LAW, DEMOCRACY AND ELECTIONS: A SOCIO-LEGAL PERSPECTIVE*

Stuart SCHEINGOLD

> It was not necessary to believe that elections and the first government in which everyone would have a vote would stop the AK-47s and petrol bombs, defeat the swastika wearers, accommodate the kinglets clinging to the knobkerries of ethnic power, master the company at the Drommedaris; no purpose in giving satisfaction to prophets of doom by discussing with them the failure of mechanisms of democracy 'free and fair', in other countries of the continent.
> —At last— a year, a month, an actual day! —our people are coming to what we've fought for. They can't be cheated! It can't happen! Not to us. We can't let it! What a catastrophe if people started thinking its not worthwhile voting bcause whatever they do the old regime will rig the thing.
>
> Nadine GORDIMER, *None to Accompany Me*.

> Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power; and provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.
>
> Alexis de TOCQUEVILLE, *Democracy in America.*

* Una primera versión de este trabajo en Sarat, Austin (ed.), *The Blackwell Companion to Law and Society.*

SUMARIO: I. *Introduction*. II. *The Classical Canon*. III. *Reformist Socio-legal Studies: Adapting the Classical Canon*. IV. *Transformative Socio-legal Studies: The Postmodern Critique*. V. *Conclusions*. VI. *References*.

I. INTRODUCTION

At least at first glance, the primary contribution of law to democracy might seem obvious and directly related to protecting *electoral accountability*. In this paper, however, I will argue that socio-legal scholarship has largely ignored such matters. Research is available on how best to organize and enforce a system of rules that insures fair and free elections. There is also research on the democratic implications of different kinds of electoral systems —one person, one vote, proportional representation, single-member districts, gerrymandering, and the like (Grofman and Lijphart (eds.), 1986)—. Socio-legal scholars have not, however, conducted these kinds of research. Instead, their efforts to understand how law, elections and democracy contribute to one another have focused on *legal accountability* —on what is more commonly referred to as the rule of law—.

Why is it that socio-legal scholarship has largely neglected the study elections, as such? It is, as I will argue below, because of a belief among socio-legal scholars that legal accountability makes a unique and elemental contribution to democracy. According to this way of thinking, electoral accountability, though a necessary condition of democracy, becomes a sufficient condition only in combination with legal accounta-bility. Without legal accountability (or the rule of law), electoral accountability is, according to this distinctively legal way of thinking incomplete, unreliable, and self-destructive.

While intrinsic to socio-legal studies, this approach has its origins in a longstanding canon generated by classical political theory and jurisprudence —what I will henceforth refer to as the classical canon—. Socio-legal studies, I will argue, borrows from, adapts, and, to some extent, challenges this classical canon. Thus, according to the classical canon, legal accountability protects against too much democracy. It does so by way of rights, which insulate civil society from unwarranted intrusions by states that from time to time, may embrace intemperate egalitarian

objectives. In contrast, socio-legal scholarship sees legal rights as a weapon against inequality and too little democracy —a means of correcting the injuries done to democracy by a state working in league with and at the behest of powerful interests—. Despite dramatically different diagnoses of the problem, then, legality in general and rights in particular are the solution of choice for all concerned.

Clearly this is complex and contested intellectual terrain in which competing premises about both democracy and law yield multiple narratives about the interactions among law, democracy and elections. *My goal in this essay is not to choose among these narratives. Instead, I want to indicate how the intellectual community comprised of socio-legal scholars has used social theory and empirical research to destabilize the classical canon and to enhance and enrich our understanding of the relationships among law, elections, and democracy.*

- Socio-legal research began by revealing gaps between the law on the books and the law in action. This research was conducted in accordance with the generally accepted ground rules of positivistic social science; it respected the fact-value distinction and was often directed at obtaining quantitative data and subjecting it to tests of statistical significance. The resultant findings tended to be used in support of adaptive theorizing that sought to explain and remedy the principles of the classical canon without uprooting it.
- More recently, the introduction of interpretive research methods borrowed from cultural anthropology has generated research findings that feed into the postmodern search for alternative forms of law that would be compatible with more participatory modes of grassroots democracy. Thus, interpretive research focused on culture and consciousness among individuals and within primary groups. Similarly, postmodern theorizing with its radical reformulation of democratic aspirations, and the threats to them, complemented interpretive research.

To my way of thinking, socio-legal scholarship does not call into question the search for, or the belief in, distinctive affinities between

legality and democracy.[1] Because these affinities were first uncovered in classical political theory and jurisprudence, it is necessary to begin with the classical before going on to consider the challenges to it posed by socio-legal theory and empirical research.

II. The Classical Canon

According to classic political theory and jurisprudence, law and democracy have developed in tandem with one another and are interdependent —albeit uneasily so. Political theorists see order as a precursor and a necessary, but an insufficient condition, of democracy—. This view builds from the Hobbesian insight that without law, there can be no order and without order, there can be no freedom. Subsequently, democratic theorists adapted Hobbes' distinctly *un*democratic insight by incorporating expanded conceptions of freedom and of accountable political institutions. The version of democracy that emerged is ordinarily characterized as *liberal* democracy. However, as will become readily apparent below, *political* democracy is the terminology that better serves the purposes of this essay. Accordingly, liberal democracy and political democracy will be used more or less interchangeably.

1. *Liberal Democratic Political Theory*

While the Hobbesian conceptions of order and freedom are widely regarded in modernist accounts as a kind of prelude to democracy, there is, of course, nothing even vaguely democratic that can be directly derived from Hobbes. Bridging the gap between Hobbesian order and democratic order are constitutionalism and individual rights, two quintessentially legal phenomena associated with John Locke and, thus, with liberal/political democracy.

1 Within socio-legal scholarship Critical Legal Studies (CLS) is an exception to this generalization. CLS deployed the findings from conventional empirical research to develop neo-Marxist critiques of the classical canon. CLS stressed the intrinsic indeterminacy of legal reasoning and its infinite capacity for manipulation by the powerful at the expense of the powerless. In so doing, CLS analysis led inescapably to a repudiation of the classical canon's attribution of an underlying synergy between legality and democracy. For this and reasons addressed later (see note 23), I have not included CLS in my analysis of the contributions of socio-legal scholarship to an understanding of the interaction of law and democracy.

Constitutionalism, rather like Hobbesian order, is more about order than democracy. Constitutionalism does, however, impose non-Hobbesian accountability on the ruler —thus creating a distinctively legalized vision of political authority—. As David Held puts it, constitutionalism is directed at insuring that the state is "restricted in scope and constrained in practice in order to ensure the maximum possible freedom of every citizen" (1996: p. 50). The result is to introduce both a more expansive notion of freedom and to plant the seeds of popular sovereignty. It is presumably, in this sense that Locke declared "Wherever Law ends Tyranny begins" (quoted by Held, *ibidem*, p. 44).

If, however, constitutionalism takes a step towards popular sovereignty and democracy, their realization requires much more. Accordingly, Held goes on to distinguish between two kinds of modern states:

- The constitutional "modern state as a circumscribed system of power which provides a regulatory mechanism and checks on rulers and ruled alike" (*ibidem*, p. 49).
- "The modern state as a democratic political community in which 'rulers' are representatives of, and accountable to, citizens" (*idem*).

The latter required the introduction of individual rights that constitute citizens and citizenship within a political community.

These essentially *liberal* rights were in Held's words required, "to create a private sphere independent of the state, and by a concern to reshape the state itself. This meant freeing civil society —personal, family, religious and business life— from unnecessary political interference, and simultaneously delimiting the state's authority" (*ibidem*, p. 50). At the same time, the *political* flank of this vision of democracy was to be nurtured and protected by the right to vote, to become a candidate for public office, to free speech and association, and the like. In short, the version of democracy that emerged rested on a combination of civil rights among citizens and political rights erected against the state. The former rights were to maintain the integrity of civil society and the latter to assure democratic accountability and the autonomy of individual citizens.

For purposes of this essay, it will be important to distinguish this political vision of democracy from the social democratic and the emancipatory (or postmodern) versions associated with socio-legal scholarship. Whereas political democracy aspires primarily to freeing indivi-

duals and civil society from of an abusive and non-accountable state, social democracy incorporates material aspirations.[2] As Held puts it, social democratic rights are directed at incorporating "redistributive welfare measures—including measures introducing social security, public health provision and new forms of progressive taxation" (*ibidem*, p. 69). More broadly, the distinctions among the political, social-democratic, and emancipatory iterations of democracy emerge, respectively, from the three so-called generations of rights.[3]

— First generation rights are closely linked to the rule of law and to social contract theory. The center of gravity of such rights tends to be negative. They limit interference by the state or other social actors and incorporate conceptions of liberty, privacy, due process, and the like. On the other hand, first generation rights also include positive rights to *political participation* (free speech and association, voting, running for office, etc.). First generations rights are, thus, intrinsic to political/liberal democratic regimes.
— Second generation rights have to do primarily with entitlements to economic and social well being (formulated in Articles 22-27 of the Universal Declaration of Human Rights, 1948). Included among such rights are basic education, health care, minimum income, secure employment, workplace organization, food, housing, social security, and the like. These second generates were first articulated social democratic theory.[4]
— Third generation rights incorporate sweeping, controversial and incipient entitlements to collective or communal goods. These include peace, security, a healthy environment, safe natural resour-

2 Here I depart somewhat from Held who sees both liberal and social democracy as variants of a single, liberal-representative model democracy. He goes on to distinguish the liberal-representative model from a Marxist/One Party model. The latter he sees as largely discredited, and in essence drops it from his analysis (Held, 1995: pp. 5-16).

