Comment on Santos

The Challenge of the South

John Brigham

We make lots of things into texts these days (movies, conversation, dreams) in order to bring them into our discussions. The hope is that something is gained. Here we have a public speech that has become an essay. I hope we don't lose too much in treating it that way. In addressing the written text of Santos's "Three Metaphors . . ." (1995), I would like to recall the speech of which the text is a part. The speech took place in a large and fabulously ornate room in the Royal York Hotel in Toronto.[1] It was a luncheon speech presented to gathered scholars who had, as I recall, just completed a chicken salad plate and run through a series of awards. The speech came near the end of the 1995 Annual Meeting of the Law and Society Association.

Such an occasion is a classic in the practices of associations, which use them to build collective identities from the myriad smaller and more typical performances, in our case, the panel sessions. Luncheon speeches are somewhat uncharacteristic of the Law and Society Association. Although the luncheon is always done beautifully, it is a more formal event than sociolegal studies scholars are accustomed to—being Realists and all. This is an association that had a journal years before it decided to constitute a membership and meet face to face. We know ourselves as taking our marginality in legal scholarship as an honor. Most of us think of status-conferring ceremonies as things the people we study do. I always find it a little odd to look up from an uncleared table to the dais for inspiration, but I love these occasions for their aspiration. We are constituted as a group, and it is to the ongoing requirements of the constitutive function[2] that the Santos speech makes its contribution.

The author thanks Christine Harrington for her help. Address correspondence to John Brigham, Political Science Department, University of Massacusetts, Amherts, MA 01003.

[1] The Royal York dates from the railroad era. It looms near the shore of Lake Ontario across from the train station, representing an imperial presence from a century ago. The room had been used earlier in the conference for a series of biographical presentations taking the Association through the lives of its notables.

[2] See Hunt 1993 for discussion of the constitutive process in law.

Law & Society Review, Volume 29, Number 4 (1995)

I have had the good fortune to be involved with Boa Santos for a significant part of my professional life. I have attended conferences he put together and organized panels with him. I witnessed him introduce Albie Sachs, the South African legal revolutionary, in one extraordinary session in Spain five years ago. I have appreciated his company and his counsel. He links North American Law and Society with a much larger community of Law and Society scholars from Europe and Latin America. It is around people such as Santos that we have begun to form an international community. The character that community might take is at the core of his presentation. If we heed his call, the community may be more than an imperial expression of Anglo-American law and culture.

In a comment on the Amherst Seminar some years ago, Santos spoke warmly of his involvement in our work.[3] He eschewed the pretense of scientific objectivity while placing his perspective on the work of the Seminar in terms of the shift from personal to professional knowledge. The Seminar was becoming public property and Santos expressed his disorientation resulting from the transformation. His comments called attention to the relationship between scholarly observation and our social practices (like eating together). In a luncheon talk, the relationship between what is said and who we are remains compelling. My comments, like the Santos talk, are a professional endeavor in the sense familiar to Law and Society scholars in which the social is professional. And, as in the relationship between institutional forms and social practice popularized by Paul Bohannan (1967), here we all take a spin with "double institutionalization." Santos's talk broke with the focus on the personal at the biographical session earlier in the meeting and challenged us collectively to think about our identity. Following our awards ceremony, we had some sense of who we were and we had announced who we liked. Santos chose to try to tell us who we should become. Of course, this requires caution. Santos wrapped his admonitions in great erudition and a romantic way with English. He was charming in his challenge.

Over the last ten years of fascination with interpretation in social research and the pull of arts and letters, I have sometimes cautioned my colleagues about presenting themselves as poets. My position has been that as sociolegal scholars we get our authority from research rather than rhymes. We draw attention by the refinement of our experience rather than the rhetorical power of our vision. Yet, Santos is not a colleague for whom this distinction makes much sense. He does science while alliterating. His presentation comforts us with the repetitions of the orator.

[3] "[A] group of fine colleagues . . . whose company is relaxing and pleasant and with whom it is possible to entertain exciting debates." Santos 1989:156.

His talk, he says, will confirm "the different audiences in their differences" and he tells us that his "argument is itself constituted by three arguments." For Santos, "the paradigmatic crisis of modern science necessarily entails the crisis of modern law"—"the future promised by modernity has no future"—and he counsels us to "experiment with the frontiers of sociability as a form of sociability." When things need to be emphasized—like difference, argument, crisis, future, or sociability—Santos says it twice and features the ideas prominently. But he also draws on considerable experience.

