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# THE OBJECTS OF LAW: DERRIDA, WESTERN LEGALITY, AND COLONIAL MANAGEMENT

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This paper highlights the problematic nature of Jacques Derrida's reading of the law as it pertains to the material effects of colonialism. In doing so, it points to a deeper problem in postmodernity, namely, its insistence on ethereal ideals of justice that cannot sufficiently account for the material costs of colonial practices. Employing the concept of subaltern cosmopolitanism as it is developed in the works of Boaventura de Sousa Santos, this paper ends by fully developing the Derridean negotiation regarding the place of justice. By rehabilitating Derrida's understanding of the law within the tradition of post-colonial thought, it is argued that the legal philosophy is able to begin with the problem of coloniality and employ the subject position of the other as a central feature in developing a critical theory of law.

KEYWORDS: Derrida, Boaventura de Sousa Santos, law, colonialism, critical legal studies.

## Introduction

Jacques Derrida remains a central figure in critical studies of the law since his remarks at Cardozo (Derrida 1992: 1). Since *Force of Law,* Derridean deconstruc-

tion has been used to analyze the connection between civil and religious laws (Jacobson 1992), assess the limits of legal systems theory via the presence of female bodies (Cornell 1992, 1993). Derridean deconstruction has also been used to contest the foundations of legal orders by pointing to the distinguishing between law and society in Critical Legal Studies (Unger 1996, 2015). Duncan Kennedy utilizes both Derridean methods and humor to destabilize liberal legal concepts by tracing the ways in which they loop back in on themselves and distort their own meaning (Kennedy 1992). Currently, Derrida is re-emerging as a central force in racial analysis as a means to deconstruct "white mythologies" such as law (Hesse 1997).

It could be stated that current legal scholarship coming from anti-colonial scholars, such as Boaventura de Sousa Santos and Samera Esmeir, also fall under the category of Derridean deconstruction of law. However, there is a sense in which Derrida's theory of law is itself a reinstatement of the very same Eurocentric mythos of law that it was intended to disrupt (Santos 2002, 2007; Esmeir 2012). By focusing their studies on the ways in which "Law" was used to manage economic outputs in colonial holdings, the authors point to an important flaw in Derridean understanding of how law operates. By seeking to destabilize the reified form of "Law" through pointing to its "prosthesis of origin", Derrida in fact maintains a Eurocentric understanding of "Law" (Derrida 1992; Santos 2007; Esmeir, 2012). Derrida supplants the ideal of "Law" not with materiality of laws, but with an idealized body of law. To do this, from the standpoint of post-colonial legal histories, is to circumnavigate the material cost of European legal preferences (genocide, torture, rape, racism, and economic piracy) on living bodies in order to ground his theory in a largely European sense of "mystical justice" (Derrida 1992; 2002).

This paper seeks to rehabilitate the Eurocentricity of Derridean readings of the law, by reading law as a text of colonial dominance in addition to its capacity for intrastate violence. It does so by moving in three parts. The first section of this paper develops Derrida's reading of the law through *Force of Law* and related moments in Derrida's work. The second section critiques this understanding through Santos' criticism of western legal preferences using Esmeir's Egyptian case as an empirical bedrock. Finally, following Maria Lugones, this paper will weave together Santos' subaltern cosmopolitanism with Derridean negotiation to present a deconstructive reading of the law that focuses on the material costs of modernity rather than an ethereal sense of justice.

## Law-as-Justice

Derrida's aim in *Force of Law* is not to read western law through the colonial[1] landscape, rather, develop an understanding of problem of authority in law. Derrida seeks to problematize the overlapping relationship of law to justice[2]. This means that there can only be one interpretation of justice in each society which he refers to as "the Law". While Derrida does much to uncover the tenuous foundations of Law's authority, he offers a reified reading of "Law" as it operates in western society. As it will be shown through Esmeir and Santos below, Derrida's reading of Law can only provide a partial account of legality, when viewed through the lens of the colonialism.

Derrida begins his critique of the law with the problem of its foundation. The source of Law is an originary othering, or violence, whereby it sets itself up as the authority (Derrida 1992: 13–14). For Derrida, this creates a problem of law being a violence without a ground in authority[3]. This leads to a circular logic of authority whereby the law has the capacity to act because it is law, and it derives its authority solely from its presence as law (Derrida 1992: 13–14; Derrida 1988: 20–21). The exercise of the law, regardless of codification or form is nothing more than an iteration of this violence repeatedly through the text of law[4].

