Comment on Santos

A Prophecy of Possibility: Metaphorical Explorations of Postmodern Legal Subjectivity

Austin Sarat

> Pleasure precedes business. The child at play is practicing for life's responsibilities. Young impalas play at fencing with one another, thrusting and parrying. Art for art's sake was the main avenue . . . to ancient technological breakthroughs. Such also is the way of metaphor: it flourishes in playful prose and high poetic art, but it is also vital at the growing edges of science and philosophy.
>
> —W. V. Quine (1979)

> What is truth? A moving army of metaphors, metonymies and anthropomorphisms, in short a summa of human relationships that are being poetically and rhetorically sublimated, transposed, and beautified until, after long and repeated use, a people considers them as solid, canonical, and unavoidable. Truths are illusions whose illusory nature has been forgotten, metaphors that have been used up and have lost their imprint and that now operate as mere metal, no longer as coins.
>
> —Nietzsche (1956)

I

Law both assumes and constitutes subjectivity. We come before the law with will and imagination, but without law we could not attain subjectivity at all (Derrida 1990; see also Unger 1975; Douzinas & Warrington 1994:410).[1] Exploring the nature and constitution of the legal subject, the varied and contingent ways law helps make us who we are, is a risky endeavor in the

I am grateful to Kristin Bumiller, Tom Dumm, and Stephanie Sandler for their helpful comments on an earlier version of this essay. Address correspondence to Austin Sarat, Department of Law, Jurisprudence & Social Thought, Amherst College, Amherst, MA 01002.

[1] As Goodrich (1995:131) argues, "Law stands on the boundary between knowing and being. Law . . . marks the hinge, the breakage, between inside and outside, power and truth. Law passes between the exterior and the interior, it is the hinge upon which the subject swings. . . . Law screens and mirrors, it appears outside but goes inside, it is text but it is also flesh, it institutes the subject." Or, as Lingis (1983:114) puts it, "A person is an ideal entity, that is, one that maintains itself by force. The will to be a person is produced by thought, by subjection to law."

Law & Society Review, Volume 29, Number 4 (1994)

most tranquil of historical periods. It is, however, even riskier in times of turmoil and transition. Doing so in such a way as to advance a political and ethical project using tools most appropriate to that project is a challenging task even in periods when canons of proof and argument seem well settled. It is even more challenging when there is little consensus about what counts as valid argument and persuasive proof.

Boaventura de Sousa Santos's "Three Metaphors for a New Conception of Law" (1995) explores the constitution of the legal subject and advances a political project in the face of a "deep and irreversible" crisis of modernity and just as we are "entering a period of paradigmatic transition" (pp. 571, 569). His essay is about both the subjectivity that law assumes and that which law constitutes.[2] At the heart of Santos's concern are these questions: What ways do we have of glimpsing the emerging postmodern legal subjectivity? What will be the subjectivity that will bring postmodern legality into being?

Every age and field has its prophets. Some are prophets of doom; others are prophets of possibility. Santos has been and is one of the most prophetic voices in the legal field. His is a prophecy of possibility, of opportunity, of opening. Santos locates possibility, opportunity, opening in the simultaneous triumph and exhaustion of modernity (Lyotard 1984), and he invites his readers to build a legality appropriate to the dawning of a new era.[3] He asks us to embrace postmodernism as a settled fate and an expanding horizon of possibility. Thus his essay is self-consciously utopian in its aspiration, allying itself with the project of constructing "oppositional postmodern subjectivities competent enough to face the forthcoming paradigmatic competitions and willing to explore the emancipatory possibilities opened up by them" (p. 574).

Santos's prophecy of possibility comes at a time when legal scholarship, and law itself, is undergoing one of those periods of rupture in which traditional assumptions no longer seem adequate or satisfactory.[4] It is in this context that Santos's poetic and

[2] Modern law—the law of liberalism and the Enlightenment—both presumes and helps to bring into being an interiority (Hart 1968); it knows us, even as it makes us, responsible agents who are made into legal subjects (Morris 1970). The subjectivity of the modern legal subject is, at the same time, an unstable one. It both desires and fears freedom. It both desires and fears regulation. The instability of the modern legal subject is an attribute of modern legality itself which lurches from expansive freedom to extensive regulation and back again as historical condition and political possibility demand it. But the instability of the modern legal subject is also founded in a series of repressions and repetitions (see Garber, forthcoming; also Goodrich 1995) through which the legality of Enlightenment liberalism exhausts itself even as it appears to be reaching the point of its greatest triumph.

[3] Postmodernism in legal thought is compatible with many different versions of what such a legality might entail. See Unger 1987; Douzinas, Warrington, & McVeigh 1991; Rose 1994.