3 This account of rights generations is adapted from a entry on rights written jointly with Michael McCann for the *Encyclopedia of the Behavioral and Social Sciences* (in press).

4 Held does not distinguish among generations of rights, but his cosmopolitan model of democracy does call for the realization of what are generally recognized as 3rd. generation rights (1996: 267-286). The fit is, however, uneasy because Held's reading is so distinctly modern and liberal democratic, rather than postmodern.

ces, and group self-determination. For purposes of this essay, these third generation rights are associated with the postmodern aspirations of emancipatory democracy.

Note that the progression among rights' generations introduces tensions into democratic theory. The democratic claim of first generation rights is that it is necessary to protect citizens and civil society from the power of the state. Conversely, in the name of social democracy, second generation rights invoke the state's power to intrude into civil society in order to protect its "have-nots" from its "haves" (Galanter, 1974). Third generation rights muddy the water still further in that they do not identify the institutions that are responsible for realizing the indeterminate rights associated with emancipatory democracy.

Second and third generation rights also challenge the classical canon's hallmarks of legality to which we now turn.

2. *Democracy and Legality*

According to the classical canon, legality can be seen as providing the procedural conditions that make democracy possible. Both historically and conceptually speaking, constitutionalism was a first step from the rudimentary Hobbessian conception of law as command to legality as a condition of democracy. As Held points out:

> Constitutionalism defines the proper forms and limits of state action, and its elaboration over time as a set of doctrines and practices helped inaugurate one of the central tenets of European liberalism: that the state must be restricted in scope and constrained in practice in order to ensure the maximum possible freedom of every citizen (1995: 50).

Constitutionalism is, thus, about the establishment of legitimate authority rooted in a reciprocal relationship between the rulers and the ruled.

Legality further refines this relationship by creating a comprehensive and coherent system of rules. The system is comprehensive in that it covers a multiplicity of relationships among individuals and between individuals and the state. The system is coherent in the sense that the

rules are consistent with one another, that they are knowable, and that they are predictable. The agent of this coherence is legal reasoning, which structures the relationships among rules. While intricate, and thus difficult to master, legal reasoning nevertheless constitutes a public language that is universally accessible —albeit only indirectly through the intervention of those with legal training.

Among legal theorists of the common law world, H. L. A. Hart has been perhaps the most well known, widely recognized, and eloquent voice in the transmuting of constitutionalism into a full-blown political theory of legality. He, however, does not see his work as revealing any necessary or constitutive connection between law and democracy. Quite the contrary, as an analytical positivist, he takes great pains to head off any such inferences. He does so, in part, by asserting that law and morality are altogether separable from one another and also by arguing that, despite some affinities between law and justice, they are not constitutively linked to one another. Indeed, he concludes that law is "unfortunately compatible with very great iniquity" (1961: p. 202) —providing as evidence the coexistence of a regime of positive law with the Nazi state.

Neo-natural law theorists challenge Hart's position. They have developed an alternative take on legality that serves to link law constitutively with democracy. According to Lon L. Fuller, Hart's neo-natural law protagonist in an intense debate during the 1960s, there is a morality embedded in legality —a morality that is at the core of law. As Fuller sees it, law amounts to no more and no less than "subjecting human conduct to the governance of rules" (1964: p. 162). But this is possible, he argues, only insofar as law sticks to certain standards. Thus, for example, people can conduct themselves according to rules only if these rules are clear enough to be understood, only if they are not retroactive, and so forth. Up to this point, the differences between Fuller and Hart are relatively minor. Hart acknowledged that law tends to operate in this fashion but denies these are hallmarks of legality or legal ordering. In other words, their differences are philosophic —a dispute over how law is to be defined.

However, Fuller makes one additional move, to which Hart takes vigorous exception. When taken together, according to Fuller, the standards that must be met if human conduct is to be truly subjected the governance

rules add up to a kind of moral code —what he refers to as the "inner morality of law". It is "inner" or *internal* in that it applies only to the relationships among the rules, but in what sense is it *moral*? Fuller addresses this question only obliquely but another neo-natural law theorist, Philip Selznick (1962), addresses it more directly.

Selznick's excursion into natural law begins with a determination to rethink the separation of fact and value that is so central to social science. In so doing, Selznick assimilates law to a variety of "normative" systems that are studied by social scientists whose goal is to understand what makes them tick —engaging, that is, with the moral values that are intrinsic to them. Thus, Selznick distinguishes moral inquiry from moral advocacy. The former he argues is entirely in keeping with social science while the latter is outside the lines. When applied to law, Selznick draws directly on Fuller whose internal morality of law, Selznick characterizes as identifying a distinctively legal ideal (1962: p. 177).[5] This ideal has "to do with the way rules are made and with how they are applied" (*ibidem*, p. 173). As such, it is associated with the principles of justice, albeit with only one element of a comprehensive conception of justice.

> The essential element of legality, or the rule of law, is the governance of official power by rational principles of civic order. Official action, even at the highest levels of authority, is enmeshed in and restrained by a web of accepted general rules. Where this ideal exists, no power is immune from criticism nor completely free to follow its own bent, however, well intentioned it may be...
>
> This concept of legality is broad enough, but it is not so broad as the idea of justice. Justice extends beyond the legal order as such. It may have to do with the distribution of wealth, the allocation of responsibility for private harms, the definition of crimes or parental issues. Such issues may be decided politically and law may be used to implement whatever decision is made. But

5 The difference I detect between Selznick and Fuller is of direction and purpose rather than substance. Fuller is intent, in my judgment, on making an empirical argument about the connection between a morality of duty that is intrinsic to rules and thus makes law possible. In making that argument, he tends to treat the internal morality of law not so much as an ideal as a functional requisite of rule following and, thus, of law. Selznick's objective, on the other hand, is to explore the values that inhere in the ideal of legality. He is, therefore, much more explicit than, but not at all in conflict with, Fuller on the specifically moral dimensions of law.

the decision is not peculiarly a legal one, and many alternative arrangements are possible within a framework of the rule of law (*ibidem*, 171-72).

Note that Selznick's claim in the first paragraph above is not simply about maintaining the integrity of rules. Instead, it is about establishing legitimate authority —that is, authority made legitimate by the opportunity provided through law to appeal to the system's "own ideals and purposes" (*ibidem*, p. 179). Law thus is in its nature an agent for inquiring into, and promoting the realization of, the system's most basic values.[6] In this sense, Selznick posits the legal accountability of the state's institutions as a complement to electoral accountability and thus a contributor to political democracy.[7]

Within the classical canon, there is a second distinction —the distinction between law and politics— which confines legality to political democracy. More specifically, Fuller and another leading figure among United States legal theorists, Alexander Bickel, take issue with the degradation of legality that they associate with more robust democratic values of the New Deal and the civil rights movements. In these instances, Fuller and Bickel detect a blurring of the distinction between law and politics with the resultant sacrifice of legality in the name of democracy.

Bickel's objections to judicial activism resulting from civil rights litigation are the more familiar. Because, the courts are, he asserts, counter-majoritarian institutions, encouraging them to intervene actively in the claims and counterclaims raised by civil rights and anti-poverty advocacy tends is to undermine democracy. These are, Bickel and others are inclined to argue, decisions, which the Constitution left to the duly elected representatives of the American people. Indeed, it might be said that Bickel's argument engages in exactly the kind of search for the ideals of the system that Selznick advocated in his claims on behalf of natural law. However, this purposive inquiry arguably led Bickel to a

6 It is perhaps precisely in this spirit that Alexander Bickel once proclaimed that law is "the value of values... the principal institution through which a society can assert its values" (1975: 5).

7 Subsequently, as will be discussed below, Selznick and Phillipe Nonet (1978) developed the conception of "responsive law" —a conception intended to be compatible with a more robust form of democracy.

very circumscribed vision of the role of law —a vision that stressed its "passive virtues" (1962: Chapter 4).

Fuller's objections are less familiar, more abstract, pragmatic rather than normative, and apply to the administrative agencies. Administrative agencies are at the core of the welfare state, because the welfare state has been the primary instrument through which liberal democratic regimes have addressed problems of poverty and inequality. Insofar, then, as bureaucracy and legality are mutually exclusive, legality becomes an obstacle to social democratic reform and further weds legality to the *political* democracy.

According to Fuller, legality in general and rights in particular are driven by a commitment to nurturing settled expectations by way of a more or less absolute commitment to preexisting rules. Conversely, administrative agencies are supposed to be attentive to outcomes and, thus, are best served by marginal utility calculations, which put settled rules at risk. For example, assume that there are clear rules against anti-competitive practices of the sort involved in U.S. government's case against Microsoft. Still, the Justice Department could, as Fuller might have understood the situation, have been justifiably more concerned with the health and vitality of market than with whether a rule had been broken.[8] For Fuller, this is not about democracy but simply about acknowledging the distinctive and mutually exclusive terrain of law and economics. Still the implications of Fuller's concerns for social democracy are clear. To pursue social democracy is, ipso facto, to preclude legal accountability —an essential component of democracy according to the classical canon.