Iterability, in the Derridean sense, is the capacity for a text to convey meaning or intent after its author is gone (Derrida 1988: 20–21). This requires an understanding of that intent to be attached to the text as it is passed along. In the case of law, iteration covers the originary violence of the founding with an original intent of justice (Derrida 1992 13–14; Derrida 1988: 20–21). Law becomes the source of

[1] While it is not his expressed intent, in typical Derridean fashion, it plays the role of subtext to his argument. Derrida begins this text with a lengthy complaint on having to speak English and points out the problems of having to ingrate himself to the requirements of the conference. This is a precursor to a later speech given on the role of language in colonial identity (Derrida 1992: 3–4; Derrida, 1998). For a fuller reading of the subtext, language, and coloniality as it appears in Derrida, see John McCormick's *Derrida on Law* (McCormick 2001, 397–398).

[2] Saul Newman highlights Derrida's purpose in developing an argument about the "mystical foundation of authority" in his work. As he points out, by rendering authority groundless, Derrida attempts to reinsert the role of justice-as-such as central both to the ethical and practical role of law (Newman 2001 128–129).

[3] "Its very moment of foundation or institution (which in any case is not a single moment inscribed in history since it is ripped apart by one decision), the operations that amount to founding, inaugurating, justifying law (*droit),* making law, would consist of a *coup de force*, of performative and therefore interpretive violence that in itself is neither just nor unjust and no previous law with its founding or anterior moment could contradict or invalidate" (Derrida 1992: 13).

[4] Drucilla Cornell highlights this in her work on Derrida's reading of the law. As she points out, this circular logic of authority that always refers to law as the source of law, is the means that the originary violence of interpretation, highlighted by Derrida above is erased and replaced with a narrative of interpretation. See, for example, her work in *Working with Derrida* (Cornell 1993: 80–81).

justice and vice versa, in such a way that the originary violence of the founding of law is obfuscated. Law, and its authority, become an irrefutable presence that gives context to justice, but is necessarily reliant on justice for its authority[5] (Derrida 1992 13–14; Derrida 1988: 20–21).

What emerges for Derrida is an image of law that is both iterable and citational. It is iterable in the sense that each time a judge makes a ruling, while it is a novel instance it is an iteration of the originary justice that animates law. It is citational in the sense that these new iterations are tied first to the conception of justice generally, they are also a part of a specific body of case law that can be cited as proof of its justness (Derrida 1992: 22–24). Justice, in this arrangement[6], allows for both the capacity to iterate the law by supplying the original intent of the law and the conditions that make law possible, or its foundation (Derrida 1992: 22–24; Newman 2001: 127–129). Law's authority, for Derrida, rests on its capacity to repeat itself as the interpretation of justice. In this intertwining of law and justice as co-originary, Derrida finds the nature of justice to be the other to law. Justice is the ethereal foundation of law's iterability, yet justice itself is always of the future, that which comes after the enforcement of the law[7].

Law renders the "to come" of justice as a stable field of power operations, by tethering it to a cited corpus. Derrida refers to this reading of law's necessity as "law-as-justice" (Derrida 1992: 24–25). This conflation of law and justice becomes highly problematic for Derrida, because while law is present in rulings, decisions, and statutes, justice is effectively erased from the equation[8]. Law-as-justice, for Derrida, is an image of law that focuses on codified law as the sole interpretation of justice in a society. In this sense, law covers justice through codification by creating a self-referential system in favor of codified law (Derrida 1982: 15–17; Derrida 1988: 20–21; Derrida 1992: 26–27). "Law-as-justice" highlights the second problem in contemporary understandings of law, its unitary nature. Law, he argues with Max Weber, is a monopoly on violence. This requires that there be only one

[5] Newman highlights this relationship in his work, pointing out that this supplanting of violence with justice as the source of law's authority stabilizes the social field on which law operates, but also necessitates justice as something that must come "always after adjudication" (Newman 2001: 127–129).

[6] It is important to note, that for Derrida, and deconstruction in general, these formulations amount to an arrangement or formation of power operations in texts (Derrida 1982). As Derrida himself points out, because they are arrangements they are imbued with *differánce* or the capacity to be different and / or rearranged. For a more thorough explanation of *differánce* as it pertains to this discussion see Newman 2001: 123–124.

[7] "Justice remains, is yet, to come á venir, it has an, it is á-venir, the very dimension of events irreducibly to come. It will always have this á-venir, and always has. It is for this reason that insofar as it is not only a juridical and political concept, opens for *l'á*venir the transformation..." (Derrida 1992: 27).