[4] As Santos (1995:003) rightly puts it, "[T]he general crisis of legal regulation has become another form of excessive regulation. Legal despotism presents itself as legal an-

prophetic call to come to terms with the transition from modernism to postmodernity should be read. Delivered as the main address at the Law and Society Association's 1995 Annual Meeting, Santos's call takes postmodernism, which has for a long time been lurking just over the horizon of work in this field, and puts it, for a moment, at the center of attention.[5] Santos invites law and society scholars to contemplate a world in transition and a world of transition. He warns that in such periods of transition communication breaks down (pp. 569–70). Audiences differently schooled, though occupying a common intellectual space, may find themselves divided as theories, concepts, and vocabularies proliferate.[6] It is then both appropriate and unsurprising that many will find Santos hard to fathom.

archy." Like our own research, law is said to be "turning outward" in search of new grounding (Minow 1979:79); like our own research, law seems to be undergoing a rapid "rotation" in which attempts are made to accommodate contradictory intellectual assumptions. Some of those contradictions and challenges are potent enough to "distort the purposes of law and threaten its very existence" (Fiss 1986:1). And even if one resists such an apocalyptic vision, it seems safe to say that not since the emergence of Legal Realism more than 60 years ago (Kalman 1986; also Singer 1988) has there been so much uncertainty as well as so much excitement about what is happening in the legal world. This is as true in the Law and Society Association as elsewhere, and Santos's essay may help us understand what is going on in our own community.

[5] Of course, Santos is not the first to put postmodernism at the center of attention. See Handler 1992a.

[6] As Santos notes (p. 569):

> In the specific paradigmatic transition we are now entering, any given discipline, be it sociology of law or archeology, tends to be constituted by a larger or smaller number of rival rhetorical audiences. The level of real communication among them is very low and whatever they do have in common . . . has much more to do with the dominant institutional production of knowledge than with the knowledge produced.

Thus it is not surprising that today the Law and Society Association is more plural, more fragmented than ever. There are now three or four generations of law and society scholars. There is no longer an agreed-upon canon of law and society research. Where once legal doctrine would never be spoken about in law and society gatherings, today our community makes space for that work (for an example see Douglas 1994). Literary and humanistic perspectives have made some inroads (Greenhouse 1992). Feminist work and queer theory now enrich the conversation about law in society (see Herman, forthcoming). Post-Marxist approaches to law as well as interpretivism and deconstruction are found side by side with formal modeling and large-scale, quantitative data analysis.

Law and society traditions are, as they should be, up-for-grabs as new scholars give new definition to the field. As Calavita and Seron (1992:770) put it,

> This is a crucial juncture for sociolegal studies. . . . It is a time of self-reflection and reevaluation of our methodological and theoretical legacies, a time of self-criticism and skepticism not only about the validity of our traditional approaches but also, it seems, about the validity of the endeavor itself.

Where once people came to the Law and Society Association to escape being marginalized in their disciplines (this explanation was provided to me by Lawrence Friedman at an early stage in my Law & Society career), today everyone feels marginal in this field. The positivists feel unappreciated; the interpretivists feel threatened; critical scholars believe that the work of law and society scholars and the Association is not political enough; traditional social scientists, that it has been too politicized. Whereas almost 10 years ago I felt no such diffidence about my ability to describe law and society scholarship (see Silbey & Sarat 1987; Sarat & Silbey 1988), today it is hard to say what constitutes or defines law and society research.

In this commentary I argue that what makes his essay hard to fathom is at the heart of its value and its achievement. I point, in particular, to the importance of his choice of a style of writing that is fully consistent with the substantive political position he seeks to advance. He writes in a way which is in tune with his own utopian vision, a vision which insists on the necessity of "using the imagination to explore new modes of human possibility" (p. 005). He writes about imagination in a way that sparks imagination. In addition, Santos avoids the conventions and language of scientific argument and proof in order to break with the "historical complicity of modern law with modern science" (p. 571).

Santos not only calls attention to postmodernity as a social condition, but by relying on metaphor he also provides a useful map of the opening up of a new legal subjectivity made possible by, and made necessary to, postmodern legality. The subjectivity he seeks to encourage is imaginative, irreverent, and inventive. It is playful, and seriously unserious. It is, in his terms (p. 573), "law-inventing" rather than "law-abiding." The subjectivity that Santos (p. 574) evokes in his use of three metaphors—the frontier, the baroque, and the South—is at one and the same time aesthetic in its orientation yet ethically and politically engaged as well. It is precisely because he takes seriously the material conditions of modern society that Santos values imagination and inventiveness.

The postmodern legal subjectivity which Santos describes is an aesthetic achievement of no small measure because it is also deeply invested in an emancipatory project made available by the "paradigmatic transition." It isn't enough for him that the legal subject is inventive if the law that is invented is at war with invention itself. It isn't enough to imagine if imagination doesn't put one in touch with the facts of subordination, of silence, and of histories stolen by Imperial projects (Cornell 1990; Said 1993). Santos uses metaphor to encourage us to try on the dispositions, habits, moods, and identifications that might redeem the emancipatory promises of modern law while leaving behind its repressive, regulating repetitions. In so doing his essay breaks down, or through, the modernist dichotomy of aesthetics and ethics (Kant 1951; see also Eaton 1989).[7] It shows that there is an ethics al-

[7] In breaking down this distinction Santos follows in the footsteps of Nietzsche (1974), among others. As Nietzsche (1974:55) wrote praising the aesthetic attitude,

> O those Greeks! They knew how to live. What is required for that is to stop courageously at the surface . . . to adore appearance, to believe in forms, tones, words, in the whole Olympus of appearance. Those Greeks were superficial—out of profundity. And is not this precisely what we are again coming back to, we daredevils of the spirit who have climbed the highest and most dangerous peaks of present thought and looked around from up there—we who have looked down from there? Are we not, precisely in this respect, Greeks? Adorers of forms, of tones, of words? And therefore—artists.

ready inside every aesthetic gesture and an aesthetics in every ethical argument.[8]

By marrying style and substance and bridging the separation of aesthetics and ethics, Santos significantly advances the conversation about postmodernism and law. Yet there is still more to what he has done. His essay points to places and peoples where the imagination and inventiveness he values already have been developed, if only episodically or as a survival strategy in the face of oppression. In the lives of people at the margins of modernism he identifies some resources, which he names in and through metaphor, for the construction of a postmodern legal subjectivity. In so doing he contributes to the persistently modernist task of thinking through the sociology of the postmodern transition, of spelling out the conditions under which a new legal subjectivity can be brought into being. And he points the way for others to cultivate a novel way of being in the world, a way that "liberates" the "oppressor," a way made possible in the breaking down of boundaries and the reversals of movement that accompany the postmodern transition (p. 581).

