written about legal efforts in the 19th c. to stop dueling in the American South. On Lessig's account, two strategies stand out: one strategy "aimed to eliminate dueling simply by banning it from social life; the other aimed to eliminate it simply by changing its social meaning" (971). The first strategy was unsuccessful. He argues: "Proscription here fails in part because it directly challenges the norms of loyalty built within the social structure, and these norms can be quite strong. Within the elite's rhetorical structure, a law banning dueling

was not a sufficient reason to refuse to duel" (971). The second, focusing on social meaning, was successful. How did it work?

...an individual participating in a duel was barred from public office after the duel. Holding public office...or more importantly, serving the public, was itself a duty of the elite. Thus, exclusion created a conflict in the duties faced by the elite, and hence an elite-based reason for refusing the challenge of a duel...What is different about the second proscription is that it functions within the elite's rhetorical structure, to undermine the very basis for dueling itself. A gentleman could appeal to a gentleman's duty in escaping the duel, rather than appealing to self-interest or the rules of commoners. (971-2)

This is an excellent example of how social meanings interact in structures and, more generally, how law and culture are intertwined. But of course, things are not always so simple or as successful, for the weight and breadth of social meaning may surpass the ingenuity of lawmakers, e.g., the social meaning of race remains a dominant force in shaping US social structures in spite of lifetimes of legal effort to displace it.

Law is also a valuable mechanism for directly managing resources. The Americans with Disabilities Act has distributed access to public space more just and has also changed the social meaning of disability. Tax law is also a direct intervention on the material conditions of social life. And yet....

Take-away: Ordinary individual agency is usually ineffective in changing big social systems, and small ones are embedded in big ones. Law can sometimes help change practices by changing social meanings and material conditions.

IV. Changing Culture: Limitations of Law Alone

I hope we can agree that the legal system (at least in the United States) plays a huge role in upholding the status quo and its economic and status hierarchies, and does not, overall, promote social justice (with some exceptions).

Often legal change is more effective if it arises out of social movements that have already, to some extent, shifted practices. For example, many find it surprising how quickly marriage equality laws were passed in the US. But the LGBTQ rights movement worked for decades to shift understandings of same-sex relationships and to integrate them into more traditional family structures. In some places, the change of law was a formal recognition of this work. Social movements have greater freedom than legal institutions to rethink our background assumptions and disrupt the status quo; legal practice has power by

virtue of being backed by the state. Deep engagement between the two is crucial for envisioning and creating more just and durable structures.

But social movements (consider for example the feminist movement, the LGBTQ movement, the Black Lives Matter movement) provide more than support for legal change. They are typically concerned with cultural change beyond law. And such cultural change is necessary to achieve social justice.

(i) Not all oppression falls within the scope of law or policy, especially within the context of liberalism. Women and girls are treated unjustly in families, but the division of labor in the family is not considered a matter for the state to control (though law may incentivize fairer practices). The public/private distinction is not the only barrier. Iris Young (1990) argues that oppression is group-based injustice that takes five forms: exploitation, marginalization, powerlessness, cultural imperialism, and systematic violence. These are all sustained by ideology. We need to change culture. Although law can nudge social meanings, it cannot reach into the domains where culture guides how and what we value.

(ii) Social movements do not simply hand down directives but create alternative practices, seeking ones that work in context, with the aim of spreading them to others. This allows the movement to benefit from local knowledge (Ostrom 1990; Argawal 1992), from participants' sensitivity to existing social meanings and practices (Escobar 1998), and from counter-publics and small scale "experiments in living" (Anderson 1991). Movements create new social networks, which is a well-established method for creating positive feedback loops that change complex systems. Co-designing new practices is empowering to those directly affected and has greater democratic legitimacy (Hoffecker 2017).

(iii) Although a legitimate social movement must be empirically and morally justified (not all social movements promote justice!), carefully reasoned arguments are not necessary for gaining moral knowledge or for moral progress (See Haslanger 2017b; 2021). And in the vast majority of moral disagreements, argumentation is not effective in changing minds. Moreover, as I argued above, changing individual minds does not change practices that are the established mode of coordination in a milieu. Although legal interventions provide nudges and sanctions that can be helpful in changing behavior, conformity to a new norm based on sanctions is not stable (Anderson 2014, 3-4). Instead of relying (wholly) on reasoned debate, social movements prompt *paradigm shifts* in understanding the social world through practical engagement with others.

Take-away: Many social movements aim for cultural change (sometimes in addition to legal change). Such movements address injustice in ways that are well-suited to complex dynamic systems for they target a broad range of practices that form social relations, offer alternative social meanings, and disrupt material conditions in ways that call for (technological?) intervention.

V. Conclusion

Is there a message here for academics, legal theorists, philosophers? Maybe we can play a role in informing legal arguments or provide principles of justice. But is it our job to change culture? I've suggested that law can change culture by shifting social meanings; it can also support social movement work by formalizing changes that have been achieved in practice. And philosophers can develop normative principles to guide our interventions into unjust structures.

But this is not all. In my experience, many philosophers and other academics take themselves to be theorists *rather than* activists, as if one cannot be both. They suppose that theory is not a form of activism. This seems to assume that activists are illiterate or stupid, or that they are not interested in theory (don't activists just make signs with simplistic slogans?). But this is deeply misguided.

Theory, including philosophy, is a crucial part of any movement: Social movements rely on a critique of what is taken for granted, what "everyone knows," the world as we live it, as ideology has made it. Shifting consciousness is at the heart of philosophy. In addition, movements are called upon to critically engage dominant paradigms, to offer alternative explanations, and to construct new tools of thought and action. Philosophical work isn't only happening in classrooms and academic offices. And work that does happen in classrooms and offices plays a role in activism.

Rebecca Solnit (2014) reminds us: "it will take everything you have to steer the future away from endless war, from the annihilation of the earth's treasures and the grinding down of the poor and marginal."

And as Audre Lorde (2017) said, "Sometimes we are blessed with being able to choose the time, and the arena, and the manner of our revolution, but more usually we must do battle where we are standing."