[8] This erasure, for William Sokoloff, exists at the intersection between decision and indecision for Derrida. As he points out, while law is present in the decisionism of its rulings, justice marks the trace of the undecidable that must supplement that decision (Sokoloff 2008: 343–345).

law, or interpretation of justice, that is valid (Derrida 1992: 33–34). Each instance of law is a monopoly on justice within a given territory that first requires old law to be invalidated (Derrida 1992: 36–39).

"Law-as-justice" is the capacity to produce order in a society through a unified understanding of justice (Derrida 1992: 41–42). Multiple interpretations imply a multiplicity of legitimate sources of power. These multiplicities have the effect of undermining laws capacity to produce order. Each new law is a unitary form that must undo the old law to gain primacy (Derrida 1992: 41–42). For Derrida, this requires a reinsertion of the originary violence of law to both conceptualize the just, but also to reify law as the legitimate interpretation of justice. Thus, the historical memory of law, goes back to its founding moment, but does not go beyond that point, lest it calls into question its own validity. This is best illustrated in his example of the possibility of the general strike. Once the general strike gains momentum, he argues, law must recognize it as threat to its validity and act to undo it (Derrida 1992: 42–43).

## Abyssal Legalism

There are two problems with Derrida's reading of the law from the perspective of coloniality. First, as Boaventura de Sousa Santos argues, Eurocentric readings of legal development miss the extent to which legality itself was used to subdue the colonies. Thus, the atemporal and decontextualized reading of western law becomes problematic in understanding the use of western law to subdue the colonies.[9] Second, as Samera Esmeir points out, coloniality is not revealed through the capacity of one form of law to eliminate other modes, but rather through a series of maneuvers that both displace *and* disfavor indigenous modes of law (Esmeir 2012: 22–23).

Santos takes the human cost of modernity as the starting point for his understanding of the political terrain of law. For Santos, this requires situating the colony at the center of any understanding of western legal development (Santos 2002: 4–5). This is accomplished by highlighting the development of two distinct operations of law: while both emerge and develop from the metropolitan self-image, they are based on a distinct separation between the metropole and the colony.

[9] For a more thorough discussion of temporality in Derrida's reading of the law, see Camil Ungureanu. For her, Derrida's mystical foundation implies a permanence to the law, that is ascribed by its self-referral. While this is the crux of his critique of the law, it seems that it is also ultimately tied to a reified idea of the law as a stable permanent presence in social life that is a necessary condition for social relations (Ungureanu 2008: 304–308).

For Santos, western epistemological preferences for scientificity are intimately connected to the form western law takes in modernity (Santos 2002: 2–3). This connection manifests itself in the preference for scientific reasoning on the one hand, and codified legal norms on the other. Science and law emerged in liberal discourse as a means of managing the excesses and deficits of modernity. Empirical epistemology emerged to limit the scope of problems to manageable elements in the political context. This had the effect of shifting the gaze of modern political discourse from large scale ethical dilemmas to the management of things within the state[10]. This created both the possibility for individualism as a political discourse, and the preference for legal formalism (Santos 2002: 4–5).

Legal formalism finds its roots in the preference for logical continuity by allowing the predictable regulation of objects within the society (Santos 2002: 4–5). This capacity to normalize the interactions between the individual and law, allowed the expansion of politics into its own intellectual constellation[11] (Santos 2002: 4–5). Law was a corollary to the scientific management of society, because law allowed a modicum of protection against opposition, by referring all opposition back to itself as the form of authority. This cooperative relationship between science and law is the hallmark of modernity for Santos, because it highlights a shift in understanding of society as a problem of proper management rather than of ethical considerations.[12] What emerges from this connection of scientific management and the coercive power of law, is an idea of law based on two pillars of regulation and emancipation.

The regulatory pillar is built around the principles of the state, the market, and the community. Each of these institutions creates a series of expectations regarding the central governing body and the individual. The pillar of emancipation calls into question the norms and practices that manage these expectations (Santos 2002: 2–3). Emancipation acts to destabilize the expectations of state / market / community, by calling into question the boundaries and legitimacy of these expectations. If the pillar of regulation acts to regularize relationships in a society, the pillar of emancipation disrupts these relationships to call them into question and posit new possibilities (Santos 2002: 3–4).