III. Reformist Socio-legal Studies: Adapting the Classical Canon

The classical canon has been challenged by a melange of scholars who support the ideals of political democracy but deplore its failure to live up to those ideals. At the core of this challenge are the shortcomings

8 Suzanne Weaver's study of the conflict between lawyers and economists in the antitrust division of the justice department can be read as an empirical confirmation of Fuller's theorizing.

of pluralism and of the welfare state —shortcomings analyzed by those political and social theorists who wish to expand the reach of democracy while somehow preserving its political core.[9] They trace the shortfall between the theory and practice of political democracy due to economic and social inequality, which subvert both electoral and legal accountability.[10] The contribution of socio-legal scholarship to this internal critique is the primary objective of this section. First, however, it is worth looking at the broader reformist critique generated within political and social theory.

Well before the emergence of socio-legal studies, democracy had moved beyond the political democracy of the classical canon in both social democratic and pluralist directions. The social democratic impulse resulted in reform ranging from the piecemeal programs of the New Deal in the United States to Britain's post WW II welfare state. These reforms led the state to intervene in the economy through the regulation of business activity, re-distributive social programs —and in the United Kingdom nationalization of basic industries like coal and basic services like health and transportation. The objective of these social democratic reforms was to ameliorate the material inequalities of capitalism while preserving capitalism, political democracy and legality.

Political democracy, for its part, had also evolved: from a vision of electoral accountability vested in individual citizens to a pluralist accountability vested in organized interests and exercised through lobbying as well as elections. The controlling ideal of pluralism is, according to Michael Walzer, an inclusive conception of civil society as "*a setting of settings*: all are included, none is preferred" (Walzer, 1992: 98). According to this view, the state is to nurture and protect "uncoerced human association and also the set of relational networks —formed for the sake of family, faith, interest and ideology— that fill this space" (*ibidem*, p. 89). In political terms this came to mean freedom of groups representing the full range of legitimate interests to compete in the political arena

9 Of course, there have also been challenges from outside directed at supplanting the classical canon, and these will be taken up in the next section of this essay.

10 A stronger critique of political democracy, considered below, is that electoral accountability and legal equality are *intrinsically* incompatible with the extremes of wealth and poverty that inevitably accompany regimes that attempt to combine democracy and capitalism.

on a roughly level playing field. Because aggrieved interests were free to organize and compete, the absence of organized representation was taken as a reliable indicator of satisfaction and, thus, of a successful working democracy.[11]

Beginning in the late 1950s, some deviant figures in the American academic community began to challenge both consensus pluralism and the timid interventions of the U.S. version of the welfare state. This is not the place to detail this growing disenchantment but three related lines of argument and research were especially important:

- C. Wright Mills and others challenged the assumption of a relatively even distribution of political power. Mills identified an interdependent "power elite" whose "unity rests upon the corresponding developments and the coincidence of interests among economic, political, and military organizations" (1957: 292).
- E. E. Schattschneider (1960), Peter Bachrach and Morton Baratz (1970) went on to analyze the unobtrusive processes through which this mal-distribution of power corrupted political democracy. At the heart of their analysis was Schattschneider's conception of the "mobilization of bias" according to which those with dispropor-

11 Pluralist democratic theory was largely the construction of political science in the United States. To begin with, pluralism refocused attention from individuals to organized groups —thus celebrating the democratic contribution of the "factions", that Madison in *Federalist* #10 saw as a threat to deliberative democracy. This celebration can be traced through the political science literature beginning with A. F. Bentley's seminal inquiry into interest group politics, *The Process of Government: A Study of Social Pressures* (1908). Bentley's perspective subsequently became the paradigm of political science and was developed into an overarching pluralist theory —most notably in Truman's, David, *The Governmental Process: Political Interests and Public Opinion* (1951) and Dahl's, Robert, *Who Governs?* (1961). For a critical analysis of the pluralist conception of democracy and its destructive impact on both legal and democratic values, see Lowi, Theodore J., *The End of Liberalism: The Second Republic of the United States*, 2nd. ed. (1979). Note, however, that Lowi's critique is, in effect, an affirmation of the classical canon rather than a revision of it. Within political theory, as such, Sheldon Wolin's *Politics and Vision* (1961) provides a subtle and comprehensive analysis of the corruption of the classical democratic canon by the intrusion of social concerns. For Wolin, however, group theorizing was the last step in this regression. Much of the liberal democratic theory that I have identified as the classical canon was itself, according to Wolin, a corruption of the true canon whose locus is in the political theory of the Greek *polis*.

tionate power exercised it less to confront or to suppress opposition than to deny it voice.

- Frances Piven and Richard Cloward (1971) charged that welfare benefits were not only inadequate but were utilized for purposes of regulating the poor rather than for reducing inequality and poverty.

Viewed from these new perspectives, political democracy was problematic in terms of both how it worked and what it produced. Pluralist political bargaining and electoral politics were no long self-justifying, because power was unevenly distributed and because power could be exercised to exclude dissatisfactions from the political arena.[12] In addition, the bargains that were struck were at the expense of society's most vulnerable groups —providing them with inadequate resources while treating them more as serfs than as citizens.

It was in this setting that socio-legal studies began to flourish. To begin with, socio-legal studies documented the ways in which the broader context of social, economic, and political inequality compromised equality before the law. In addition, socio-legal analysis revealed reformist strategies for ameliorating inequality while protecting, indeed enhancing, legality. This scholarship of documenting and explaining inequality amounted to a sea change in the study legality —supplanting the normative and doctrinal approach of the classical canon with social science and social theory. However, this sea change did not pose a fundamental threat to the classical conception of legality. What did pose a fundamental threat were the egalitarian, purposeful and political legal strategies proposed by socio-legal scholars to ameliorate the shortcomings of pluralism and the welfare state. In short, as *internal* critics it was necessary that they reconcile their new legality with the classical core, which they wished to preserve.

It is no coincidence that a reformist socio-legal scholarship began to flourish in the 1960s and 1970s in rough parallel with the civil rights, anti-war, anti-poverty and environmental movements. In both the academy and the political arena, the predominant response was to seek out

12 In a more theoretical vein, it has also been argued that "interest group pluralism" as it came to be known (Lowi, 1979), generated centrifugal forces that divided the polity among competing interests.

proactive and preemptive projects and understandings that would re-conceive and re-energize widely acknowledged structural synergies between law and democracy. Events in the United States —like the massive resistance to civil rights in the South and the repression of the anti-war movement— were widely read as a measure of the gap between what the classical canon promised and what it delivered. And yet, it seemed equally clear, in the heady days of the Lyndon Johnson's war on poverty and Kerner Commission's report on violence, that delivery was tantalizingly close and that legality could contribute to it.[13] In short, both the rights-based activism and the socio-legal research that analyzed and charted its progress rested on a continuing faith in the underlying, but insufficiently realized, structural affinities between legality and democracy.[14]

1. *The Limits of Legal Accountability: Inequality Before the Law*

While the focus of this essay is on the socio-legal scholarship that began to develop in the 1960s, sociological jurisprudence, legal realism, and legal historians laid the foundation. What historians like J. Willard Hurst, John R. Commons and Charles Beard contributed was a determination to look beneath legal doctrine to the social, economic, and political forces that shaped legal doctrine and judicial decisions. Following directly in their path, Hurst's in particular, socio-legal scholars launched a comprehensive inquiry into the divergence between law in action and law on the books. Among other things revealed by this inquiry was the hollowness of formal equality.

13 Symptomatic was the Legal Services Program, a prominent element of the war on poverty. This program was viewed by its most enthusiastic advocates as a vehicle for actually reducing poverty —not simply as a way of providing legal representation for the poor. See Cahn and Cahn (1964).

14 One certainly did not have to be a socio-legal scholar to appreciate, and to engage with, all of this. Academics, however, had their own compelling reasons to become involved. Here was new research terrain, which provided opportunities to challenge both political and intellectual orthodoxy —to be at the cutting edge of both politics and scholarship. In short, given the generally buoyant political mood of the era, it stood to reason that academic work would be adaptive and corrective rather than radical or revolutionary. Nor need one be cynical to acknowledge that career enhancing funding by the government and foundations also drew scholars to this research terrain and probably shaped the research that they undertook and the sensibilities that they brought to it.

The emblematic, and, indeed, the seminal, work here was Marc Galanter's analysis of "Why the Haves Come Out Ahead" (1974).[15] Galanter's central thesis was that beneath the appearance of equal justice under law, "repeat players" in the legal process had a decisive advantage over "one shotters." These repeat players were, moreover, overwhelmingly drawn from among the privileged and powerful, while one-shotters were just as overwhelmingly numbered among the ineffectual and dispossessed. Both Galanter's findings and his mode inquiry —looking, that is, beneath the reassuring surface of formal equality— became defining elements of socio-legal scholarship. In a similar vein, Joel Handler led the way in exposing the inadequacy of the due process protections afforded welfare recipients against the often mean spirited and abusive procedures of the state agencies on which they depended (1966). This work, as well as other research on welfare dependency by Handler and Hollingsworth (1971) was, of course, consistent with, and lent credence to, Pivan and Cloward's claim of welfare as a means of regulating rather than liberating the poor.

