

## Ballad of a Thin Man: Sociolegal Studies in a Time of Postmodern Crisis

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Because something is happening here  
but you don't know what it is  
Do you, Mr. Jones?

—Bob Dylan<sup>1</sup>

What happens when the occupiers abandon the city but the forces of liberation fail to show up? What should we do when the rebels lose the people in a thicket of doctrine and become terrorists, but the empire can't imagine how to strike back except with more terror directed at the same people?

Examining the antinomies of modernity, it often seems today as if the springs of history had lost their vital tension. Moderns could dream of a collapse of a regulation—but with the saving grace that an emancipatory project was waiting to fill that vacuum with a new and more historically progressive program (mediated in complex ways by parties and governments). Or if the moment favored the forces of order, moderns could inhabit visions of scientific government chasing out the bandits of ignorance and prejudice. Progress was inevitable. In contrast, we seem to witness fantastic changes (the fall of the Soviet empire, the democratic revolution in South Africa) with little real sense of progress.

Our problem is clearly not that we cannot access these reassuring themes of modernity. They can be had any day at your local video store. Pictures of huge crowds marching with banners in front of state buildings. Generals hurriedly entering limousines. Paul Muni playing Zola or Pasteur. Their very profusion seems to assure their counterfeit quality. Like a bad dream, they seem vivid but disturbingly altered.

Boaventura de Sousa Santos is among the most eloquent voices arguing that this palpable sense of malaise is not just a

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<sup>1</sup> Bob Dylan, "Ballad of a Thin Man," on *Bob Dylan: Highway 61 Revisited* (Columbia Records, 1965).

product of the impending close of the millennium, a case of the aging baby boomer blues, but a broad and deep loss of confidence in the most important centers of power and knowledge, including law and science. What is taking place, according to Santos (1995), is simultaneously a crisis of subjectivity and government. At least for many, the subjectivities associated with modernity are demoralized ("the future is no longer what it used to be"). Yet the cultural project of modernity has been so successful in wiping out alternatives that these once hallowed (but now hollowed) narratives continue to occupy center stage. Meanwhile, the prospects of institutional transformation, which might be expected to stimulate new innovations in subjectivity (subject, citizen, comrade), are themselves bogged down. The project of emancipation, Santos (p. 571) suggests, has collapsed into regulation.

Santos asks sensibly enough, What is to be done?<sup>2</sup> Without much explicit reflection, Santos addresses this question to sociolegal research. Perhaps this is an obvious site of infection if law and science find themselves problematized. Perhaps we must simply start with what it is that we already do. Clearly those forms of scholarship which depend for their relevance on the unproblematic quality of the main narratives of government and subjectivity are likely to become increasingly dissociative. The pull of the policy audience remains, but even the pretense of bringing the realities of action home to the producers of law in the books has dissolved into the open co-production of knowledge and power in enterprises like the United States Sentencing Commission. Likewise, those research programs that self-identify as critical and radical find themselves increasingly preoccupied with describing what those terms are supposed to mean. Much of law and society has steered a course to the middle range and remained skeptical of being too close to either policy or critique. The work has a robustness because of this, but the project must be renewed in a manner that respects the problematization of law and science.

One strategy is to explore the range and complexity of legal subjectivities. The recent flourishing of narrative jurisprudence in law schools and the focus of many Law & Society scholars on the role of law in reproducing subjectivities both speak to that enterprise. Santos's strategy in his essay might be seen as an intensification of this approach. The frontier, the baroque, and the South are metaphors but also strategies for the "construction of oppositional postmodern subjectivities" (p. 574). The great promise of this approach is the potential to discover secret passageways and hidden chambers within modernity's haunted

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<sup>2</sup> The echoes of Lenin will confirm the suspicions of some that postmodernism is just a new cover for old-fashioned modernist "commie" subversion while it will suggest to others that Santos remains emotionally more linked to modernism than one might think.

house. Even within the core institutions of modern knowledge and power, such research suggests, we will find that people engage in a far more complex traffic with their presumptively master narratives than might be imagined. In short, we can learn that we were always already more than moderns.