[10] "The reconstructive management of the excesses and deficits could not be managed by science alone. It required the subordinate but central participation of law. Such participation is subordinate, because the moral-practical rationality of law to be effective, had to surrender to the cognitive-instrumental rationality of science" (Santos 2002: 5).

[11] ???

[12] Consider this argument about Esmeir's historical trajectory of colonialism and law. As she pointed out, the shift from *shari'a* to codified English law was a problem of making the colony manageable through law. Further it was taken up by means of a discourse that shifted the historical trajectory of the colony from one of tradition to one of progress (Esmeir 2012: 20–23).

The tension between these two poles create western self-identity, as suggested by Santos. In modern discourse, this identity is predicated on the invisibility of distinction between the metropole and the colony (Santos 2007: 3–4). As Santos points out, enlightenment writers used the colony as the permanent site of the state of nature[13] in their writings to accomplish two things. First, it developed the narrative of progress. By developing the liberal frame work out of a state of lawlessness, theorists could create a narrative of superiority through the distinction between "the Old World and the New World" (Santos 2007: 5–6). Second, by utilizing the colony as a permanent state of nature, theorists created an abyssal line between the modern west and the colony. This line was necessary, Santos argues, because the claims of universality inherent in liberal rights arguments would be undone if the colony were a part of these considerations as a space of possibility (Santos 2007: 3–4).

The colony emerged as a place not only outside liberal conceptions of law, but a place in which the possibility of law was absent. It emerged as a space of permanent lawlessness in modern thought. As such, the defining tension of western justice was not extant in the colony. In absence of this tension, and in absence of the law, western universal values were still universal because they could not be expected to operate in places in the world that existed without law (Santos 2007: 12–14). Thus, principles that shaped the management of the colonies were not based on the western tension between emancipation and regulation but were based on the need for resource extraction. The law of the colonies developed around the twin drives of appropriation and violence (Santos 2007: 14–15).

The use of violence and appropriation was justified in liberal thought by drawing a sharp distinction between western liberal society and the primitivity of the colonies. The utility of violence was highlighted by demarcating the colony as a space of savagery and brutality, in opposition to the regularity of interactions through the law in the west (Santos 2007: 6–7). Appropriation spoke to how the colony emerged inside western discourse, as a space of resources. The colonial object emerged as an interesting resource for study, but this study was only important insofar as it could be used to better understand how to manage the colony (Santos 2007: 7–8).

Knowledge about the practices and customs of the colony became central to the exploitation of the colonies by providing the necessary knowledge about the people inhabiting the holding to create a regulatory system that furthered resource

[13] Utilizing Thomas Hobbes and John Locke, Santos points out that the colonies existed as an example of the state of nature. Hobbes refers to "the savage people in places of America" as an example of what the state of nature looked like. Locke in a more benign was states "In the beginning the world was America" (Santos 2007: 7). By deriving their examples from colonial holdings, Santos argues, the colony was permanently solidified in the western mind as a site of lawlessness. This solidification allows authors like Blaise Pascal to state "Below the Equator there are no sins" (Santos 2007: 6).

extraction (Santos 2007: 12–14). Knowledge production shifted from knowing the world of the other to maintaining control over colonial holdings through developing law that mimicked cultural and social customs. We can see the operation of the regulatory onus of law in the colonies in Esmeir's analysis of the development of British management practices in Egypt.

For Esmeir, legal development in the colonies was not marked just by violent upheaval; it was also an emergent process of shifting the expectations of law from the pursuit of justice in *Shari'a* to the management of predictable outcomes through a more rigidly codified law. This process, while marked by a rupture in history, is one whereby those living in the present are simultaneously aware of but cut off from a legal tradition that antedates colonization. Indigenous law is relegated to a state of backwardness and superstition in favor of new modern law, rather than being destroyed by a new one (Esmeir 2012: 22–23). She highlights this development in her analysis of the replacement of *Shari'a* law with codified law in British controlled Egypt.

*Shari'a* law manifests a deep connection between law and history. It was connected to the development of the *umma* across time, rather than being seen as parliamentary production. *Shari'a* does not offer a set of hard fast rules and punishments, general principles of justice were applied on a case by case basis given the facts (Esmeir 2012: 32–33). The authority of law under *Shari'a* was found in the interrelation of the ideas of justice found in the traditions and history of the *umma,* and the application of these traditions to the situation. Thus, each ruling was in fact a new law, but was connected to a juridico-historical sensibility that placed adjudication firmly inside a lived tradition (Esmeir 2012: 31–32).