The basic conclusion to be drawn from this work was that it is the exception rather than the rule for law and courts to embrace egalitarian values. In addition, socio-legal scholars, particularly those in political science, turned their attention to the disappointing policy consequences of the *exceptional* instances in which courts did support egalitarian democratic values. The resultant body of "compliance" and "impact" research documented how, why, and to what extent, the courts were unable to transform judicial decisions into operative public policy. The controversial matters that were the focus of this research included school desegregation, desegregation elsewhere in the society, school prayer, and defendants' rights. Virtually everywhere they looked —administrative agencies, political leaders and the public— researchers uncovered widespread resistance to, and neglect of, judicial decrees (Canon and Johnson: 1999). Generally speaking, this research revealed that, absent the political will to enforce judicial decisions, the courts could do little to

15 Tellingly for purposes of this account of divergence of socio-legal scholarship from the classical canon of legal theory, this article appeared in an early issue of *Law and Society Review* after being turned down by established law reviews.

redress the unequal distribution of resources within the polity (*cf.*, Muir, 1967).

Most broadly, this early socio-legal research cast doubt on one of the mainstays of the classical canon, the much-vaunted autonomy of the law. If in matters of public policy the courts can not assure remedies for the rights, which they articulate, the political *dependence* of the courts is undeniable. Similarly, if the "haves" do reliably come out of ahead, it means that the law, like politics, is responsive to differentials in status and material resources. In short, the initial message of socio-legal research was that law and politics are inseparable and perhaps indistinguishable. Accordingly, this research also called into question the underlying integrity of constitutional legality while at the same casting seemingly decisive doubt on legal accountability as a guardian of political democracy. However, subsequent socio-legal scholarship breathed new life into legal accountability by facing up to, rather than evading, the inextricable connections between law and politics.

2. *Politicizing Legal Accountability: A Politics of Rights*

Paradoxically, socio-legal scholarship both discredits and affirms the democratic potential of legal accountability. Assessed in conventional terms, socio-legal scholars have provided convincing evidence that constitutional rights are not readily available entitlements and are thus unreliable agents of constitutional democracy. On the other hand, by providing a politically inflected account of rights and legality, socio-legal scholarship has also demonstrated how a politics of rights can help defeat the mobilization of bias. Recall that it was this mobilization of bias, which is both intrinsic to, and subversive of, pluralist political democracy.

From the perspective of the politics of rights, rights and the judicial decisions in which they are articulated are analyzed not as legal entitlements or as moral imperatives but as political resources that can serve redistributive objectives. Specifically, the cultural resonance of rights provides discursive access to the symbols of legitimacy. The symbolic currency of rights has proven effective in mobilizing and organizing inchoate interests that had been excluded from meaningful participation in pluralist bargaining. Moreover, by demonstrating that legitimate rights

have been denied to marginalized groups in the society, a political of rights has also generated sympathy and support within political arena.

Consider, for example, the course of desegregation in the United States. The record indicates that the constitutional entitlements affirmed by the Supreme Court were in themselves largely ineffectual and that desegregation proceeded only after the Civil Rights Movement gathered momentum (Rosenberg, 1991). There is, however, also reason to believe that constitutional litigation did, by way of a politics of rights, contribute *indirectly* to the emergence and success of the Civil Rights Movement (Scheingold, 1988). On the one hand, the judicial validation of civil rights claims generated hopes that fed the organizing efforts of African Americans and their supporters. On the other hand, the "massive" legal resistance to judicial decrees —not to mention the TV documented spectacle of *extra-legal*, resistance— enlisted the support of northern liberals. Taken together, these *unintended* consequences of constitutional litigation helped to destabilize the political stalemate that had protected segregation since the end of the Reconstruction.

Subsequent socio-legal research on rights-based campaigns for people with disabilities (Olson, 1984), pay equity McCann, 1994) and animals (Silverstein, 1996) has clearly demonstrated how, why, and to what extent a politics of rights can be successful. In particular, the research sheds further light on the indirect and contingent democratic potential of a politics of rights.[16] Victories in constitutional litigation are neither necessary nor sufficient. The lesson of the civil rights cases was that court *victories* were largely ineffective. Still, it was possible to take advantage of their "radiating effects" (Galanter, 1983) to alter the political landscape in ways that advanced the cause of desegregation. The research on pay equity demonstrated that judicial *defeats* could similarly be le-

16 The intellectual politicization of law can be traced to what might be termed the pre-history of socio-legal research. This work, with its locus in political science, was directed at incorporating law and courts within the pluralist paradigm. Several political scientists argued that law should be viewed as "a political instrument" (Rosenblum, 1955) and "litigation as a form pressure group activity" (Vose 1967. See also Peltason, 1958). However, while bringing law and politics closer together, rights continued to be viewed as legal entitlements —as prizes, which were the object and culmination of, and yet somehow separate from, political struggle. The problem with this approach was, of course, that it provided no answer to the problem posed by the tendency to ignore these decisions.

veraged by labor movement activists for movement building purposes (McCann, 1994). In short, litigation serves democratic objectives best as a prelude to, and in combination with, complementary political strategies.[17]

In recent years, cause lawyering research has revealed multiple instances around the globe in which politicized conceptions of legal accountability have been deployed on behalf democracy. Some of this politicization pursued politics of rights-like strategies. For example, lawyers in the United State engaged in movement building among Central American immigrants (Coutin, 2001), and Latin American cause lawyers have worked at the grassroots to organize opposition to, and to destabilize, authoritarian state structures (Meili, 1998). A somewhat different kind of politicization entails use of the law in order to subvert it. This strategy of politicization was uncovered among American lawyers working against capital punishment (Sarat, 1998) and among Israeli lawyers trying to desegregate housing (Shamir and Ziv, 2001).

Clearly, the politicization of legal accountability is rooted in an altered conception of legality —a conception in which law and politics merge inextricably into one another. Thought of as entitlements, legality and rights are direct, absolute and conclusive. Thought of in political terms, they are indirect, contingent and dependent on strategic choices. The politics of rights, in effect, transforms rights from ends in themselves to a means of political action. Legality, with its locus in social and cultural practice becomes a terrain of political struggle. Does, however, this merger amount to a destructive colonization of law by politics? Is it possible to both politicize legality and preserve it? If not, then the politics of rights would seem to be less appropriate to an internal critique of the classical canon than to an external assault on it.

17 While a politics of rights can readily alter the political landscape, there is no guarantee that success will be forthcoming. Even, perhaps especially, when successful, a politics of rights may well generate a backlash. Consider, in this regard, the ongoing conflict between the abortion rights and right to life movements and the widespread opposition to affirmative action and to the rights of defendants. Still, no strategy is without risks, and socio-legal research seems to have clearly established that by deploying rights politically it is possible to destabilize the status quo and to redress pluralist inequalities. For those without access to conventional political resources, a politics of rights does, then, provide a meaningful alternative.

3. *Theorizing a Political Legality*

It is one thing to establish that the strategic politicization of legal accountability works and quite another to reconcile it with the classical canon.[18] After all, maintaining the boundary between law and politics has been a foundational element of classical legal theory and jurisprudence. However, Phillipe Nonet and Philip Selznick (1978) have proposed an instrumental conception of legality that goes at least part of the way towards reconciling political legality with classical legality. While they are not entirely successful, their project provides a theoretical foundation for socio-legal scholarship as well as a conception of legality that protects and enhances egalitarian democratic values. They do so by shifting the locus of legality from its classical base in political theory and jurisprudence to social theory and socio-legal studies.

More specifically, Nonet and Selznick's offer a developmental account of law, which identifies a three-stage legal progression from "repressive law" through "autonomous law" *towards* "responsive law". The first two stages are, in effect, drawn from the historical record and, as they point out, "evoke, and with some fidelity, the classic paradigms of legal theory" (1978: 17).

> The repressive law recalls the imagery of Thomas Hobbes, John Austin, and Karl Marx. In this model law is the command of a sovereign who possesses, in principle, unlimited discretion; law and the state are inseparable. Autonomous law is the form of governance conceived and celebrated as the "rule of law" in the jurisprudence of A. V. Dicey. The writings of legal positivists, such as Hans Kelsen and H. L. A. Hart, as well as their natural-law critics, especially Lon L. Fuller in *The Morality of Law*, also speak to the subordination of official decisions to law, the distinctiveness of autonomous legal institutions and modes of thought and the integrity of legal judgment (*ibidem*, 18).

In other words, Nonet and Selznick's autonomous law is, in effect, equivalent to the version of legality incorporated in the classical canon.

18 There is a long tradition of social democratic theorizing among political theorists. That tradition going back at least to John Stuart Mill meant those political theorists, as opposed to legal theorists, could readily reconcile social democracy with the classical canon.

It is, however, through the third —and as yet unrealized— responsive stage that Nonet and Selznick adapt legality to socio-legal studies and to egalitarian democracy.

A responsive law, as they see it, is a law that is purposeful, political, and participatory and its goal —indeed, it essential payoff— is to save legality from the self-defeating tendencies of formalism.[19] In its place, they propose "a legal order that would undertake affirmative responsibility for the problems of society" (1978: 115) —while somehow retaining its distinctive identity. To do so, they claim that law must become more regulatory and less judicial— "that is capable of reaching beyond formal regularity and procedural fairness to substantive justice" (*ibidem*, 108). In their analysis, regulation is a metaphor for privileging purpose over procedure and an acknowledgment of the growth of a bureaucratic state. Because the bureaucratic state is very much a discretionary state that is subject to capture by the politically powerful, it is necessary to control discretionary abuse. In other words, Nonet and Selznick associate themselves with the critique of pluralism, and they agree with Handler that the procedural remedies of classical legal accountability are inadequate (*ibidem*, 105).