II

Several years ago Joel Handler (1992a) used his Presidential Address before a Law and Society audience similar to Santos's to engage in a sympathetic critique of postmodernism in sociolegal studies. He chided scholars for indulging in a dignifying celebration of postmodern style while the world around becomes ever more repressive and unjust. In his view, postmodernism does not, and cannot, provide adequate resources in a situation of escalating threats to the disadvantaged and disempowered. Criticizing vocabulary used in an earlier essay by Santos (1991), Handler (1992a:728) warned: "The enemies of the poor and those who suffer discrimination do not rely on *localized knowledge in mini-rationalities*" (my emphasis). He called on politically responsible, progressive legal academics to reject postmodernism and "to develop a theory of political economy that will address the problems of redistribution and discrimination" (p. 819).

Handler's presentation precipitated several sophisticated commentaries and responses (see McCann 1992: Austin 1992; Ewick 1992; Calavita & Seron 1992; Hutchinson 1992; Winter 1992). As I read it, Santos's essay is a further rejoinder. It is a rejoinder by reaffirmation. It is a reaffirmation that asks its readers what it would mean to reject postmodernism. While it never mentions Handler, Santos's essay leads me to ask, Was Handler's invitation based on a rejection of the postmodernist diagnosis of

[8] As de Man (1979:28) notes, "All philosophy is condemned, to the extent it is dependent upon figuration, to be literary and, as the depository of this very problem, all literature is to some extent philosophical."

the conditions of late modernity? Or was it instead an invitation that acknowledges the fact of postmodernity but invites a non-postmodern response?[9]

Santos provides a postmodern response to the fact of postmodernity. His essay does for our understanding of legal subjectivity what Judith Butler (1994) has done for our understanding of sex and gender. Just as Butler (p. 1) asks, "Is there a way to link the question of the materiality of the body to the performativity of gender?"[10] so Santos might be understood as asking how we might link postmodernity as a set of material conditions to the possibilities of postmodern legal subjectivity. For him postmodernism is a condition of life to which we *must* respond. Postmodernism is an emergent fact; it is not a fad of academic discourse. The question, then, is not to be postmodern or not; it is not whether but *how* to imagine the postmodern moment and its implications for law.[11]

Metaphor is Santos's preferred device for doing so.[12] He writes metaphorically about metaphors and, in so doing, relies on a linguistic device well suited to invite his readers' own imaginings (Ricoeur 1977). As Davidson (1979:29) puts it,

> Metaphor is the dreamwork of language and, like all dreamwork, its interpretation reflects as much on the interpreter as on the originator. The interpretation of dreams requires collaboration between a dreamer and a waker, even if they be the same person: and the act of interpretation is itself a work of the imagination. So too understanding a metaphor is as much a creative endeavor as making a metaphor, and as little guided by rules.

Santos uses metaphor to provide a glimpse over the horizon and, at the same time, to invite his readers to look for themselves. Metaphor replaces "some stale 'natural' kinds [of knowledge] with novel and illuminating categories, in contriving facts, in re-

---

9 Ewick (1992:756), in her commentary on Handler, notes that he was "caught between these two views of the postmodern condition: on the one hand, it is a way of operating or a style . . . that we can, through an act of will, decide to cast off; on the other hand, it is a condition of life to which we are shackled." One of the crucial achievements of Santos's essay is that it is not, in any way, caught between these views.

10 Butler (1994:1) argues that "sexual difference . . . is never simply a function of material differences which are not in some way both marked and formed by discursive practices. Further, to claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference."

11 In his demand that we come to terms with postmodernity, Santos reminds me of a position taken several years ago by Jamie Boyle (1985). Confronting the postmodernist challenge to foundationalist thinking, Boyle identified two possible responses. One he called "tragic modernist"; the tragic modernist sees all action as "problematic" if it cannot be grounded in the timeless, the objective, the universal (p. 1081). The other, which Boyle labels the "active modernist," sees the absence of foundations and its accompanying contingency and fluidity "as a liberating rather than a demobilizing phenomenon. By undermining both social and conceptual authoritarianism, this absence provides a momentary opening for other ways of being and other forms of life" (ibid.).

12 For a useful discussion of the way metaphor figures in other disciplines, see Gerhart & Russell 1984.

vising theory, and in bringing us new worlds" (Goodman 1979:175). Where some might want definition or comforting references to familiar literatures, Santos is suggestive rather than definitive, evocative rather than referential. He makes no concession to the modernist demand for linearity and, as a result, speaks elliptically about a world that best can be apprehended as an ellipsis.