When British inherited the colony from the French they quickly moved to bring it under the management of the crown. In doing so, it found considerable trouble administering the law, as *Shari'a* is structured different than English law, thus making it impossible for colonial magistrates to impose order (Esmeir 2012: 37–39). It was only through replacing *Shari'a* law with a form of codified law that the English could manage the new acquisition. Through a discrediting *Shari'a* and the schools of *fiqh* that surrounded it, the British magistrates began a series of reforms to the law to bring it in line with the codified law of the crown. Reform and modernization of the law, for Esmeir, became a new founding myth of the law, which was enacted in two ways. The disempowerment of *Shari'a* judges, and the training of modern reformers in London, rather than through existing schools of *fiqh* in Egypt (Esmeir 2012: 37–39).

First, *Shari'a* placed considerable power in the hands of the individual *qadi,* or judge. While each *qadi* was responsible for applying the principles of justice to

the case before them, they were the ultimate arbiter of how these principles were applied. Each ruling was individual and situational law rather than a codified law as the English understood it (Esmeir 2012: 37–39). British magistrates began undoing the power of the *qadi* by imposing sentencing rules on their procedures to regulate outcomes. Mandatory sentences were imposed on *qadi* who were responsible for doling out these sentences in conjunction with their opinion on the matter. This not only bound the *qadi* to the code of law, but it also detached the law from its historical foundation. Through the imposition of codified punishments, Esmeir argues, the force of coloniality was unleashed on the Egyptian legal system. Rulings no longer found their authority in the *qadi* or the specific school of *fiqh* that was applied to the case, rather authority was bound in the law itself through its punitive capacity (Esmeir 2012: 34–35).

Second, this erasure of history was covered by training a new generation of legal scholars in western legal preferences rather than traditional *fiqh* schools. This too had the effect of changing the legal landscape by creating a new historical context for law based on the writing of western educated legal scholars. As Esmeir points out, Egyptian legal scholars began advocating for a modernized form of law. *Shari'a,* they began to argue was too chaotic and unpredictable in its outcomes. What was needed, therefore, was a more "modern" form of law that could be relied on for stable legal outcomes such as was found in the west (Esmeir 2012: 32–33). It was through the writings of legal scholars such as Al-Bishri, that the new legal founding myth was formed. This too was built on an intimate connection between history and law, but a history of progress rather than of tradition. The new juridi-co-historical context was one of progress from the chaotic backwardness of *Shari'a* and towards a modern conception of law with predictable outcomes and codified remedies (Esmeir 2012: 40–41).

It was impossible, for codified law to emerge in Egypt, Esmeir argues, without one culture taking on an idea of its own inferiority to another culture. Modernity, through the guise of law, offered just such a myth. It replaced the chaos of history with the precision of the modern. The authority of law was based it its regularity and repetition rather than the application of general principles to individual cases. Outcomes could be made predictable; thus, a body of case law could emerge around codified law giving it the validity of practice (Esmeir 2012: 43–44). Thus, Esmeir argues, Egypt's colonization came not through the force of violence, but through the force of law as seen through the desire of modernization.

Esmeir's narrative provides context to Derrida's arguments. As she points out, colonization of Egypt would not have been fully possible without a shift in law. This required a new legal narrative based on "progress." The story of Egyptian colonial

rule is not a story of violent conquest and subjugation in this regard, but rather it is a complete dispensing of traditional modes of justice in favor of codified law, for the expedience of colonial management (Esmeir 2012: 16–17). The development of colonial law unalterably shifted Egyptian identity. The development of new legal norms severed the historical connection to traditional authority in ways that would never be undone. This was possible because the new law was not the wholesale importation of British law as the rule of the colony, rather it was a hybridization of British codes with the veneer of *Shari'a* to make the colony manageable (Esmeir 2012: 34–35).

Esmeir's narrative of legal development in the colony points to a telling problem Derrida's theory of justice as it pertains to legal development. While Derrida uncovers the "originary violence" of the founding of law, which makes the authority of law suspect, he only does so in a Eurocentric context. As such, the purpose of law is the adjudication of justice which results in conflicts and / or revolution. He fails to account for the development of a law whose onus isn't the dispensing of justice "to come", but whose goal is to render a space predictable to secure resources. In short, by failing to account for the way in which western legal preferences spread from the metropole to the colony, Derrida in fact misses the extent to which law is not a unitary interpretation of justice, but only so for the metropole. The law of the colonies, developed in the metropole, did not emerge as a dispute over justice, it developed based on the needs of the metropole in securing the colony as a permanent site of resource extraction. What emerges from Esmeir's argument, which will be taken up below with Santos, is the failure of Derrida to account for law as a means of displacing and silencing the other.

