Comment on Santos

A New Conception of Law?

Marianne Constable

In his address to the 1995 Law and Society Association, Boaventura de Sousa Santos argued that times are changing and that "we"—the law and society audience, among others—must use "the imagination to explore new modes of human possibility and styles of will and to oppose the necessity of what exists on behalf of something radically better that is worth fighting for and to which humanity is fully entitled" (Santos 1995:573). Admirable sentiments, on which Santos elaborates via three suggestive metaphors introduced to help "reinvent maps of social emancipation and subjectivities with the capacity and desire for using them" (ibid.).

After pondering what Santos calls—in this admittedly "adapted and simplified version" of a longer text—the "cultural metaphors" of the frontier, the baroque, and the South, the sociolegal scholar may be left wondering just how these metaphors relate to law. What is the "new conception of law" announced in Santos's title? What, for that matter, is the old—that is, modern—conception of law that these metaphors are invoked to confront? What follows comments on, first, Santos's understanding of the crisis of modern law; second, the confrontation with modern law that he envisions; and finally, his use of a map metaphor for approaching the ostensibly "new" place of law.

For Santos, modern society is characterized by the development—and, outside Europe, the imposition—of rational or scientific management. Modern law played a role "subordinate [to science] but equally central" in this development, he claims, as it provided juridical or "nonpolitical" solutions to what would otherwise have been the political problems of social rebellion and social conflict. Although conceptions of social regulation and of social emancipation formerly checked one another, Santos claims, the "deep and irreversible crisis" occurring today involves the reproduction of social regulation "by and through" the

Address correspondence to Marianne Constable, Department of Rhetoric, University of California, 2125 Dwinelle Hall #2670, Berkeley, CA 94720-2670.

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emancipatory practices that should confront it. "Deprived of its emancipatory antidote," as he puts it, "legal regulation has become another form of excessive regulation" (p. 571) and the time has come to imagine a newly and truly emancipatory—and hence nonscientistic and nonregulatory—alternative.

Alternative to what? To modernity? To law? Not directly. For Santos's concern is less with modernity than with its "paradigm," less with law than with its "conception." Santos's argument privileges human conceptualization. Modernity is for him a situation in which "[a]lternative *modes of conceiving* regulation and emancipation in Europe and elsewhere were . . . discredited, both by the destruction of the knowledges upon which they were grounded . . . and by the oppression . . . of the social groups whose practices sustained such knowledges" (p. 570; emphasis added). And modern law in Santos's account is conceptual; it has *become*—rather than positivist and autopoietic—"Kelsen's pure *theory* of law, legal positiv*ism*, and autopoie*sis*" (ibid.; emphasis added).

While Santos's account in some ways resembles an exaggerated Weberian rationalization, Weber's ideal types were constructs. Santos by contrast suggests that the paradigm of modernity actually exists. According to Santos, then, we are entering a period not simply of transition but of "paradigmatic transition." And by imagining, rather than conceiving, new relations between law and knowledge, Santos hopes that we may emancipate ourselves from the rational paradigm of modernity to achieve a "paradigmatic transformation."

In other words, Santos claims that it is characteristic of modern regulatory law that citizens' attempts at freedom ("emancipation") paradoxically lead to additional regulation: some rights claims, for instance, produce elaborate governmental structures and enforcement mechanisms. What Santos considers the current crisis of modern law constitutes a situation in which stagnation exists because any occurrence of regulation or emancipation always favors greater regulation. Santos's metaphors or *topoi* are intended to invoke possibilities of subverting this situation, to transport us to another space rather than simply to reverse the dynamic.

What Santos understands as the current crisis in modern law can also be characterized as an extreme version of legal positivism. It corresponds to a situation in which, for instance, H. L. A. Hart's two conditions for a legal system—that citizens generally obey primary rules marked as valid by secondary rules and that officials accept the secondary rules (Hart 1961:113)—collapse into one, as citizens become their own officials.[1] The work of Michel Foucault describes just such a situation. Rather than over-

[1] Note that this is not the same as the rule of law, in which officials become subject to their own laws.

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looking "the deep interpenetration" between juridical power and disciplinary power, as Santos claims (p. 571), Foucault (1979a: 222) argues precisely that "the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines."[2] As citizens or subjects become their own officials or disciplinarians for Foucault, the Enlightenment aspiration of individual freedom comes to entail the normalization of subjects and, as Santos puts it, emancipation collapses into regulation involving both law and science.

As far as this modern law goes, Santos writes, it "will only be successfully confronted in the paradigmatic transition by constellations of emergent frontier, baroque and Southern legality" (p. 582). Such "constellations of legality," he suggests, will aim toward emancipation from centralized state regulation and foster critical anti-colonialist solidarity. By offering ostensibly new ideas of the self ("emergent subjectivities") and ways of being with others ("sociability"), the metaphors convey a conception of citizens who are law-inventing rather than law-abiding (p. 574).