A different strategy, less developed by Santos in his essay (but see Santos 1991), focuses on the problem of government. On the level of mainstream political discourse, there is surprisingly wide agreement that the way we govern ourselves is deeply flawed and should be either overhauled or replaced altogether. Public opinion polling shows historically low levels of confidence in major government and private institutions (Bureau of Justice Statistics 1993:164). The legal and medical systems are routinely described as disasters by the media, which brook no boundaries to bring us fresh scenes of mayhem. Watching things fall apart in cities where basic infrastructures and codes of civility have shattered—sometimes across town, sometimes across the globe—many in the affluent core of the West appear to believe that “the system doesn’t work.”<sup>3</sup>

When research looks more closely at how the spaces which these alarmed consumers actually inhabit are governed—inside corporations, shopping centers, and much of the private housing market—we find that the intensity of regulation is higher than ever, that people accept it with docility and even gratefulness, and that due to a range of new technologies (both machine and organizational), this regulation can be carried on more efficiently than ever. If we look inside other settings however—public housing projects, inner city public spaces, and schools—we see a very different mode of governing. The new technologies of control do not come into play here. Instead, we find government based on violence and coercion. It’s only a bit of a distortion to say that we have two governments (Simon 1993:250 ff.): one for those linked to the formal economy and carried out by large private enterprises; the other for those linked to the state (through welfare) or to the informal economy and carried out by the often heavy-handed minions of the state. Levels of urban violence unseen for decades now coexist with life only a few freeway miles away in highly controlled settings of mass private property (Shearing & Stenning 1984).

Thinking about a crisis of regulation must start with this very polarization of experience and perception. For much of the 20th century, a set of strategies linking unionization, state regulation, welfare, and more or less oligopolistic industries took shape in the Western core nations. These social structures made possible a mode of government based on work discipline, productivity and

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<sup>3</sup> This may not be the first era in which people have proclaimed that “the system doesn’t work,” but it must be one of the first in which the Republican Party has championed that view.

wage growth, and socialization of the most systematic forms of modern risk (work accidents, diseases, recessions) (Piore & Sabel 1984; Harvey 1989; Rose 1995 forthcoming).<sup>4</sup>

The sense of the social as a common locus of risk and security, which informed liberal and conservative strategies of government for much of the century, has become visibly depleted (regulation collapses into emancipation). In its absence, dark visions are possible. As politicians work their grotesque cycle of promising to restore high-modernist levels of affluence and security while rapidly dismantling what ever is left of the machinery of that settlement, other voices and gestures emerge. For a grim example, consider the diagnoses of our impasse recently offered by the Unabomber:

Because human work will no longer be necessary the masses will be superfluous, a useless burden on the system. If the elite is ruthless they may simply decide to exterminate the mass of humanity. If they are humane they may use propaganda or other psychological or biological techniques to reduce the birth rate . . . of it the elite consists of soft-hearted liberal, they may decide to play the role of good shepherds to the rest of the human race.<sup>5</sup>

There are, of course, lots of more optimistic scenarios (e.g., Gingrich 1995).

Sociolegal scholarship has a tradition of asking naive and useful questions about who the subjects of law are and how things are governed (e.g., Macaulay 1986; Nader 1974). A post-paradigmatic recovery of that tradition could contribute to a self-understanding of the present. But to accomplish this, I believe, we must lower our sights and recognize our own thinness. Rather than attempting to diagnose crises of social regulation in general, or reconstruct subjectivities, or reconceptualize law, we might want to bracket those projects as roads "closed for repairs" while we undertake a new examination of the contests being waged around the construction of subjectivities and the government of specific social spaces (Rose & Miller 1992).

Santos offers three metaphors for the kinds of knowledge and law which may facilitate the construction of postmodern subjectivities. In the frontier, the baroque, and the South, Santos finds emancipatory possibilities. He also recognizes that new forms of government may develop there which will prove anything but emancipatory. To suggest the complexity of the relationship between how we are governed and what kind of subjects we are, I want to sketch briefly some of the modes of regulation

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<sup>4</sup> I attempt to describe some of the genealogy of this formation in Simon, forthcoming.

<sup>5</sup> "Excerpts from Manuscript Linked to Suspect in 17-Year Series of Bombings," *New York Times*, 2 Aug. 1995.

that we already find in these spaces (although to do so I must kill much of their metaphoric charm).