## From the ethereal to the material

As noted above, both Derrida and Santos heavily problematize the tethering of justice to the idea of law in modernity. Both seek to provide a conception of justice that moves beyond the constraints of modernity. Derrida, through his critique of law as a framework of obfuscating violence through arguments about justice, creates a theoretical rubric whereby the only arguments that can be made about justice must be open ended and thus his theory must always contain an element of religious mysticism.[14] If law derives its authority from its repeatability and cita-

[14] For a thorough reading of the religious elements of Derrida's conceptualization of justice see McCormick 2001: 404–412.

tionality, justice, in Derrida's reading, seems to derive its force from a position of radical contingency that must be negotiated endlessly.

This is problematic in the reading of Santos, because while it places a primacy on the contingency of power relationships, it offers no means of rearranging them. Negotiation, as suggested by Derrida, implies that parties to negotiation are recognized as being on equal footing. Problematic in this, as will be seen below, is that Derrida's starting point is a place of radical equality that fails to account for the historical situation of coloniality and the manifest disequilibrium between the global north and the global south. In failing to take the human cost of modernity seriously, Derrida begins on the other side of the modern paradigm without giving an adequate road map for arriving there.

Derrida's reading of the law-as-justice points to a specific problem in modern legal sensibilities. Law's power is derived from its repeatability (Derrida 1992: 13–14). The repeatability of law is found in its origin, namely the separation of codified law from a general sense of justice. This separation, or "originary violence", has telling effect. Law is both tethered to a specific conception of justice, and also must be the necessary supplement[15] to justice that gives it meaning. This makes it impossible to come to a conceptualization of "justice-as-such" absent the "law-as-such", which must fill in its contours (Derrida 1992: 13–14).

While this supplanting of justice-as-such with law-as-justice does serve to solidify the foundation of law, by covering up the originary violence of identification of justice with law, it does not free the law from justice. Law relies on justice to give its code meaning. This reliance means that we cannot speak of law as such, in the way we can justice. Law, when disentangled from justice, emerges as state violence in the form of disciplinary power, such as the police[16] (Derrida 1992: 32–34). This inability of law to act without the veneer of justice speaks to the separate nature of justice (Derrida 1992: 27). It is for this reason, Derrida argues, that justice beyond a mere juridico-political concept is something that exists prior to law and is capable of rewriting and rearranging it.

[15] Derrida makes use of this term in *Dissemination* in reference to Plato's understanding of writing. As he points out, writing is a *pharmakon*, something that is both a poison and a cure. The idea of the dangerous supplement as he applies it here denotes the idea that while codified law can be used to serve justice, modernity has shifted the balance from justice through the law to law as justice. Codified law, in his argument has replaced the drive for justice (Derrida 1981: 99–103; Derrida 1992: 15–17).

[16] It is fruitful to consider Derrida's argument through the work of Joe Soss and Michelle Alexander. Both focus in on the prisons as a site of disciplinary power of the state that has gone beyond the just confines of the law. Alexander sees mass incarceration as a reapplication of racist powers under Jim Crow, where black bodies are subject to the disciplinary power of the state specifically because of their race (Alexander 2010). Soss agrees with this but places the prison in the rubric of disciplinary powers such and welfare and work programs that seek to extract value from the racialized poor (Soss, Fording and Schram 2011).

Derrida remains messianic[17] about justice in his reading of law. Derrida seems keen to keep the idea of justice open through his insistence on negotiation and solidarity as perpetual political processes. These two terms, he argues are inexhaustibly because they are "always-already other oriented" (Derrida 2002: 24–25). The inexhaustibility of the possibility of the "other", he argues is central to understanding justice beyond the law.

Justice, in Derrida's interpretation, is a sense of responsibility without end. It is a responsibility to negotiate the idea of justice itself and the violence contained within it. Furthermore, this sense of responsibility requires the endless interrogation of memory. It requires us to seek out the sedimentation in the law and critique its mystical foundations (Derrida 1992: 18–20). It is an act of disarticulating law-as-justice and rearranging its relationship to justice. It is the act of deconstruction, and deconstruction has justice as its end goal (Derrida 1992: 15). It is, finally, an incomplete project of continually assessing and reassessing what it means to be just.