In their judgment, responsive law can, however, serve both accountability and democracy by providing a forum for social advocacy by interests that tend to be excluded from pluralist bargaining. They build their case on the familiar ground of the civil rights litigation conducted in the United States by the NAACP Legal Defense Fund's and anti-poverty campaigns of the OEO legal services program. They view all of this approvingly as a "deliberate effort to make the legal process an alternative mode of political process" (1978: p. 96). It follows that judges and other legal professionals are to welcome this opportunity for "participatory decision making as a source of knowledge, a vehicle of communication and a foundation for consent" (*ibidem*, 97). But responsive law is about purpose as well as consent and to this end Nonet and Selznick call upon the legal order "to lend affirmative authority to purpose". To do so, "the focus of legal analysis must be the social patterns and constitutional arrangements that frustrate legal ends... In the context of

19 They readily acknowledge that they are building on a theoretical foundation laid by legal realism and earlier by sociological jurisprudence. The wedding of law to purpose also recalls Selznick's engagement with natural law.

responsive law, claims of right are understood as opportunities for uncovering disorder or malfunction, and hence may be valued administrative resources" (*ibidem*, 106).

While Nonet and Selznick thus take major steps towards a politicization of legal authority, their determination to preserve the core of classical legality seems to result in an unwillingness to face up to the full implications of both politicization and purpose. This is clearest with respect to politicization because they stop well short of embracing the lessons of a politics of rights.

> Social advocacy invokes legal authority and uses forums that can be held accountable to legal rules and principles. Hence, the characteristic locale of such advocacy is the court or the administrative agency rather than legislative bodies. *The appeal is to legal entitlement, not to political will* (*ibidem*, 97. Italics added).

They concede that by "enlarging the meaning and reach of legal values", they also attenuate "'distinctively legal' ideas and modes of thought" (1978: 117). However, their objective is clearly to enhance rather than subvert legality.

It thus seems clear that Nonet and Selznick's vision of a responsive law stops well short of the dual forms of politicization associated with the politics of rights. On the one hand, the politics of rights, as was noted earlier, is about taking law outside of legal forums and even using it to subvert the law. Moreover, Nonet and Selnick fail to acknowledge, much less to address, the extent to which their effort to assimilate law to regulation can reasonably be seen as an attempt square the circle.[20] While they explicitly associate Fuller with purposive law, they do so without addressing the contradiction that Fuller, as noted earlier, articulates between law and regulation —that is between subjecting human conduct to the governance of rules and basing decisions on the fluid terrain of marginal utility calculations.[21]

20 Because Bickel died prior to the publication of Nonet and Selnick's book, he did not engage directly with "responsive law", but it is safe to say that he would have objected to it. Indeed, Nonet and Selznick cite him, along with Robert Bork, Herbert Wechsler, and others as opponents of the the judicial activism that Nonet and Selnick associate with responsive law (1978: 74).

21 It is worth noting that it is not only adherents of the classical canon that are

Despite these caveats, it seems altogether appropriate to see Nonet and Selznick as both the first theorists of socio-legal scholarship and as influential transitional in the postmodern transformation of the classical canon to which we now turn.

IV. Transformative Socio-legal Studies: The Postmodern Critique

This section focuses on the postmodern critique of the classical canon's vision of law and democracy and on the increasingly prominent contribution of postmodern theory and empirical socio-legal research. The postmodern critique is transformative in that it identifies an intrinsic incompatibility between an authentic democracy of emancipation and the classically inflected iterations of law and democracy. Moreover, the postmodern critique, at least as articulated by Boaventura de Sousa Santos, the preeminent voice of postmodern socio-legal scholarship, embraces the pursuit of "revolutionary" change and denounces "normal" change.

Nonetheless, Santos' postmodern break from political and social democracy is not, on close examination, as unequivocal as his strongest claims imply. Certainly, as will emerge below, Santos' visions of postmodern democracy and postmodern law do not turn the classical canon on its head. And while he identifies himself with revolutionary change, his agenda is neither violent nor is there any talk of doing away with private property —despite a thorough distrust of capitalism and an obvious attraction to socialism. Moreover, much of what Santos offers remains entangled in, and appreciative of, political and social democracy at their best.[22]

Despite all of these disclaimers, I believe it is still appropriate to think of Santos' postmodern narrative of law and democracy as *inte-*

sensitive to this tension between law and regulation. Writing just prior to Nonet and Selznick, CLS scholar Roberto Unger analyzed the "disintegration of the rule law" stemming from state's involvement "in the tasks of overt redistribution, regulation, and planning [as] it changes into a welfare state" (1976: 192-193).

22 In, thus recognizing the affinities among modernism, law, and liberal democracy, postmodernists seem further to agree with modernists that the democratic aspirations associated with Marxism are no longer viable.

llectually transformative.[23] That is to say, we are encouraged to *think* in terms that do represent a sharp break from both the classical canon and the social democratic critique. In the spirit of the postmodern project, Santos embraces as virtues what the modern project tends to regard as vice. Thus, he constructs visions of law and democracy that celebrate dispersion, indeterminacy, codependence, and subversion while being deeply distrustful of order, regularity, coherence, and coordination. Specifically, the state and its law emerge, as we shall see below, as enemies of emancipation.

Further underscoring the intellectual break, Santos' postmodern narrative is consonant with refocusing socio-legal scholarship in general and its empirical research in particular from the formal institutions of state and society to the informal regularities of social exchange. If, as postmodern theory tells us, emancipatory democracy is dependent on nurturing genuine reciprocity at the micro-sites of power, it follows that empirical research that focuses on these micro-level exchanges is essential.

1. *Postmodern Democratic Theory*

Santos' conception of emancipatory democracy is complex, elaborate, and elusive, and I am able to do it cursory justice, at best. For purposes of this essay, however, what matters most are those features, which make emancipatory democracy intellectually transformative and thus constitute

23 As was mentioned earlier, an equally transformative, neo-Marxist analysis was developed by Critical Legal Studies (CLS) scholars. My reading is that CLS can be seen as a kind of bridge to postmodernism within socio-legal scholarship. Taking cues from Gramsci, CLS detailed the ways in which legality in liberal capitalist states is inextricably enmeshed in the dominant structures of power. It follows that legality must be viewed as agent of domination rather than resistance —thus making it an exercise in futility to use "the law to fight the system which (theory tells us) law maintains" (Thomson, 1992: 6). CLS scholars were, thus, more or less obliged to turn their backs on the empirical evidence of contingent opportunities revealed by socio-legal research. It is also true that the CLS was largely the work of law professors. They were adept at revealing the hegemonic truths embedded in legal doctrine but not much interested in initiating an empirical rejoinder to the findings of socio-legal studies. In this sense, CLS was something of a socio-legal studies dead-end —useful as critique but without much promise for advancing the socio-legal inquiry or for revealing an alternative transformative agenda.

its break from political and social democracy. At the heart of the matter, is the rejection of *power* as inimical to emancipatory democracy —irrespective of the settings and forms in which power is exercised and no matter how well intended its objectives. This is because Santos, taking his cues from Steven Lukes, identifies power with inequality —or more specifically with "any social relation ruled by an unequal exchange" (1995: p. 407).

It follows then that both the liberal state and the welfare state work at cross purposes to emancipation. Santos acknowledges that political democracy is the modern project at its best and, indeed, has given birth to the "pillar of emancipation" (1995: p. 2). However, the fatal flaw of the liberal state and political democracy is that they are both too weak and too little disposed to reach out beyond the political order to curb power within the social and economic orders. As for the social democratic state, while attentive to social and economic power, its remedy is the blunt instrument of regulation. In effect, social democracy calls upon the state to use its sovereign power to redress imbalances of power within the social and economic orders. Because of this reliance on regulatory means, the social democratic state is too strong and indeed too much of a menace to serve as an agent of emancipatory democracy. Thus, from a postmodernist perspective, even the most well-intentioned welfare state has revealed itself as more the problem than the solution to democratic deficiencies. In sum, for Santos the problem with the political democracy is its incapacitating preoccupation with the power of the state while the problem with social democracy is an intrinsically self-defeating reliance state power.

The obstacles to emancipatory democracy are, therefore, formidable. To be successful the agents of emancipation must permeate all sites of power, must be effective against all forms and constellations of power, and must eschew the vertical impositions intrinsic to regulation. To these ends, Santos seeks, in the spirit of the dialectic, to turn knowledge, one of the tools of unequal exchange, against itself.