Santos seeks to evoke a mood as much as construct an argument. He gives a language to those who already "assume the existence" of the postmodern transition rather than trying to convert those who are skeptical about its significance. He engages in a genre of what has been called "postmodernist provocation" (Winter 1992:798). Through his provocation he "seeks to prod the well-defended subject into recognizing its own constructed and contingent character" and to imagine new possibilities (ibid.).

Moreover, as the quotation from Davidson (1979:29) reminds us, metaphor and their interpretation are "little guided by rules." They are, in a word, "unruly" since "metaphorical truth is compatible with literal falsity; a sentence false when taken literally may be true when taken metaphorically" (Goodman 1979: 175). Metaphor is, in one sense, quite literally against the law. And it surely defies the law of genre that prevails in our field (see Johnson 1994).[13] Relying on this linguistic device is particularly appropriate for a writer who, like Santos (p. 573), praises and promotes the "law-inventing" over the "law-abiding" citizen.

Yet the postmodernism about which Santos speaks has, according to Bertens (1995:12; see also Calavita & Seron 1992:766; Winter 1992:792), "been a particularly unstable concept. No single definition of postmodernism has gone uncontested or has even been widely accepted. . . . Such instability," Bertens suggests, "is of course the inevitable fate of all critical concepts that try to delineate movements and/or periods, but the case of postmodernism is surely excessive." Instability, even "excessive" instability, is itself one of the attributes of the emerging postmodern condition to which Santos calls our attention.[14]

As Unger (1987:42) writes, "at any given time and place, people's enacted vision of society . . . turns repeatedly within a nar-

[13] For a general discussion of the law of genre see Derrida 1980.

[14] "Postmodernity," Bauman (1992:187–88) contends,

> may be interpreted as fully developed modernity taking a full measure of the anticipated consequences of its historical work. . . . The most conspicuous features of the postmodern condition: institutionalized pluralism, variety, contingency and ambivalence—have all been turned out by modern society in ever increasing volumes; yet they were seen as signs of failure rather than success. . . . The postmodern condition can be therefore described, on the one hand, as modernity emancipated from false consciousness; on the other, as a new type of social condition marked by the overt institutionalization of the characteristics which modernity . . . set about to eliminate and, failing that, tried to conceal.

row area. The ordinary course of legal, political, and moral controversy stays within a set structure and stakes out familiar alternative positions." The instability of postmodernism helps us break out of those routines. Transition opens things up, though not equally for all people; it frees the spirit and calls all of us to "explore new modes of human possibility."

Like Unger (1987), Santos asks us to stand on the "borderline between inside and outside" and to refuse the "closure of horizons" (p. 573). He names this place a "heterotopia." Appropriating this notion from Foucault (1970:xvii–xviii; see also Dumm 1990), Santos (ibid.) urges not a going to a new, unknown place but instead "a radical displacement within the same place: our own place." Foucault (1970:24) described heterotopias as "something like counter-sites, a kind of effectively realized utopia, in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted." They are particular intensifications of already existing materials.

Metaphor itself functions heterotopically. It is "a bridge enabling passage from one world to another" (Shiff 1979:106). In his choice of linguistic devices, as well as his decision to write about metaphor, Santos enacts the very thing that he seeks to describe. Doing so summons his readers to think the future by radically rethinking the present, to rearrange the possibilities of the present to invent new futures. Santos's aim, he says (p. 573), "is to experiment with the frontiers of sociability."[15]

As Santos sees it, modern law is dominated by a consciousness of obedience, of law as an ordering principle in a world perpetually on the verge of a cataclysmic disorder (Sarat & Kearns 1991a). And surely he is right. In mainstream jurisprudence, from Austin's famous dictum that law is the "command of the sovereign backed by sanction" (Austin 1995) to inquiries about why people obey the law (Tyler 1990), the citizen has been shown to stand in a hierarchical relationship to legal authority. Even the litigious, rights-conscious citizen can claim her rights only by addressing herself to legal authority; rights are understood to be the product of particular institutional practices (Dworkin 1977). Modern legality makes itself available from above to issue commands and to answer claims.

Yet always present within that legality was what Robert Cover called a "jurisgenerative" potential (Minow, Ryan, & Sarat 1992: 103).[16] Law is as much about excess as about restraint, as much

[15] In this desire Santos is like Simmel (1971) at the turn of the century and Mailer (1957) at mid-century. It is, of course, true that the kind of experimentation as well as the kind of sociability which Santos has in mind is very different from that of either Simmel or Mailer.

[16] In this sense, as Cover (see Minow et al. 1992:95) put it, "We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."

about the generation of normative possibility as the imposition of normative order, as much an invitation to moral imagination as to moral order.[17] This idea is at the heart of Santos's prophecy of possibility. Full flowering of the law-inventing citizen is, for him, the great aesthetic/ethical possibility that both precipitates, and is precipitated by, postmodern legality. The law-inventing citizen will, if Santos is right (1991:113), invent an "antiauratic law, an interstitial, almost colloquial law."

When Santos speaks about the subjectivity of the law-inventing citizen, he is not simply referring to a set of interior states; postmodern subjectivity is a performative practice. It is the "reiterative and citational practice by which discourse produces the effects that it names" (Butler 1994:1). To describe the performativity of the postmodern subject Santos offers metaphors—the frontier, the baroque, the South—rather than a program.

