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DANS **DROIT ET SOCIÉTÉ** 2003/1 n°53 , PAGES 137 À 163

ÉDITIONS **ÉDITIONS JURIDIQUES ASSOCIÉES**

ISSN 0769-3362

ISBN 2275023542

DOI 10.3917/drs.053.0137

Date de mise en ligne : 01/03/2008

Article disponible en ligne à l'adresse

<https://shs.cairn.info/journal-droit-et-societe1-2003-1-page-137?lang=en>



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Droit et Société 53-2003
(p. 137-161)

Téléchargé le 05/06/2016 sur https://shs.cairn.info (IP: 216.147.137.89)

Résumé

Pouvoir symbolique sans violence symbolique ? Analyse critique des *Legal Consciousness Studies* aux États-Unis

Dans cet article, l'auteur analyse la réception d'un courant théorique particulier par la sociologie américaine du droit, celui reconnu dans le mouvement *Law and Society* sous l'intitulé *Legal Consciousness Studies*. Il avance que l'ambiguïté théorique qui caractérise ce courant provient de ce qu'il est inspiré par des théories sociales incompatibles entre elles dans la mesure où elles sont basées sur des présupposés différents quant aux rapports sociaux. Pour dépasser cette confusion, le concept d'efficacité symbolique utilisé dans ces études est analysé et confronté à la notion de pouvoir symbolique chez Bourdieu.

Culture juridique - Pratique sociale - Sociologie comparée du droit - Théorie sociale - Violence symbolique.

Summary

The reception of a constructive social theory in the American sociology of law is analyzed in this paper. To do so, it focuses on a specific and celebrated trend in the *Law and Society* movement here termed *Legal Consciousness Studies*. It is argued that there is a theoretical ambiguity in these studies that follows from the fact that they adhere to different currents of social theory, which are irreconcilable to the extent that they are based on different presuppositions about social relations. To illustrate this ambiguity, the concept of symbolic efficacy employed in these studies is analyzed and contrasted to Pierre Bourdieu's idea of symbolic power.

Comparative sociology of law - Legal culture - Social practice - Social theory - Symbolic violence.

L'auteur

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Parmi ses publications :

- *La eficacia simbólica del derecho*, Bogotá, Ediciones Uniandes, 1994 ;
- *El caleidoscopio de las Justicias en Colombia* (avec B. de Sousa Santos), Bogotá, Ediciones Uniandes, Siglo del Hombre, 2001 ;
- *Sociología jurídica*, Bogotá, Universidad Nacional de Colombia, 2001.

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During recent decades, social theory has struggled with the attempt to overcome both subjectivist and structuralist conceptions. In this effort actors have been understood to construct social reality through their practices in such a way that they are, at the same time, socially constructed. Neither subjects nor objects exist prior to this work of construction ; the nature of reality is therefore always symbolic, discursive. These ideas have been accorded a warm reception in the *Law and Society* (L&S) movement, and, in particular, in a current of thought within the movement that is interested in the study of legal consciousness in the everyday life of social actors, here termed *Legal Consciousness Studies* (LCS). In this paper I propose to analyze some aspects of the reception of that social theory in these sociolegal studies. The hypothesis that I want to demonstrate is that, despite the importance of their contributions to understanding of law, there is a theoretical ambiguity in these studies. This follows from the fact that they adhere to different currents of social theory, which are irreconcilable to the extent to which they are premised on different presuppositions about social relations.

To illustrate this ambiguity I will contrast the way that the concept of symbolic efficacy is employed in the LCS and in the work of Pierre Bourdieu, who is frequently cited by the new sociolegal studies as an authorized theoretical reference. I will analyze, first, some basic concepts that underpin the sociolegal studies considered here ; then, I turn to an explication of some notions related to the idea of the symbolic in law ; finally, I concentrate on a theoretical comparison between Bourdieu and the Legal Consciousness Studies. My hope is to contribute to the French debate on both Bourdieu's sociolegal theory and the sociology of law in general.