Drawing on Gramsci, Santos notes that each site of unequal exchange produces its own hegemonic local knowledge —a specific common sense, a local hegemony.[24] From this perspective, knowledge provides dis-

24 Note that, according to Santos, there are six "structural places" of power and of

cursive reinforcement for unequal exchange and is, thus, inimical to emancipation. On the other hand, because knowledge is permeable it can also serve emancipation. "Emancipatory relations develop, then, inside power relations, not as the automatic outcome of any essential contradiction, but rather as created and creative outcomes of created and creative contradictions" (1995: p. 409). For emancipation to proceed, it is, therefore necessary "to promote, through dialogic rhetoric... in each of the... clusters of social relations, the emergence of emancipatory topoi and arguments or counterhegemonic common senses... eventually to become knowledges-as-emancipation" (*ibidem*, p. 441).[25]

In terms of this essay, two elements of Santos' formulation emerge as crucial. On the one hand, emancipation works not through regulation but through dialogue and persuasion —thus purging power from emancipatory democracy. Secondly, there is a need for multiple versions of emancipatory knowledge suitable, respectively, to the hegemonic common sense prevailing at each site of power. In short, emancipatory democracy embraces fragmentation and persuasion —thus, largely, banishing the state from the core and relegating it to periphery of democracy. While postmodern *legality*, to which we now turn, may not be indispensable to emancipation, it is the route that Santos emphasizes and, of course, the route directly relevant to socio-legal scholarship and thus to this essay.

six "forms" power. Thus, unequal power relations are found not only in state, that is the "citizenplace", but also in the household, workplace, marketplace —as well as being globalized in the worldplace. Similarly, the forms of power vary from site to site. It is, therefore, not sufficient that emancipation address "domination" —the form of power exercised by the state. It is also necessary to counter those forms of power characteristic of the other sites —for example, patriarchal power in the household, capitalist exploitation in the workplace, and so on (1995: Chapter 6).

25 As he goes on to specify, emancipation depends for its success on the "capacity to organize in constellations of emancipatory social agencies, that is, in constellations of equal exchanges against constellations of powers, in constellations of radical democratic legalities against constellations of despotic legalities, in constellations of emancipatory knowledges against constellations of regulatory knowledges" (Santos, 1995: p. 446).

2. *Postmodern Legality*

Postmodern legality seeks to remedy those elements of the classical canon that Santos deems inimical to emancipation. He targets the privileging of state law, the search for coherence, and the reliance on regulation. In their place, he proposes a de-centered legality, which substitutes mediation for regulation and nurtures reciprocity and mutual dependence. The emancipatory logic behind Santos vision of postmodern legality is consistent with, and prefigured by, his theory of postmodern democracy. Briefly put, his objective is to purge power from legal exchanges by making them responsive to society's multiple subjectivities.

At first glance, it might seem that Santos' postmodern legality is indistinguishable from Nonet and Selzick's responsive law. Indeed, to Santos postmodern legality builds on a definition of law that is compatible with the internal critique of classical legality and perhaps with the classical canon itself.

"[L]aw is a body of regularized procedures and normative standards, considered justiciable in any group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force" (1995: p. 429).

By thus incorporating "regularized procedures and normative standards," Santos adopts one of the cornerstones of classical legality. Moreover, he explicitly recognizes legal formalism as necessary in order to "guarantee the security and certainty (*ibidem*, p. 240). Note also that by identifying legality with a variety of normative standards —those, that is, that are developed "in any group", Santos begins to sound, as he acknowledges, much like a traditional legal pluralist.

However, once Santos introduces the state into his analysis, the radical character of his postmodern legality becomes immediately clear —although here, too, in a subtle and elusive way. Santos is intent on uncoupling law from the state, because he deems state law doubly at odds with his emancipatory objectives. To begin with, state law has a unique potential for colonizing other legal sites.

> On the one hand, it tends to be more spread out across social fields than any other legal form... On the other hand, since it is the only self-reflexive legal form, that is, the only legal form that thinks of itself as law, territorial state

law tends to conceive of the legal field as exclusively its own, thus refusing to recognize its operations as integrating broader constellations of laws (1995: p. 429).

What makes this imperialism of state law so dangerously problematic to Santos is that, although the rights embedded in state law promote democratic values, state law is compromised beyond redemption by its inevitable reliance on regulation and thus on power.

Moreover, for all of his willingness to acknowledge norms, forms, and regularity, Santos' postmodern legality is, above all, protean and centrifugal. Put another way, he wants to move from a single legality to multiple, concurrent, and heterogeneous legalities intermingling with one another. Santos argues that such multiple legalities can be, if properly constructed, "constitutive of an emancipatory legal practice in a radically democratic, socialist society" (1995: p. 240). However, the emancipatory potential of multiple legalities will be realized only if legality is:

— Non-professional, so that "the relationship between power and knowledge is strikingly transparent" (*ibidem*, p. 242).
— Accessible, "both in terms of its costs in money and time, and in terms of the general pattern of social interaction" (*idem*).
— Participatory, which means "parties present their own cases" (*ibidem*, p. 244).
— Consensual, meaning that conflict resolution is through "mediation" rather than through the intervention of regulatory authority (*idem*).

With all these elements in place, postmodern legality can and should "organize autonomous social action by the popular classes against the conditions of reproduction imposed by capitalism" (*ibidem*, p. 238).

The result is a radical break between Santos' postmodern legality and even the nethermost iterations of classical legality. With respect to legal pluralism, Santos contrasts its composition of "different legal orders... conceived as separate entities coexisting in the same political space" (1995: p. 473) with his own formulation of "different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions" (*idem*). While he does not address, Nonet and Selznick's responsive law, the contrast is once again readily apparent. To begin with,

responsive law would seem to be much more about recognizing "different legal orders... conceived as separate entities" than about "different legal spaces superimposed, interpenetrated and mixed". In addition, the state would seem to remain very much at the core of responsive law. Indeed, it is the state, which is charged with the responsibility of making the law expansively responsive. Moreover, the means to that end is a generally applicable system of dispute resolution that lends coherence and thus legitimacy to the legal process. Finally, while Nonet and Selznick would no doubt applaud an accessible system, there is no reason to believe that they would purge the system of professional advocacy or of non-consensual means of resolving disputes.

3. *Interpretive Socio-legal Research*

Postmodern socio-legal theory is rooted in assumptions about the pernicious interaction between classical legality and social, political and economic inequality —the tendency, that is, of state law to affirm and, in affirming, to confer legitimacy on unequal exchange relationships. A substantial and ever growing body of socio-legal empirical findings, drawn largely from the interpretivist research on dispute resolution, lends credence to this distrust of state law. Portions of the empirical research also seem consistent with Santos' claims that a truly postmodern legality could contribute to emancipation. Oddly, however, these two literatures —the theoretical and the empirical, while sharing a postmodern sensibility and coming to congruent conclusions, seem oddly oblivious to one another. Accordingly, one objective of what follows is to explore the synergy that I detect between postmodern legal theory and the findings that emerge from interpretive socio-legal dispute resolution research.

In what sense are these two literatures postmodern? To begin with, they both extend the boundaries of legality beyond state law into the "everyday life" of society, and they identify a "constitutive" role for law in society. Sarat and Kearns (1995) distinguish the constitutive role of law from its instrumental role as follows:

> Instrumentalists... treat rules as tools used (or avoided) in the everyday world to facilitate the accomplishment of various goals, whose origins are substantially independent of law itself (*ibidem*, p. 25).

> Constitualists... [are] interested in the ways in which the law has generally shaped the beliefs, attitudes, and understandings of legal subjects, in the ways they imagine their own capacities and their relations with one another (*ibidem*, p. 41).

In other words, the instrumental conception is top down and legality is identified with its material consequences —in terms of resources, sanctions, compliance and so forth. Conversely, to think of legality constitutively is to focus on its cultural resonance at the grassroots —asking how people "experience and interpret law in the context of their daily lives" (Ewick and Silbey, 1998: p. 33).

In locating legality in society, the constitutive perspective identifies as legal social practices that are not included within the classical conception of a hierarchical, autonomous and coherent system of objectively ascertainable positive law. Instead, constitualists offer a de-centered, socially and subjectively constructed understanding of legality —legality, which is by definition subject to varying interpretations according to time, place, and situation.

This broadening of the concept of legality is both descriptive and normative. First and foremost, interpretive socio-legal research is dedicated to empirical observation and, as such, has revealed legality at work in ways and in venues, which are excluded from classical and even sociological legal inquiry. These empirical findings have normative implications, however —demonstrating that legality contributes to inequality through hegemony as well as through law enforcement. The documentation of legal hegemony has, in turn, led to a search for counter-hegemony and, thus, to a clear convergence with the emancipatory aspirations driving Santos' postmodern legal theory.

Insofar as socio-legal empirical research is focused on hegemony and counter-hegemony, it follows that it is necessary to probe legality's subjectively constructed, multiple meanings. In other words, it is necessary to develop a research agenda around such questions as:

> How do people experience and interpret law in the context of their daily lives? How do commonplace transactions and relationships come to assume or not assume a legal character? And in what ways is legality constituted by these popular understandings, interpretations, and enactments of law (Ewick and Silbey, 1998: p. 33).

It also follows that to answer such questions, it is necessary to employ research methods that provide access to legal consciousness. Accordingly, socio-legal scholars have turned to qualitative, ethnographic research methods developed and long dominant among legal anthropologists.[26] Some scholars challenge the empirical validity of this interpretive research. However, Sarat and Kearns argue that these studies are "decidedly empirical in character, if by this one means they will be grounded in extensive observations, rigorously assembled —and imaginatively 'read', of course" (1995: p. 57).