The first two of these metaphors draw on actions and practices of particular people at particular historical moments which Santos wants to recuperate and make available to the theorization of postmodern subjectivity.[18] As Santos unpacks them, these

The creation of the nomos is the work of communities and associations existing side by side in any complex social order. Those communities and associations foster a rich plurality of normative visions. Indeed, those communities and associations are defined, in part, by the content of the visions that they generate, that they maintain over time, and that they mark as worthy of respect and engagement. It is these visions, each associated with a particular group and its traditions, that foster commitment and that provide the energy for, as well as the content of, imaginative, inventive activity.

Cover was, however, by no means a prophet of the postmodern transition. Yet he did not come to the exploration of the state and its law in the posture of Hobbesian desperation, searching for an economy of violence. It is not too little order, but too much order, not too thin a moral world, but too thick a moral world, that, in his view, confronted modern legality. "It is the multiplicity of laws," Cover said, "the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution" (Minow et al. 1992:104).

[17] Modern law, as both Cover and Santos recognize, is always pulled in two directions, and, as a result, there is "an essential tension in law" (Minow et al. 1992:204 n.2). On the one hand, law participates in the generation of normative meaning, though its normative ideas are just one among many in any society. Its promise is the promise of emancipation. On the other, law plays in the domain of social control, and uses violence to enforce one (its) conception of order. Meaning-making, meaning-generating normative activity in plural communities and associations, human emancipation, the freeing of creativity and imagination, all these sit uneasily with, and complicate the task of, maintaining order. Thus, as Cover (ibid., p. 109) put it, "there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. . . . The uncontrolled character of meaning exercises a destabilizing influence upon power."

[18] The frontier: If we are to be ready and able to invent a new legality, we must imagine living at a distance from power; we must will distance, and stand as if poised between the old world and new possibilities. Being on the frontier, as Santos puts it, means "to live outside the fortress." It is, then, by definition a place of danger in relation to law. It is, at once, on the margin of law and marginal to law. It is, as a result, one place for forging new configurations. Unlike Foucault's (1980) power/resistance dynamic in which the geography of power is all encompassing and yet the resistance is nevertheless ubiquitous, Santos imagines a differentiation in the territory of law which is quite consequential. But the frontier is, for him, both a place and an imagining.

However, contrary to Santos's own understanding, the frontier can neither be a place nor an imagining where people can/should feel at home. Somehow home seems to be

metaphors are evocations of play/playfulness/being in play. They invite irreverence in places where reverence is revered.[19] They depend on the essentially aesthetic ideas of distance and detachment. They invite parody and pastiche, selective appropriation without embarrassment. Like metaphor itself, they operate in the interstices of social relations and social practices.

"Eccentricity," "subversive and blasphemous imagination," "disproportion, laughter, subversion," these are some of the words Santos uses to capture frontier and baroque sensibility. As Winter (1992:795) puts it, "postmodernism signals aestheticism, detachment, irony, pastiche, kitsch, irreverence, provocation, and arch self-referentiality." However, Santos never disentangles these attributes of postmodern legal subjectivity from its particular political projects. While he is, in this sense, interested in the politics of play, he is, at each and every moment, serious, especially about the material conditions of subaltern and colonized people.

In Santos's hands, metaphor is itself part of an emancipatory strategy. His use of metaphor invites his readers to the life of imagination. And imagination, as Unger (1987:58) says, "consists in a set of enacted preconceptions about the possible and desirable forms of human association; assumptions about what relations among people should be like in different domains of social existence."

III

Metaphor and imagination are words of the artist, and this, someone like Handler (1992a) would argue, is much too dangerous a time for a legal subjectivity content to play out the subversive dynamic of a baroque feast in which the populace marches at the end of the procession "mimicking their betters in gesture and attire and thus provoking merriment" (p. 579). Santos's version of postmodern legal subjectivity is, however, not merely an aesthetic achievement.[20]

While all of his metaphors evoke an ethical relationship and a political commitment, the metaphor of the "South" stands a bit apart from the others. It is the most referential and least imagina-

the wrong word to describe life on the frontier. As Kateb (1990:210) notes, "We are not at home; we have too much at our disposal merely to construct a home. There must be some metaphor other than home for the desired condition."

[19] Santos's metaphorical language and his discussion of metaphors in a speech before the Law and Society Association artfully enacts what it describes.

[20] In the postmodern condition law's peripatetic nature functions as a narrative force in legal process, and it imposes demands on theory. Because it is not possible to fix the legal, to pin it down, it is difficult not only to say what law it is but also to say how its power is exercised and what it contributes to the ethical. Santos's refusal to separate aesthetics and ethics in postmodern subjectivity requires that we think about the ethical as itself on the circuit, in transit, on the move.

tive, so referential, in fact, that it works least well as metaphor. It sets an ethical limit on the distance and playfulness of the law-inventing citizen. However, because Santos insists that postmodern legal subjectivity must *combine* the frontier, the baroque, and the South lest it end up in a corrupt and corrupted version of each, he opens up a new dialogue in which emancipation of the imagination is a prerequisite to a playful, "colloquial" legality which, in turn, cannot be at home in a society marked by gross inequalities of power and position.

As against those who insist that postmodernism is nihilistic, Santos's postmodern legal subjectivity is wedded to a vision of the good, of justice, or a beckoning ethical horizon. As Hutchinson (1992:779–80) argues,

> In the face of the problematized agent, postmodernism does not capitulate or retreat from the task of struggling toward an enhanced social solidarity and experience of justice. Instead it points to a renewed engagement and sustained challenge to existing historical conditions. By abandoning the search to recover or fix a unified and pristine self, the hope is to empower subjects by making them individually aware of their capacity for self-(re)creation and their collective responsibility for establishing a mode of social life that multiplies the opportunities for transformative action. . . . Citizenship in a postmodern polity is not a received status but is a continuing responsibility to make the best of the situation for oneself and others.