## 1. Governing the Frontier

Frontiers (both borders between societies and between society and its others) create special problems of government. The tightening of control is palpable to anyone who has visited the international portions of airports and harbors. The very possibility of the heterodox calls forth strategies of ordering and surveilling that would be considered unnecessary in the interior (Foucault 1977). This was already the case in traditional societies, and modern government went even further in opening up the freedom of the interior while clamping down on the border. In recent years, however, there has been a steady migration of techniques of power from the border to the center. The strategies once focused on policing the frontier are increasingly showing up within the interiors of society (Auchincloss-Lorr 1993). Constitutional law has become a source of transmission rather than resistance. In the 1970s the Supreme Court established that the protections of the Fourth Amendment requiring individualized suspicion for even minor police interventions applied in only diminished form at international border crossings (see, e.g., *United States v. Brignoni-Ponce* 1975; *United States v. Martinez-Fuerte* 1976). At the border the Court permits both generalized suspicion and, more disturbingly, suspicion based on group status. In the 1980s and 1990s the Supreme Court recognized similar zones of diminished individuality or (to put it in political rather than geographic terms) governmental needs that require the suspension of the right to be seen as an individual; the zones include alcohol checkpoints, drug testing, and special institutional settings like schools, hospitals, and prisons (see e.g., *Michigan Dep't of State Police v. Sitz* 1990).

## 2. Governing the Baroque

Theme parks, urban entertainment zones, and shopping centers are where we must look to find the sites of late modernity's eccentricities, its feasts and carnivals (Santos, p. 578). These spaces are governed with a meticulousness that would make the public guardians of the border jealous. In their brilliant study of Disney World, for example, Shearing and Stenning discovered that the theme park had considered security in virtually every element of the park from landscape design to the proliferation of employees dressed as cartoon characters (with giant heads of Mickey and Donald and the like) who act as police responding to violations of a set of norms vastly more extensive than any penal code. Control at Disney World does not look coercive. It is em-

bedded in the environment. As soon as a car enters the parking lot at Disney World and equivalent spaces, the conduct of the visitor has been shaped to accord to a complex but determined menu of options from which there is no escape except exit from the magic kingdom.

### **3. Governing the South Side**

In the spaces of the oppressed, whether those of the colonial South or the domestic "South Side," "South Central," or "South Bronx," we know all too little about how life is governed. What is most visible is disturbing. We find in many cases the most brutal (and ineffectual) methods from the modern classical repertoire of police and prisons. About half of the young African American males in the large urban centers of the United States are in the custody of the criminal justice system or wanted by them (Mauer 1990; Raspberry 1992). Yet this strategy is so far from providing real security that the chances of dying violently for African American young males are ten times that of their white peers (Bureau of Justice Statistics 1993:385). Visible forms of community-based power, constituted by violent honor societies of young males, are hardly comforting alternatives (Shakur 1993).

But consider South Africa. The penetration of "traditional" leadership and custom by all manners of Western subjectivities and strategies of regulation is near complete after three centuries of brutal colonization (Comaroff & Comaroff 1991). Yet in the space of a few short years, South Africa has transformed itself from the reigning nightmare case of modern government (Lelyveld 1985) to perhaps the most promising site for reinventing democracy in the world today. Here one's optimism can be supported by the very limitations on the ability to utilize our failed strategies of governing the poor. Unlike the political class in the United States, South Africans can harbor few illusions that majority rule will be compatible with governing its impoverished majority through discredited establishments of police and imprisonment (Mathews, Heymann, & Mathews 1993). One suspects that alternative strategies of government are developing in our own South sides as well. One problem is that they have little chance to show up in the violence-obsessed representations of both journalism and social science research.

### **Conclusion**

A focus on power, regulation, and government is not an alternative to the project of reconstructing postmodern subjectivities. The sense that we are undergoing a profound cultural transformation (which Santos calls the grain of truth in postmodernism) is rooted in the experience (perhaps misinformed but powerful)



that modern forms of subjectivity and strategies of government are in crisis (Beck 1991; Giddens 1990). The works most capable of addressing Santos's post-paradigmatic dilemma are ones that will speak across questions of government and subjectivity. To govern is to assure the existence of governable subjects. To be a subject is to recognize some limit in the form of regulation.

Nor are these metaphors of government meant to suggest that the potential for emancipation in the frontier, the baroque, and the South are simply covers for an ever efficient and ruthless empire of power. (Santos himself raises the danger of "eccentric forms of regulation"; p. 581.) The rationalities and techniques of power that have moved from the frontier to the interior, which govern our spaces of eccentricity and which circulate through North and South, may not have the same significance they had in their paradigmatically modern settings. Disney World, for example, brings its enormously sophisticated control apparatus to bear on its visitors primarily to guarantee their security, reinforced by the potential for liability to its visitors should they become injured in the Magic Kingdom.