A substantial body of interpretive research reveals pervasively hegemonic legal consciousness. Consider, for example, Carol Greenhouse, Barbara Ynvgvesson, and David Engel's research into the ways in which legality in three small towns served to discredit outsiders and legitimate their unequal exchanges with insiders. It is not only that the outcomes of formal legal process favor insiders —in a manner reminiscent of Galanter's findings about the haves and the have-nots. More telling with respect to the construction of hegemony, litigation by outsiders was taken as evidence of litigiousness and, thus, of a threat to the values that sustained the community. According to Greenhouse:

> My major ethnographic argument is that, although people claim to evaluate the newcomers to their town in terms of their reputation as conflictual and litigious, in fact, their ideology works the other way around. Local understandings of conflict and the court depend on prior assessment of the town's social grounds and its patterns of change (1994: p. 93).

Similarly, Engel reports that the law reinforced the symbolic marginality of outsiders. They were stigmatized as litigious for pressing personal injury claims while insiders who took their contractual disputes to courts were portrayed as properly vindicating their rights. Put another way, cultural insiders were deemed entitled to seize the legal initiative. In so doing, they were able to convert their pursuit of personal advantage

26 It is important to acknowledge that the tradition of ethnographic research into the law long preceded the development of a socio-legal research community and, needless to say, the introduction of postmoderrn socio-legal inquiry. It began among anthropologists trying to locate and understand law among indigenous peoples (*e. g.* Malinowski, 1989 and Gluckman, 1967) and was subsequently employed by urban legal ethnographers elsewhere (*e. g.* Liebow, 1967).

into a public service to the community. Conversely, cultural outsiders were only entitled to play defense. When outsiders chose to play offence they were confronted with a combination of stigma and resistance that regularly resulted in unsatisfactory out-of-court settlements (1994, p. 42) —thus conferring a further benefit on insiders.[27]

Recently, interpretive socio-legal research has revealed a more complex picture with counter-hegemonic possibilities. Both the complexity and its counter-hegemonic implications emerge most systematically in Ewick and Silbey's study of law in everyday life. One might say that Ewick and Silbey begin where Greenhouse, Ynvgvesson, and Engel leave off. Again, legal consciousness reveals the hegemonic properties of law —but not *only* hegemonic properties. Instead, Ewick and Silbey discover "polyvocality" in the stories they collect about the infusion of the law into everyday life.

"The polyvocality of legality, that is, the varieties of legal consciousness and multiple schemas of and by which it is constituted, permit individuals wide latitude in interpreting social phenomena, while at the same time still deploying signs of legality" (1998: p. 52).

This means not only that legal consciousness varies from individual to individual, group to group, time to time, and so forth, but that a postmodern melange of different and contradictory strains of legal consciousness regularly coexist with one another.

More explicitly, Ewick and Silbey identify in the stories told by their respondents three competing patterns of legal consciousness —with varying implications for hegemony and counter-hegemony.

- *Before-the-law* narratives are unequivocally hegemonic. What emerges in these narratives is a sense of the majesty of the law and thus the inappropriateness of questioning the law's judgments.
- *Against-the-law* narratives are, in contrast, unequivocally counter-hegemonic. In these stories, law is readily seen as an instrument

27 For an earlier exposé of a different kind of hegemonic double bind of rights claiming by outsiders, see Bumiller's research on anti-discrimination law (1988) and on violence against women (1990). The assertion of rights by outsiders can expose them to retaliation while at the same time requiring them (paradoxically) to take on a negative self-image as victims.

of domination, an enemy of justice, and thus, deserving of resistance and subversion.

- *With- the-law* narratives are much more ambiguous with respect to hegemony. In contrast to hegemonic narratives, law is not "discontinuous from everyday life and its concerns... [but] enframed by everyday life" (1998: p. 48).

Nonetheless, it remains one thing to uncover and identify *non*-hegemonic strands of legal consciousness and quite another to explain, in the spirit of emancipation, how to foster a counter-hegemonic legal consciousness. Ewick and Silbey move in this direction and do so in ways consistent, as I will argue, with Santos' vision of an emancipatory postmodern legality.

In Ewick and Silbey's analysis, *with the law* awareness emerges as a transitional step between the hegemonic and counter-hegemonic. Their evidence suggests that conversion is a developmental process, which is as yet only partially comprehensible. The first step away from a hegemonic legal consciousness begins with the recognition that legality is inextricable from strategic action.

"Resistance recognizes that legality's power rests on its ability to be played like a game, to draw from and contribute to everyday life, and yet exist as a realm removed and distant from the commonplace affairs of particular lives" (Ewick and Silbey, 1998: p. 234).

While, however, a necessary step toward resistance, this demystification of legality is not sufficient. Nor is it sufficient to believe that the game mostly rewards society's most efficacious actors and thus tends to replicate and, indeed, contribute to society's unequal distribution of power. *With the law* awareness can simply result in efforts by those able to do so to take advantage of the available opportunities in the manner widely attributed to savvy lawyers.[28]

28 To be sure, Ewick and Silbey note some regret among those who perceive that they are manipulating legality for personal advantage and thus undermining the ideals that they associate with legality. On the one hand, they defend their behavior in terms of the "the value of participation and agency" (1998: p. 227). On the other hand, they believe that "law... should be (perhaps is) more than that" (*ibidem*, p. 229). Thus, their strategic use of the law is accompanied by a certain regret that the law does not live up to its own ideals.

On the other hand, those who deem themselves unable or unwilling to take strategic advantage of legality —those alienated from it— tend to develop an *against the law* consciousness. "To state the obvious," according to Ewick and Silbey, "those who are most subject to power are most likely to be acutely aware of its operation" (1998: 235). Gilliom's research (in press) on the reaction of welfare recipients in the Appalachian region of Ohio sheds additional light on the conversion process. These women develop a culture of resistance against the extensive surveillance by welfare officials —a culture of resistance that is very much akin to Ewick and Silbey's *against the law* legal consciousness. Driven by the needs of the their children, they feel altogether justified in evading requirements that deny them the modest sources of supplementary income available to them. Consider the following exchange between an interviewer and one of Gilliom's respondents.

> c: You said that sometimes you cut hair, and sometimes you help your brother wallpaper. And you know all these other people who have to do something to make ends meet when they are on ADC. How do you feel about that?
>
> d: I think as long as someone is using what they are doing for their home or they are buying something that their kids need, I don't see anything wrong with it. If they are going out and they are doing it and they are boozing it up and they are using drugs, I think that's a shame... (for) me it always went to my daughter. It always went into the house or into my car or my gas tank or maybe for something that Kelly needs that she would not have otherwise (Gilliom, in press, Chapter 4).

As Gilliom points out, this is not about legal rights but about a sense of entitlement to craft survival strategies. Because the law works against these most basic needs, they are, in effect, *against the law*.[29] Similarly, Ewick and Silbey mention not only their own respondents but also the Bedouins in Israel, who Shamir discovered were subjected to the law but were not subjects of it (1998: p. 237).

There is, however, one final twist necessary to brings us back to Santos' search for an emancipatory legal consciousness. Strictly speaking,

29 It is, however, interesting to point out that much like Ewick and Silbey's narratives, so too do Gilliom's reveal some regret at evading the law overridden by a sense of agency.

while *against the law* narratives are counter-hegemonic, they result, not in a counter-hegemonic *legal* consciousness, but in the sense of an irreconcilable conflict between legality from emancipation. On the other hand, Ewick and Silbey recognize that the kind of postmodern legality that Santos proposes can, just as he argues, nurture a counter-hegemonic *legal* consciousness.

"To the degree that people tell stories that make visible and explicit the connections between particular lives and social organization, they may be liberatory" (p. 244).

Lucie White came to similar conclusions in her research on the "Mrs. G's" battle with welfare officials. White calls attention to the importance of reversing the way that "cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups" (White, 1990: p. 4). She calls instead for legal process to provide space for the defiant articulation of "emancipatory language practice" (*ibidem*, p. 50). Accordingly, the final message of this research, as I understand it, is that a counter-hegemonic *legal* consciousness in only possible within a Santos like postmodern legality—that is a legality which is non-professional, accessible, participatory, and consensual.

V. CONCLUSIONS

This paper began with a paradox. Although socio-legal scholarship has been much concerned with the relationship between law and democracy, there has been virtually no research on elections —democracy's lifeblood. The explanation for this intellectual marginalization of elections has its roots in classical political theory and jurisprudence. According to the classical canon, electoral and legal accountability are mutually constitutive elements of democracy. While democracy without law and law without democracy are conceivable, only in combination are they satisfactory. There is, in short, a longstanding tradition in legal scholarship of distinguishing electoral accountability from legal accountability and focusing on the former largely to the exclusion of the latter.

Socio-legal scholarship builds on this foundation —albeit in revisionist ways leading in directions that are distinctly at odds with much of the classical canon. At issue is not so much whether there are, or are not,

structural affinities between legality and democracy. Instead, the dispute between classical and socio-legal scholarship is over the meaning of legality and democracy as well as over methodological differences about the nature of scholarly research. Thus, classical scholarship celebrates an autonomous, top-down conception of law for its capacity to protect electoral accountability, insulate individuals from the unmediated power of the state and, in general, to keep political democracy within its proper boundaries. In contrast, socio-legal scholarship aspires to more robust forms of democracy protected by, and contributing to, a politically, socially and culturally engaged legality. In addition, whereas classical legal scholarship focuses on rules, doctrine, legal reasoning, and jurisprudence, socio-legal scholarship introduces empirical social science and social theory into the study of legality.