Unlike others who would refuse to name that responsibility or give it particular content, in an almost Rawlsian gesture, Santos calls for opposition to subordination and human suffering.[21] Standing against subordination and against suffering gives a content to ethics which denies its undecidability or indeterminacy. Postmodern legal subjects must "take a stand" against oppression and in favor of emancipation, democratization of power, and a fairer distribution of economic resources. However, they act against the law not in the name of a higher law, not to reinscribe legality in the act of opposing law. As Foucault explained in response to a question about the justification of intervention on behalf of boat people fleeing Vietnam (cited in Keenan 1987:21), "Who, then has commissioned us? No one. And that is precisely what establishes our right."

[21] As Balkin notes (1994:401), "We deconstruct law for critical purposes because of a perceived inadequation between law and justice—because we seek a justice as yet unrealized in law. Laws," Balkin continues,

> apportion responsibility, create rights and duties, and provide rules for conduct and social ordering. But law can never achieve perfect justice. Law is always, to some extent and to some degree, unjust. At the same time, our notion of justice can only be articulated and enforced through human laws and conventions. We may have a notion of justice that always escapes law and convention, but the only tools we have to express and enforce our idea are human laws and human conventions.

Santos (p. 580) calls on his readers "to side with the victim." In so doing Santos is well within the law and society tradition (see Handler 1992a). But even this isn't enough for him. We must stop "siding with the victim to become the victim" (ibid.). "Siding with the victim" implies an exteriority, a difference, which can be transcended through acts of will and empathy. "Becoming the victim" evokes an ethics in which Otherness and responding to the call of the Other is central (see Douzinas & Warrington 1994).[22] But unlike a modernist ethics in which self and other are independent autonomous entities, Santos's version of a postmodern legal subjectivity requires an identification of self and Other, not as an equation of all forms of human suffering, but as a way of making the call to go South an insistent and ever present one. In the South we recognize our humanity by recognizing the vulnerability that we share with others; we recognize that "we are all the same, not because we are all selfish and competitive individualists, but because we are all needy, fragile beings, vulnerable to ill fortune and to the brutalities and cruel indifference . . . in our midst" (Kiss, forthcoming: 377). In the South we find our humanity by becoming that which we would never rationally will ourselves to become, the sufferer. As Rigoberta Menchu said on the occasion of hearing that she had been awarded the Nobel Peace Prize, "I hope this is a contribution so that we Indian peoples of America can . . . demonstrate that the wound we feel is a wound of all humanity" (Golden 1992:A5).

From the frontier and the baroque to the South is not just a geography or a movement through space. Just as no ethical system can escape aesthetics, aesthetics, in Santos's hands, is part of a new ethics. As a result, he warns against an ethics undisciplined by aesthetics.[23] Combining the subjectivities of the frontier, the baroque, and the South insures that ethics will be disciplined by distance, playfulness, and metaphor while each is in turn put to the work of ending suffering and subordination. As he says, hegemonic domination "lies primarily either in the occultation of human suffering or, whenever that is not possible, in its naturalization as a fatality or its trivialization as show business" (p. 581). Identification of and opposition to suffering requires a "great investment in oppositional representation and imagination" (ibid.).

[22] The autonomous other, Douzinas & Warrington (p. 414) argue, "becomes the exemplary figure of the law: in his pain and suffering I sense the work of the universal which also afflicts me."

[23] To take but one example, "[T]he *topos* of the South," Santos (p. 582) suggests, "may result in putschistic and authoritarian subjectivities which, in their efforts to abolish colonialism, end up abolishing the possibilities of solidarity as well."

IV

For legal scholars and citizens alike, Santos sets an ambitious agenda. He raises our hopes as he expands our horizons. But who among us can embrace his agenda and respond to his call? I find myself feeling a vestigially modernist impulse, eager to follow the prophet of possibility, but cramped by nagging, dare I say, sociological questions. Who can and will be the postmodern legal subject? Where will postmodern legal subjectivity find its origins?

Santos suggests answers to these questions in the examples he provides to illustrate each of his metaphors. Connected to each are places, times, and historically situated people. Life on the frontier, he tells his readers, is exemplified in the experience of contemporary African American women and in their insistence on living in "the margins without living a marginal life" (p. 575); baroque subjectivity is best exemplified as we go "from the internal peripheries of the European power to its external peripheries in Latin America" and in the disproportion, laughter and subversion of the feasts of 17th-century Mexico (pp. 576, 578). And the South, Santos writes, "is a product of empire" (p. 579) though it is "spread out, though unequally distributed, all over the world . . . [in] the form of human suffering caused by capitalist modernity" (ibid.), and in the response of people like Gandhi.

What do these examples tell us about the sociology of the postmodern transition? They tell us, first, that in the face of postmodernism's breaking of boundaries, acceleration of speed, and increased culture contact, we should look to the experience of subordinated peoples, of those who have lived, or are living, in the geography of the colonized Other for the building blocks of a new legal subjectivity. In making this suggestion Santos rehabilitates the scholarship that Handler (1992a:715) criticizes, namely, some of the scholarship which celebrates "acts of resistance by the most marginalized people in society." (For examples see Scott 1990; White 1990; Sarat 1990; Ewick & Silbey 1992.)