Could the techniques of Disney be applied on the South Side or in South Central (Davis 1990)? Might forms of community regulation based on the South African model be more effective at restoring public confidence than the panoply of border controls being brought to bear on our public spaces? In this regard, we need sociolegal scholarship that can explore these sites of struggle over government and subjectivity without assuming in advance that power is oppressive, that transgression is emancipatory, or the converse. As Boa Santos has so powerfully reminded us, postmodernism is the condition of such inquiry, not its theoretical lodestone. Postmodernism tell us something is happening here but not what it is.

## References

- Auchincloss-Lorr, Katharine (1993) "Police Encounters of the Third Kind: The Role of Immigration Law and Policy in Pre-Seizure Interrogation Strategies," 20 *Search & Seizure Law Reporter* 105.
- Beck, Ulrich (1992) *The Risk Society: Towards a New Modernity*. New York: Russell Sage Foundation.
- Bureau of Justice Statistics (1993) *Sourcebook of Criminal Justice Statistics, 1992*. Washington: GPO.
- Comaroff, Jean, & John Comaroff (1991) *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa*, vol. 1. Chicago: Univ. of Chicago Press.
- Davis, Mike (1990) *City of Quartz: Excavating the Future in Los Angeles*. London: Verso.
- Foucault, Michel (1977) *Discipline and Punish: The Birth of the Prison*. New York: Pantheon.
- Giddens, Anthony (1990) *The Consequences of Modernity*. Stanford, CA: Stanford Univ. Press.
- Gingrich, Newt (1995) *To Renew America*. New York: HarperCollins.

- Harvey, David (1989) *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*. Oxford: Blackwell.
- Lelyveld, Joseph (1985) *Move Your Shadow: South Africa Black and White*. New York: Times Books.
- Macaulay, Stewart (1986) "Private Government," in L. Lipson & S. Wheeler, eds., *Law and Social Science*. New York: Russell Sage Foundation.
- Mathews, Mary L., Philip B. Heymann, & Anthony S. Mathews, eds. (1993) *Policing the Conflict in South Africa*. Gainesville: Univ. Press of Florida.
- Mauer, Marc (1990) *Young Black Men and the Criminal Justice System: A Growing National Problem*. Washington: Sentencing Project.
- Nader, Laura (1974) "Perspectives on the Law and Order Problem," in M. Lerner & M. Ross, eds., *The Quest for Justice*. New York: Holt, Rinehart & Winston.
- Piore, Michael J., & Charles F. Sabel (1984) *The Second Industrial Divide: Possibilities for Prosperity*. New York: Basic Books.
- Raspberry, William (1992) "The Making of Certified Criminals," *Washington Post*, 20 Dec. 1992, p. A19.
- Rose, Niklas (1995 forthcoming) "Governing 'Advanced' Liberal Democracies," in A. Barry, T. Osborne, & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government*. London: Univ. College London Press.
- Rose, Niklas, & Peter Miller (1992) "Political Power beyond the State: Problematics of Government," 43 *British J. of Sociology* 173.
- Santos, Boaventura de Sousa (1991) "The Postmodern Transition: Law and Politics," in A. Sarat & T. R. Kearns, eds., *The Fate of Law*. Ann Arbor: Univ. of Michigan Press.
- (1995) "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South," 29 *Law & Society Rev.* 569.
- Shakur, Sanyika, AKA Monster Kody Scott (1993) *Monster: The Autobiography of an L.A. Gang Member*. New York: Atlantic Monthly Press.
- Shearing, Clifford, & Philip Stenning (1984) "From the Panopticon to Disney World: The Development of Discipline," in A. N. Doob & E. L. Greenspan, eds., *Perspectives in Criminal Law*. Aurora, Ont., Can.: Canada Law Books.
- Simon, Jonathan (1993) *Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990*. Chicago: Univ. of Chicago Press.
- (forthcoming) *Governing Risk: Accidents, Law, and Society*. New York: Routledge.

## Cases

- Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
- United States v. Brignoni-Ponce, 422 U.S. 873, 891 (1975).
- United States v. Martinez-Fuerte, 428 U.S. 543 (1976).