Although it is hard to glean detailed conceptions (or even a detailed conception) of law from the metaphors, each metaphor indeed suggests an aspect of law that challenges some feature of legal positivism. Frontier law does not involve subjects' habitual obedience to sovereign command (as in Austin's (1954) legal positivism) or citizens' general obedience to rules marked as valid by secondary rules accepted by officials (as in Hart's), but involves parties' selective use and transgression of limiting traditions. Both the frontier and the baroque metaphors suggest that law may exist in a variety of forms in the absence of strong central authority and, *contra* the tenets of conventional legal positivism, to a large degree independent of official rule. The baroque metaphor also conveys, in the face of the stability and order sought by positivist legal systems, the inherent transitoriness of law. Finally Southern legality, rather than adopting legal positivism's insistence on separating *is* from *ought* (or questions as to the existence or validity of law from questions as to its justice),

[2] Although Foucault sometimes writes of disciplinary power as "non-juridical" and of discipline as a kind of "counter-law," one major thrust of *Discipline and Punish* is to argue that, in practice, disciplinary and extra-juridical elements have insinuated themselves into the penal or criminal justice system. The penal operation, Foucault (1979a) writes, is no longer "*simply* a legal punishment" and the judge is no longer "*purely and simply* he who punishes" (p. 22; emphasis added); but neither punishment nor judge in "the present scientifico-legal complex" are *non*juridical as such (p. 23). See also Foucault (1979b:19), in which Foucault argues that we must "see things not in terms of the substitution for a society of sovereignty [a society, roughly, with juridical power] of a disciplinary society and the subsequent replacement of a disciplinary society by a governmental one; in reality we have a triangle: sovereignty-discipline-government." See also Constable 1991.

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invokes a justice (unnamed as such) that entails solidarity against the oppressions of capitalism.

Santos's metaphorical legalities confront legal positivism, then, with nonpositivist aspects of law. At the same time, though, if modern regulatory law collapses emancipation into regulation, then emergent law threatens—despite Santos's claims—to collapse regulation into emancipation. As far as Santos is concerned, that is, the danger of each *topos* is that in failing it may thereby intensify the modernist crisis: each legality may revert to "eccentric forms of regulation . . . and liquidat[e] the will to emancipation" (pp. 581–82). An equally great problem for one interested in escaping the modernist paradigm, however, lies in the potential *success* of these metaphorical legalities.

For, as Santos's ostensibly postmodern law-inventing citizens invent "law" that is selectively traditional, transitory, multiplicitous, and chaotic, they create a law of seemingly little or no regularity. The "libertine subjectivity," "liberal democracy," and abolition of solidarity that Santos names as the risks in his *topoi* (p. 582) suggest a quite nonregulatory danger. The actual danger is that regularities and rules of practice will give way to excesses of liberty or to a freedom that belongs precisely to unconstrained—or law-inventing rather than law-abiding—human will.[3]

Although emergent law is no longer the rational scientific-technological law to which Santos objects, then, his citizen of the future renders the ultimate outcome of confrontation with modern law problematic. For the law-inventing citizen reverts to a modernist paradigm. Santos's sovereign citizen, like the citizen-official of the alleged modernist crisis, takes the place of an earlier positivism's commanding official, just as those officials once replaced the Sovereign God of natural law. Law-inventing humans still seek mastery of the world through imposition of will and, this time, of imagination.

Before relying on Santos's map of social emancipation to lead to "a new horizon of possibilities" (p. 572) where three *topoi* converge in a new conception of law, then, the critical and anticolonial citizen, as well as the sociolegal scholar who may have solidarity with the citizen, would do well to recall "the map's double function in colonialism of both opening and later closing a territory" (Wood 1992:45, citing Harley 1988:17, quoting Cronon 1983:66). Both the names and the blank spaces on a map

[3] In this respect, Santos's emancipatory legality somewhat resembles Roberto Unger's perpetually transformative "superliberalism," with its ambition to build "a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place" (Unger 1983:41). For an analysis of Unger's position that is quite analogous to the analysis one could make of Santos, see Constable 1994:580–83.

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entice the imagination, but the latter also seem to foster a thirst that eventually leads to

> the slow plugging of the holes. It is like watching a computer fill in an outline drawing with color: line by line and pretty soon . . . *none of the white is left.* Or in the case of the world . . . *none of the red,* as Indian places become increasingly hard to find on a Ptolemaic grid littered with . . . New Londons and New Spains. (Wood 1992:46)

The same map may later become "a text for studying the territorial processes by which the Indians were progressively edged off the land" (Wood 1992:46, citing Harley 1988:1), revealing cartography itself to be "a form of political discourse concerned with the acquisition and maintenance of power"—especially of state power (Wood 1992:43, citing Harley 1987:1; see also Anderson 1991:170–78). Yet even so, the map—like a metaphor—only *substitutes* for the experience of the territory (Lee 1975:44).

We must be wary when the *topoï* or places with which a map presents us entice us to create, invent, or even imagine new spaces of law. We must take the map we are offered not as an invitation to master the world or to emancipate ourselves through it but as a text for studying—or as a pretext for thinking about—the extent and limits of existent power, of modern legal positivism, and of positive law. For his contribution to *this* task, Santos deserves both congratulations and thanks.

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