But he does not simply romanticize the experience of subordination or responses to it. Subordination is no guarantee of virtue. He warns that none of his metaphorical evocations of any aspect of that subjectivity is sufficient to provide for "the construction of a topic for emancipation" (p. 581). Only in juxtaposition and constellation are they likely to be progressive. Postmodern legal subjectivity will be fragmented and plural. It will be based on the fact that

> No one today is purely *one* thing. . . . No one can deny the persisting continuities of long traditions, sustained habitations, national languages, and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness. . . . Survival in fact is about the

> connections among things; in Eliot's phrase, reality cannot be deprived of the "other echoes [that] inhabit the garden." (Said 1993:336)

The sociology of postmodern legal subjectivity points to the need for new forms of "solidarity" first among subordinated peoples and eventually between the subordinated and those who have lived with the taken-for-granted privileges of modernity (p. 581). After all, Santos addressed himself to an audience of law and society scholars sitting in a lavish ballroom, in an equally lavish hotel, in a Northern city. In his call to us, Santos's utopianism shines through most strongly.

But it is here as well that his questions are most pressing. Can those who have historically enjoyed the privileges of modernity see beyond the taken-for-granted to first imagine and then construct a new subjectivity for themselves as well as for others? Whose side, he seems to be asking, will we be on? Will we "become" the victim long enough to realize both what we have done and what has been done to us? Will we recognize that in a postmodern world "we are all undocumented migrant workers or asylum seekers, so to speak" (p. 575)? How, after all, do we, whoever we are, translate metaphor into movement? How do we, prepare ourselves for an age in which time accelerates and space collapses? In answer to these questions, "Get thee to thy heterotopias!" is not all there is to say.

References

Austin, John (1995) *The Province of Jurisprudence Determined*, ed. W. Rumble. Cambridge: Cambridge Univ. Press.

Austin, Regina (1992) "Left at the Post: One Take on Blacks and Postmodernism," 26 *Law & Society Rev.* 751.

Balkin, J. M. (1994) "Being Just with Deconstruction," 3 *Social & Legal Studies* 393.

Bauman, Zygmunt (1992) *Intimations of Postmodernity*. London: Routledge.

Bertens, Hans (1995) *The Idea of the Postmodern: A History*. London: Routledge.

Boyle, Jamie (1985) "Modernist Social Theory: Roberto Unger's *Passion*," 98 *Harvard Law Rev.* 1066.

Butler, Judith (1994) *Bodies That Matter: On the Discursive Limits of "Sex."* New York; Routledge

Calavita, Kitty, & Carol Seron (1992) "Postmodernism and Protest: Recovering the Sociological Imagination," 26 *Law & Society Rev.* 765.

Cornell, Drucilla (1990) "From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation," 11 *Cardozo Law Rev.* 1687.

de Man, Paul (1979) "The Epistemology of Metaphor," in Sacks 1979.

Derrida, Jacques (1980) "La Loi du Genre," *Glyph*, no. 7, 176.

——— (1990) "Force of Law: The 'Mystical Foundation of Authority,' " 11 *Cardozo Law Rev.* 919.

Davidson, Donald (1979) "What Metaphors Mean," in Sacks 1979.

Douglas, Lawrence (1994) "Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review," in Sarat & Kearns 1994.

Douzinas, Costas, & Ronnie Warrington (1994) "The Face of Justice: A Jurisprudence of Alterity," 3 *Social & Legal Studies* 405.