Santos gives us three cautions or "subjectivities" as sites[4] we should incorporate into our vision of law: the *frontier*, the *baroque*, and the *South*. These are fascinating images, and as he develops them, they become concepts against which to evaluate ourselves. Surprisingly, I think that at least two of these "subjectivities," rather than existing simply as aspirations in a paradigmatic shift, may actually already exist as practices in our professional community. By "our professional community," I mean the scholarly activity that built and now is maintained by the Law and Society Association. The frontier is a natural subjectivity for Law and Society. The baroque, though strange sounding today in the West, is us again. But the final subjectivity, the South, is not a place an association located in American law can easily go.

Law and Society has positioned itself on the *frontier* of American law from its inception (Friedman 1986). It is easy to read Santos's description of the frontier as if he were speaking about us as we already are rather than as we might be. LSA has made itself a part of how American law is known by operating at the margin. Selective and instrumental use of tradition are among its most familiar practices. New forms of sociability, a frontier staple, characterize our social relations, while the promiscuity of stranger and intimates is a Law and Society hallmark. Some years ago a colleague at his first meeting complained to me that the Association seemed clubby. The implication was "exclusive." Within the decade, he was the editor of the *Review*. Law knows about the promiscuity of which Santos speaks. The energy of the Western academy, whether manifested as interpretation or as economics, is eagerly incorporated into the institutions of the law through associations like ours. More telling still, where the formal authority of the state is weak, as the frontier, the Law and Society scholar grows in importance. Thus, in America, where Legal Realism was born and where we often know a judge's politics more precisely than his or her jurisprudence, Law and Society flourishes. But in Europe, where old forms of law still weigh heavy,

[4] Called *topoi* in this and other contexts to draw attention to their similarities to maps.

and in Latin America where legal formalism is an aspiration, sociolegal studies is still, for the most part, making its place.

The *baroque* as a model for action seems a little stranger—at least to a contemporary American. It would have been more familiar to 19th-century Americans. But Santos has something specific in mind. He defines the baroque as "an eccentric form of modernity" where the central power is weak, with the center reproducing itself "as if it were a margin." This makes me think of Law and Society again. Living "comfortably with the temporary suspension of order and canons" is something we do naturally. Santos holds a complex vision, and his depiction of baroque subjectivity read in the context of Law and Society is like holding up a mirror. With our open shirts (rather than three-piece suits, much less clerical collars) and our gender-neutral hierarchies, we think of ourselves as removed from *el mundo al revés* of del Leon's baroque feasts. But against the formal world of law which is our perennial backdrop, we may appear as something of a carnival. And, like the baroque, we are constantly attaching ourselves to the star of "modernist evolution,"[5] in constast to the "permanence and repose" of the Renaissance.

But what of the *South*, which in Santos's metaphor spreads out through the North and West and expresses "all forms of subordination brought about by the capitalist world system." Like the East, this subjectivity is a product of empire. It speaks a different language. The South is "the victim" that Santos exhorts us to "side with."

Meeting this challenge was one of the original aspirations of the Law and Society enterprise. Our founders engaged in social research to uncover the myths about law that, though they may not have kept populations in chains, did dampen the enthusiasms of the democratic processes. These were things like the formal ideologies of appellate doctrine and the idea that people paid attention to the Supreme Court. They documented the suffering the bourgeoisie tried not to notice. Today, however, I think that Santos's exhortation to bring the South into our community offers the most significant challenge to our subjectivity. Will we be willing to incorporate the suffering of the South into our practices? Will we accept our complicity in the imperial forms of the law?

This has become a pressing challenge as developments in the policy field, such as attacks on affirmative action and California's Proposition 187 (eliminating programs for undocumented aliens), have turned law again into an arena for racial struggle. As scholars we are appalled at the blatant racism spreading from California in the wake of Prop. 187. In our circles, we don't hear

[5] Most paradoxically in the claim of postmodernism to come after the modern, which like the "ultra" modernism of the 1960s was a fashion statement.

comments like that reported from a school security guard in Atherton, California, on the day following passage of Prop. 187—"We don't have to let fucking Mexicans in here anymore!" In constitutional law, equal treatment for aliens had once been among our clearest principles. Yet, at our recent meetings there seemed to be far more interest in O. J. Simpson than in the extraordinary legal issues surrounding Prop. 187. The urgency of this sensibility is compelling.