Derrida is gesturing towards a concept of politics that does not rely on stability and repetition for its utility, and instead relies on the capacity of negotiating subjectivities[18] to develop a sense of commonality that is situational rather than permanent (Derrida 1992: 18–20). In short, he is gesturing towards a conception of justice that requires first and foremost that everything is always-already being negotiated.[19]

It is through the strategy[20] of negotiation that solidarity becomes possible. Justice requires positing negotiation as a middle voice between extremes, one that on the one hand values the positions of binaries, but on the other hand sees them as a contingent array or *différance* which can be repositioned (Derrida 1982: 5–6; Derrida 2004: 24–25). This is the space of negotiation for Derrida. It moves in between the impossibility of giving up one's context, and the impossibility of asserting one's context as the only valid context, to mediate a solution to the seeming impasse (Derrida 2004: 24–25). Both politics and justice are an ongoing process, rather than a singular event of exclusion or selection that can only be carried forward

[17] See McCormick 2001: 404–412, for a full account of Derrida's quasi-mystical approach to the idea of justice through Levinas and others.

[18] Derrida's conceptualization of subjectivity has been highly problematized by feminist critiques for its disavowal of the feminine on the one hand, and on the other for doubly obfuscating the feminine presence on the other. See for example Chandler 1997; Grosz 1997; Kamuf 1977; Spivak 1997.

[19] "There is negotiation when there are two non-negotiable imperatives that are incompatible but are equally imperative. One does not negotiate between negotiable and exchangeable things. Rather, one negotiates by engaging the nonnegotiable in negotiation" (Derrida 2002: 13).

[20] Derrida does a lot of "heavy lifting" with his use of the word strategy. On the one hand, he uses it to point to the troubling nature of a concept he is deploying as with both "justice" and "the subject" (Derrida 2011: 88–89; Derrida 1992: 22–23). On the other, he uses it to denote a series of practices whose commitments are utilitarian at best (Derrida 2004: 24–25).

through the violence of repetition. A repetition that is only possible by ignoring the supplementary nature of otherness (Derrida 2004: 24–25).

While Derrida does much to problematize law as a groundless authority, his conception of justice seems ill-equipped to handle the human costs of modern problems such as those highlighted by Santos' reading of colonial law. What point of departure can there be for negotiation within a legal system that does not recognize the "other" as anything but a lawless space of violence, and source of resource extraction? As Santos points out, the human costs of colonialism – slavery, forced labor, and genocide – cannot find their solution in recourse to "ceaseless negotiation of non-negotiables" because the non-negotiables in questions are human lives (Santos 2007: 64–65).

While Santos agrees with the contingency of power arrangements that modernity has manifested, he seeks to rest the problem of justice on a twofold recognition[21] of the other. First, recognizing the history of power operations on the other through colonial practices, and second recognizing the colonized as a legitimate subject position that adds to rather than erodes western knowledge production. Recognition of the other as a subject position requires us to take seriously their inputs and alternative theories of justice. This requires that universal values of justice be built from below rather than being imposed from above if they are such must be built in such a way as to account for the presence of the subaltern (Santos 2007: 45–47, 54–55, 62–63). The subaltern on his reading is the presence of silenced modes of being / knowing that are disfavored by the law / knowledge rubric in western thought. Doing so means opening space in the discourse of modernity for these modes of being / knowing to not only speak[22] but also to develop an idea of universally applicable justice, which he refers to as "subaltern cosmopolitanism" (Santos 2007: 54–55).

Subaltern cosmopolitanism is the product of counter hegemonic globalizations that act decenter hegemonic knowledges. They operate in conjunction to shift the balance of power away from hegemonic ways of knowing, and open space for

[21] Consider this in relation to Frantz Fanon's understanding of recognition. As he points out, the colonial subject comes to recognize both itself, and the possibility of liberation only through the tropes provided by the colonial experience. The colonial master freed him from slavery, the colonial master provided an understanding of liberation, these understandings are not the function of a struggle for knowledge and recognition, but rather are grated through the structures of colonial subjectivity (Fanon 2008: 194–195).

[22] Edward W. Said speaks to this as well as he points out in his critique of Samuel Huntington, that there is a distinct difference in knowledge that is produced to understand the positioning of the other, and knowledge designed to manage the other. As he states, "It would seem to me, therefore, that efforts to return a community of civilizations to a primitive state of struggle must be understood not as descriptions about how they in fact behave, but rather as incitements to wasteful and unedifying conflict" (Said 2002: 590).

other modes of being to come to bare on the creation of "universals" (Santos 2007: 64–65). Santos argues that these counter hegemonic movements must be animated by a different ethos than the ones presently found in capitalism and colonialism, which manifest unequal power relations that produce social relationships based on domination and exclusion.