Douzinas, Costas, Ronnie Warrington, with Shaun McVeigh (1991) *Postmodern Jurisprudence: The Law of Text in the Texts of Law*. London: Routledge.
Dumm, Thomas (1990) "Fear of Law," 10 *Studies in Law, Politics & Society* 29.
Dworkin, Ronald (1977) *Taking Rights Seriously*. Cambridge: Harvard Univ. Press.
Eaton, Marcia (1989) *Aesthetics and the Good Life*. Rutherford, NJ: Fairleigh Dickinson Univ. Press.
Ewick, Patricia (1992) "Postmodern Melancholia," 26 *Law & Society Rev.* 755.
Ewick, Patricia, & Susan Silbey (1992) "Conformity, Contestation, and Resistance: An Account of Legal Consciousness," 26 *New England Law Rev.* 73.
Fiss, Owen (1986) "The Death of Law," 72 *Cornell Law Rev.* 1.
Foucault, Michel (1970) *The Order of Things*. New York: Vintage.
——— (1980) *Power/Knowledge*. New York: Pantheon.
Garber, Marjorie (forthcoming) "Cinema Scopes: Evolution, Media and the Law," in A. Sarat & T. R. Kearns, eds., *Law and the Domains of Culture*. Ann Arbor: Univ. of Michigan Press.
Gerhart, Mary, & Allan Russell (1984) *Metaphoric Processes: The Creation of Scientific and Religious Understanding*. Fort Worth: Texas Christian Univ. Press.
Golden, Tim (1992) "Guatemala Indian Wins Nobel Peace Prize," *New York Times*, 17 Oct.
Goodman, Nelson (1979) "Metaphor as Moonlighting," in Sacks 1979.
Goodrich, Peter (1995) *Oedipus Lex: Psychoanalysis, History, Law*. Berkeley: Univ. of California Press.
Greenhouse, Carol (1992) "Reading Violence," in A. Sarat & T. R. Kearns, eds., *Law's Violence*. Ann Arbor: Univ. of Michigan Press.
Handler, Joel (1992a) "Postmodernism, Protest, and the New Social Movements," 26 *Law & Society Rev.* 697.
——— (1992b) "A Reply," 26 *Law & Society Rev.* 819.
Hart, H. L. A. (1968) *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon Press.
Herman, Didi (forthcoming) "Law and Morality Revisited: The Politics of Regulating Sado-Masochistic Porn/Practice," 15 *Studies in Law, Politics & Society*.
Hutchinson, Allan (1992) "Doing the Right Thing? Toward a Postmodern Politics," 26 *Law & Society Rev.* 733.
Johnson, Barbara (1994) "The Alchemy of Style and Law," in Sarat & Kearns 1994.
Kalman, Laura (1986) *Legal Realism at Yale, 1927–1960*. Chapel Hill: Univ. of North Carolina Press.
Kant, Immanuel (1951) *Critique of Judgment*, ed. & trans. J. H. Bernard. New York: Hafner Publishers.
Kateb, George (1990) "Hannah Arendt: Alienation and America," in *Raritan Reading*. New Brunswick, NJ: Rutgers Univ. Press.
Keenan, Tom (1987) "The 'Paradox' of Knowledge and Power: Reading Foucault on a Bias," 15 *Political Theory* 5.
Kiss, Elizabeth (forthcoming) "Is Nationalism Compatible with Human Rights?" in A. Sarat & T. R. Kearns, eds., *Identities, Politics and Rights*. Ann Arbor: Univ. of Michigan Press.
Lingis, Alphonso (1983) *Excesses: Eros and Culture*. Albany: SUNY Press.
Lyotard, Jean-Francois (1984) *The Postmodern Condition: A Report on Knowledge*. Minneapolis: Univ. of Minnesota Press.
Mailer, Norman (1957) "The White Negro: Superficial Reflections on the Hipster," 4 *Dissent* 276.
Minow, Martha (1979) "Law Turning Outward," 73 *Telos* 79.
Minow, Martha, Michael Ryan, & Austin Sarat, eds. (1992) *Narrative, Violence, and The Law: The Essays of Robert Cover*. Ann Arbor: Univ. of Michigan Press.
Morris, Herbert (1970) "Persons and Punishment," in A. I. Meldren, ed., *Human Rights*. Belmont, CA: Wadsworth.

McCann, Michael (1992) "Resistance, Reconstruction, and Romance in Legal Scholarship," 26 *Law & Society Rev.* 733.
Nietzsche, Friedrich (1956) *Werke,* ed. Karl Schelecta. Munich: Hanser Verlag.
——— (1974) *The Gay Science,* ed. W. Kaufman. New York: Random House.
Quine, W. V. (1979) "A Postscript on Metaphor," in Sacks 1979.
Ricoeur, Paul (1977) *The Rule of Metaphor: Multi-disciplinary Studies of the Creation of Meaning in Language,* trans. R. Czerny. Toronto: Univ. of Toronto Press.
Rose, Gillian (1994) "Athens and Jerusalem: A Tale of Three Cities," 3 *Social & Legal Studies* 333.
Sacks, Sheldon, ed. (1979) *On Metaphor.* Chicago: Univ. of Chicago Press.
Said, Edward (1993) *Culture and Imperialism.* New York: Knopf.
Santos, Boaventura de Sousa (1991) "The Postmodern Transition: Law and Politics," in Sarat & Kearns 1991b.
——— (1995) "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South," 29 *Law & Society Rev.* 569.
Sarat, Austin (1990) " '. . . The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor," 2 *Yale J. of Law & Humanities* 343.
Sarat, Austin, & Susan Silbey (1988) "The Pull of the Policy Audience," 10 *Law & Policy* 97.
Sarat, Austin, & Thomas R. Kearns (1991a) "A Journey through Forgetting: Toward a Jurisprudence of Violence," in Sarat & Kearns 1991b.
——— (1991b) *The Fate of Law.* Ann Arbor: Univ. of Michigan Press.
——— (1994) *The Rhetoric of Law.* Ann Arbor: Univ. of Michigan Press.
Scott, James (1990) *Domination and the Arts of Resistance: Hidden Transcripts.* New Haven, CT: Yale Univ. Press.
Shiff, Richard (1979) "Art and Life: A Metaphoric Relationship," in Sacks 1979.
Silbey, Susan, & Austin Sarat (1987) "Critical Traditions in Law and Society Research," 21 *Law & Society Rev.* 165.
Simmel, Georges (1971) *On Individuality and Social Forms.* Chicago: Univ. of Chicago Press.
Singer, Joseph William (1988) "Legal Realism Now," 76 *California Law Rev.* 467.
Tyler, Tom (1990) *Why People Obey the Law.* New Haven, CT: Yale Univ. Press.
Unger, Roberto (1975) *Knowledge and Politics.* New York: Free Press.
——— (1987) *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy.* Part I of *Politics, A Work in Constructive Social Theory.* New York: Cambridge Univ. Press.
White, Lucie (1990) "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," 38 *Buffalo Law Rev.* 1.
Winter, Steven (1992) "For What It's Worth," 26 *Law & Society Rev.* 789.