Listening to Santos in the ballroom of the Royal York Hotel, I could not help reflecting on the previous year's meeting at the Arizona Biltmore, and earlier ones at the Stouffer in Chicago, or the Claremont in Berkeley, all luxury hotels. Our gatherings, it seems, have come to depend on the mechanisms of capitalist modernity. Going South requires facing our complicity. When we met on college campuses and set up in dorm rooms left vacant by our students, the ascetic conditions served as a sort of penance for, if not a transformative commitment to, inequality in condition. Perhaps in 1996 in Scottish dorms we will capture a little bit of that old spirit. But even when we go outside the United States, we are more likely to go North. We are the marginal frontline of global law carrying the banner of Western rights, the legal profession, and science. Whether in Amsterdam, Toronto, or Glasgow, we are an Anglo as well as a sociolegal association. While we are generally welcoming to outsiders, we have become uncomfortable living poor. We give radicals more space in our Great Halls than do some other law associations, but we are not very comfortable with the noise or commitments of their causes. The occasional petition drive at a Law and Society meeting seems to be a little diversion in comparison, say, with the Socialist Scholars Conference that meets every April in New York City. There, petitions and placards are more prominent than panels.

Santos calls our attention to the imperial relation. He asks that we "learn how to learn from the South." He gives the example of Gandhi. Do we have a Gandhi? Perhaps it is more realistic to consider whether we feature Gandhis or their insights in our studies—or whether our work is still oriented to meeting the challenge of the South. We speak much more of diversity now than we did in our early days. But we are a restrained group, nervous about commitment, and we are Northern in the quintessential cultural sense. Some years ago a meeting in Puerto Rico was suggested and warmly encouraged by Puerto Rican scholars active in the Association. But when we heard that that separatist community would not be supportive, we settled for the South of the Arizona Biltmore.

We can be more adventurous in our work, and there may be the answer to Santos's challenge. From the *Law & Society Review*'s "Special Issue: Law and Society in Southeast Asia" (Collier et al. 1994) to María Teresa Sierra's (1995) article, "Indian Rights and

Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla," our scholarship is reaching out to meet the challenge.[6] This work seems to exemplify the Law and Society Association "going South." The work manifests some of the difficulties of this encounter. In the Southeast Asia volume, the editors comment on the centrality of engagement in the scholarship of the participants and "[t]he resistance to marking or maintaining a boundary between activism and sociolegal research" (Collier et al. 1994:419). But some engagement could be good, and there is also some familiar territory in this tension between activism and research. The concept of pluralism does some of its old work in bringing Southeast Asian cultures and societies into the law. In Sierra's research on the Nahuas of Huauchinango in central Mexico, Law and Society scholarship leads the way South. Culture, rather than being romanticized, is discussed in terms of "processes of domination, colonization, and resistance" and seen as "embedded in the dynamics of state law and the global society" (Sierra 1995:229). Like earlier work in anthropology of law, her research is rich in the language and practices of "the South." And in the best sense that Santos would have us consider, the research is also conscious of the role of "our" law—imperial law—in constituting the languages and practices of an indigenous population.

From our own scholarly experience, the challenge of the South cannot simply mean recognition of another. It requires the sort of self-understanding that allows for recognition of our complicity and incorporation of self-criticism. This is a process that may eventually shift from scholarship to our professional practices. We feel we are getting better at traveling, at getting beyond the nation-state. But in New England we are aware that the missions of religious men were accompanied by those of the captains of industry. Americans have been traveling South with their factories for some time. It won't be enough to go there, not if it is on the model of the Arizona Biltmore. The South must be represented in our councils, and its struggles must have a home within our method. Thus, I think Santos's third metaphor is the really tough one to realize.

References

Bohannan, Paul, ed. (1967) *Law and Warfare.* Garden City, NY: Natural History Press.

Collier, Jane, David Engel, & Barbara Yngvesson, eds. (1994) "Law and Society in Southeast Asia," 28 *Law & Society Rev.* 417.

Friedman, Lawrence M. (1986) "The Law and Society Movement," 38 *Stanford Law Rev.* 763.

[6] Described vividly and supported with other examples by Sally Engle Merry (1995) in her Presidential Address to the 1994 Annual Meeting of the Law and Society Association.

Hunt, Alan (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law.* New York: Routledge.

Merry, Sally Engle (1995) "Resistance and the Cultural Power of Law," 29 *Law & Society Rev.* 11.

Santos, Boaventura de Sousa (1989) "Room for Manoeuver: Paradox, Program, or Pandora's Box?" 14 *Law & Social Inquiry* 149.

——— (1995) "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South," 29 *Law & Society Rev.* 569.

Sierra, María Teresa (1995) "Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla," 29 *Law & Society Rev.* 227.