Destabilizing colonial knowledge claims, for Santos, is not only a matter of the colonized subject reasserting knowledge claims in the face of coloniality. It is also the business of finding ways to ensure that the dominant Eurocentric model is receptive to these modes and can approach them without placing them in a hierarchy. This requires a new method of knowledge production and political organizations that values receptivity over domination[23]. For Santos, the project of subaltern cosmopolitanism operates to create receptive forms of epistemology in western discourse. It does so by accepting universal claims about human dignity, but by recognizing that these claims are a built on a foundation of heterogeneity rather than top down hierarchy (Santos 2007: 64–65).

Subaltern cosmopolitanism, for Santos, is emergent rather than extant. It sees itself as a necessarily incomplete project that must be continually revisited, and in doing so adds new iterations each new cycle (Santos 2007: 64–65). It creates a process of both politics and knowledge production that sees itself as necessarily incomplete.[24] This reorientation to knowledge and to politics that is additive rather than reductive. It shifts the focus of epistemology to accept the inexhaustibility of diversity and utilizes this fact as the site for future politics (Santos 2007: 64–65). Santos posits a political epistemology without the impenetrable line of subject/object drawn through cultural experiences and ways of knowing. Knowledge production is built through the multiplicity of cultural outlooks on the world, rather than placing them in a centralized arrangement.

Justice, as both Derrida and Santos argue, must be an open-ended conception not out of theoretical nicety, but rather because it speaks directly to the marginalized and colonized people's experiences of the law through western imperialism. Serious attempts to undo this experience, however, must be sufficiently grounded

[23] Grace Hong cites the connection between colonial and capitalist logic as a defining feature in her definition of neoliberalism. As she points out, neoliberalism not only manifests itself in reorganizing the system of values along economic lines, as in Wendy Brown, but more perniciously also moves to define its inside and outside through racializing concepts like citizenship as well to produce a division of both labor and people. Liberation comes, she argues, through sites of contestation that open colonial logics to alterity, making it receptive to alterity (Hong 2015: 12–15).

[24] This understanding is dramatically like the epistemology of Gilles Deleuze and Félix Guattari in *A Thousand Plateaus*. As they point out, western thinking is hierarchical thinking that situates the other in a relationship to itself based on distance rather than connection. To fully understand and apprehend the other, knowledge production must be a horizontal endeavor that values the endless possibilities of connectivity that heterogeneity offer (Deleuze and Guattari 2005).

to allow for other modes of knowing and other legal formations to come to bare on the discourse of justice in such a way as to give it both meaning and weight. Doing this, for Santos, requires two things. First, we must seek a conception of justice that is outside of codified law and animates it. Second, it must be built on a diverse body of knowledge that does not favor scientific reason over other modes of knowing. Recourse to ethereal forms of justice creates good theoretical fodder. Santos highlights, however, that the human costs of coloniality require that they be taken seriously and form a central feature of any postmodern sense of justice.

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## TEISĖS OBJEKTAI: DERRIDA, VAKARIETIŠKA TEISĖ IR KOLONIJINIS VALDYMAS

*Santrauka*

Šiame straipsnyje pabrėžiamas Derrida probleminis teisės supratimo aspektas, susijęs su atsirandančiais materialiniais kolonializmo padariniais. Sykiu nurodoma į gilesnę postmodernybės problemą, o būtent – į primygtinį jos reikalavimą laikytis nežemiškų teisingumo idealų, kurie negali pakankamai atsižvelgti į materialinius kolonijinės praktikos kaštus. Šis straipsnis baigiamas išsamiai plėtojant deridiškąsias derybas dėl teisingumo vietos, remiantis subalterniniu kosmopolitizmu, kuris išplėtotas Boaventura'os de Sousa Santos kūriniuose. Reabilituodamas Derrida teisės supratimą postkolonijiniame mąstyme, straipsnio autorius teigia, kad teisės filosofija pajėgi imtis kolonijiškumo problemos pasitelkdama kito subjekto poziciją kaip svarbiausią bruožą kuriant kritinę teisės teoriją.

RAKTAŽODŽIAI: Derrida, Boaventura de Sousa Santos, teisė, kolonializmas, kritinės teisės studijos.