There are, however, divisions within socio-legal scholarship itself —thus, resulting in two challenges to the classical canon. The more cautious of these challenges emerged from conventional social science research revealing that legal outcomes tended to reflect and reinforce social, economic and political inequality. These findings cast disabling doubt on the classical vision of an autonomous law as a guarantor of political democracy —suggesting instead that the legality and politics were intertwined and interdependent. In the legal process as elsewhere, the "haves" regularly come out ahead, as Marc Galanter put it many years ago. By thus blurring the boundary between law and politics, this research suggested that in order to construct an adequate account of law it was necessary to incorporate politics, rather than exclude them. In turn, this recognition led socio-legal scholars to document efforts to deploy legality politically on behalf of economic and social democracy. The resultant research on various litigation campaigns as well as the role of legality in the welfare state revealed something of mixed picture —in which the legality could under some circumstances enhance equality and, thus, contribute to social and economic democracy.

The second and distinctly more radical challenge of socio-legal scholarship grows out of postmodern theory and ethnographic empirical research. The result is to further destabilize classical conceptions democracy and legality and to further distance socio-legal studies from electoral accountability. To begin with, postmodern socio-legal theory rejects both political democracy and state law, because they both rely

on inherently coercive top down power —offering instead emancipatory visions of legality and democracy. According to this way of thinking, law and democracy are emancipatory only insofar as they are rooted in participatory and reciprocal grassroots regimes. Largely independent of these theoretical developments, interpretive socio-legal researchers have traced the workings of legality into the everyday lives of individuals and social groups. In so doing they have discovered pervasively hegemonic strains within legal consciousness. They have also discovered and to some extent identified circumstances under which counter-hegemonic consciousness emerges. There is, finally, a striking consonance between the preconditions for counter-hegemony and the kind of legal and political institutions that are emancipatory, according to postmodern legal theory.

VI. REFERENCES

BACHRACH, Peter and BARATZ, Morton, 1970, *Power and Poverty*, New York, Oxford University Press.

BENTLEY, Arthur F., 1908, *The Process of Government: A Study of Social Pressures*, Chicago, University of Chicago Press.

BICKEL, Alexander M., 1962, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis, Bobbs-Merrill.

———, 1975, *The Morality of Consent*, New Have, Yale University Press.

BUMILLER, Kristin, 1988, *The Civil Rights Society: The Social Construction of Victims*, Baltimore, Johns Hopkins Press.

———, 1990, "Fallen Angels: The Representation of Violence Against Women in the Legal Culture", *International Journal of Sociology of Law*, 18 (2).

CAHN, Edgar S. and CAHN, Jean C., 1964, "The War on Poverty: A Civilian Perspective", *Yale Law Journal*, 73.

CANON, Bradley C. and JOHNSON, Charles A., 1999, *Judicial Policies: Implementation and Impact*, 2nd. ed., Washington, Congressional Quarterly Press.

COUTIN, Susan Bibler, 2001, "Cause Lawyering in the Shadow of the State: A U.S. Immigration Example", in SARAT, Austin and SCHEINGOLD, Stuart (eds.), *Cause Lawyering and the State in a Global Era*, New York, Oxford University Press.

DAHL, Robert A., 1961, *Who Governs? Democracy and Power in an American City*, New Haven, Yale University Press.

EWICK, Patricia and SILBEY, Susan S., 1998, *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press.

FULLER, Lon L., 1964, *The Morality of Law*, New Haven, Yale University Press.

GALANTER, Marc, 1974, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", *Law and Society Review*, 9 (Fall 1974) 1.

———, 1983, "The Radiating Effects of Courts", in BOYUM, Keith D. and MATHER, Lynn (eds.), *Empirical Theories of Courts*, New York, Longman.

GILLIOM, John, 2001, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy*, Chicago, The University of Chicago Press.

GLUCKMAN, Max, 1967, *The Judicial Process Among the Barotse of Northern Rhodesia*, 2nd. ed., Manchester, Manchester University Press.

GREENHOUSE, Carol J. *et al.*, 1994, *Law and Community in Three American Towns*, Ithaca, Cornell University Press.

GROFMAN, Bernard and LIJPHART, Arend (eds.), 1986, *Electoral Laws and Their Political Consequences*, New York, Agathon Press.

HANDLER, Joel, 1966, "Controlling Official Discretion in Welfare Administration", *California Law Review*, 54, 479.

——— and HOLLINGSWORTH, Ellen Jane, 1971, *The "Deserving Poor"; A Study of Welfare Administration*, Chicago, Markham.

HART, H. L. A., 1961, *The Concept of Law*, London, Oxford University Press.

HELD, David, 1995, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge, England, The Polity Press.

LIEBOW, Elliot, 1967, *Tally's Corner; A Study of Negro Streetcorner Men*, Boston, Little, Brown.

LOWI, Theodore J., 1979, *The End of Liberalism: The Second Republic of the United States*, 2nd. ed., New York, W. W. Norton.

MALINOWSKI, Bronislaw, 1989, *Crime and Custom in Savage Society*, Totowa, N. J., Rowman & Littlefield.

MEILI, Stephen, 1998, "Cause Lawyers and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil", in SARAT, Austin and SCHEINGOLD, Stuart (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, New York, Oxford University Press.

MILLS, C. Wright, 1957, *The Power Elite*, New York, Oxford University Press.

MCCANN, Michael, 1994, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago, University of Chicago Press.

——— and SCHEINGOLD, Stuart, "Rights in Law", *Encyclopedia of the Behavioral and Social Sciences*, in press.

MOUFFE, Chantal (ed.), 1992, *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, London, Verso.

MUIR, William K., 1967, *Prayer in the Public Schools: Law and Attitude Change*, Chicago, University of Chicago Press.

OLSON, Susan, 1984, *Clients and Lawyers: Securing the Rights of Disabled Persons*, Westport, Conn., Greenwood Press.

PELTASON, Jack W., 1955, *Federal Courts in the Political Process*, Studies in Political Science, PS/25, New York, Random House.

PIVEN, Frances Fox and CLOWARD, Richard, 1972, *Regulating the Poor: The Functions of Public Welfare*, New York, Vintage.

ROSENBERG, Gerald N., 1991, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago, University of Chicago Press.

ROSENBLUM, Víctor G., 1955, *Law as a Political Instrument*, Studies in Political Science PS/16, New York, Random House.

SANTOS DE SOUSA, Boaventura, 1995, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge.

SARAT, Austin, 1998, "Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering against Capital Punishment", in SARAT, Austin and SCHEINGOLD, Stuart (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, New York, Oxford University Press.

——— and KEARNS, Thomas R., 1995, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life", in SARAT, Austin and KEARNS, Thomas R., *Law in Everyday Life*, Ann Arbor, University of Michigan Press.

SCHEINGOLD, Stuart A., 1988, "Constitutional Rights and Social Change: Civil Rights in Perspective", in MCCANN, Michael W. and HOUSEMAN, Gerald L., *Critical Perspectives on the Constitution*, Little, Brown.

SCHATTSCHNEIDER, E. E., 1960, *The Semi-Sovereign People*, New York, Holt, Rinehard and Winston.

SELZNICK, Philip, 1962, "Natural Law and Sociology", *Natural Law and Modern Society*, Cleveland, World Publishing.

SELZNICK, Phillip and NONET, Phillipe, 1978, *Law and Society in Transition: Toward Responsive Law*, New York, Harper.

SHAMIR, Ronen and ZIV, Neta, 2001, "State-Oriented and Community Oriented Lawyering for a Cause: A Tale of Two Strategies", in SARAT, Austin and SCHEINGOLD, Stuart (eds.), *Cause Lawyering and the State in a Global Era*, New York, Oxford University Press.

SILVERSTEIN, Helena, 1996, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement*, Ann Arbor, University of Michigan Press.

THOMSON, Alan, 1992, "Foreward: Critical Approaches to Law: Who Needs Legal Theory?", in GRIGG-SPALL, Ian and IRELAND, Paddy, *The Critical Lawyers' Handbook*, London, Pluto Press.

TRUMAN, David, 1951, *The Governmental Process: Political Interests and Public Opinion*, New York, Knopf.

UNGER, Roberto Mangabeira, 1976, *Law in Modern Society: Toward a Criticism of Social Theory*, New York, Free Press.

VOSE, Clement E., 1959, *Caucasions Only: The Supreme Court, The NAACP, and the Restrictive Covenant Case*, Berkeley, University of California Press.

WALZER, Michael, 1992, "The Civil Society Argument", in MOUFFE, Chantal (ed.), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, London, Verso.

WEAVER, Suzanne, 1977, *The Decision to Prosecute: Organization and Public Policy in the Antitrust Division*, Cambridge, MIT Press.

WHITE, Lucie, 1990, "Subordination, Rhetorical Survival Skills, and Suday Shoes: Notes on the Hearing of Mrs. G.", *Buffalo Law Review*, 38 (1 Winter).

WOLIN, Sheldon, 1961, *Politics and Vision: Continuity and Innovation in Western Political Thought*, London, George Allen and Unwin.