I. Legal Consciousness Studies

At the end of the 1980s some prominent members of Law & Society began to reconceptualize its project. The aim was to achieve greater critical commitment in opposition to the predominant position, which, according to the Critics, was politically and epistemologically perverted through the prevalence of an institutional viewpoint and a public policy bias. This redirection revived the old realist purpose to attain an empirical sociology of law that was, at the same time, critical. The studies encompassed in this project of renewal can be termed « Legal Consciousness Studies » (LCS). They include for the most part those authors referred to in McCann and March (« Law and Everyday Forms of Resistance »)¹, but they include also part of that group of sociolegal researchers - especially what Trubek and Esser have named the « Cultural Anthropology » tendency - partially linked to the Amherst Seminar in

1. Michael McCANN and Tracy MARCH, « Law and Everyday Forms of Resistance : A Socio-Political Assessment », in Austin SARAT and Susan S. SILBEY (eds.), *Studies in Law, Politics, and Society*, London, JAI Press, 1995. These authors are : Patricia EWICK and Susan S. SILBEY, « Conformity, Contestation and Resistance : An Account of Legal Consciousness », *New England Law Review*, 26 (3), 1992 ; Sally E. MERRY, *Getting Justice and Getting Even : Legal Consciousness among Working-Class Americans*, Chicago, University of Chicago Press, 1990 ; Austin SARAT, « Off to Meet the Wizard : Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law », *Law & Social Inquiry*, 15 (1), 1990 ; Lucie WHITE, « Subordination, Rhetorical Survival Skill, and Sunday Shoes : Notes on the Hearing of Mrs. G. », *Buffalo Law Review*, 38, 1990 ; Barbara YNGVESSON, *Virtuous Citizens, Disruptive Subjects : Order and Complaint in a New England Court*, New York, Routledge, 1993.

Massachusetts. All these authors base their work in a *constitutive theory* of social action and beginning from that point attack instrumentalist visions of law. In this sense they are not too dissimilar from the Critical Legal Theorists, although LCS distanced itself from these theorists in its vindication of empirical investigation. It is worth noticing that my critique to Legal Consciousness Studies does not include all uses of constitutive theory in sociolegal studies. Race Theory and Feminist Theory, for instance, have very often a different understanding of *constitutive theory*. There are some legal theorist who apply the *constitutive theory* to the legal field in rather different terms, for instance John Brigham and Henry Stuart. I will develop my analysis on these Legal Consciousness Studies mostly in very general terms, understanding that they belong to what is today a dominant trend in sociolegal studies in USA. I am aware of the fact that given this level of abstraction my critique is not suitable to all authors interested on legal consciousness.

The legal phenomenon is seen in LCS as a constitutive element of social reality and not as an official institutional apparatus destined to intervene in this reality. According to Ewick and Silbey : « The ways in which the law is experienced and understood by ordinary citizens as they choose to invoke the law, to avoid it, or to resist it, is an essential part of the life of the law ². » The attention of the investigator is directed toward those everyday concrete social practices in which legal rules are perceived as constitutive elements of the reality. This emphasis on the routine instead of the exceptional, on the social in place of the institutional, and on mental representations (the symbolic worldview) instead of a coercive legal system (the instrumental vision) are common elements in this change of optic.

The concept of legality is central to this perspective. As Patricia Ewick and Susan Silbey point out :

« Legality is an emergent feature of social relations rather than an external apparatus acting upon social life. As a constituent of social interaction, the law-or what we will call legality - embodies the diversity of the situations out of which it emerges and that it helps structure ³. »

Three more or less scattered premises can be detected in this reconfiguring of Law and Society : first, a defense of empirical research without this implying the adoption of positivist postulates ; second, a progressive political position in favor of weak or marginalized social actors ; and finally, a perspective that is more open to exploring the complexities of the relationship between law and social change from a constructivist perspective.

In the first place, LCS was opposed to the crude positivism of the early years of the Law and Society movement. There is no ob-

2. Patricia EWICK and Susan S. SILBEY, « Conformity, Contestation and Resistance : An Account of Legal Consciousness », *op. cit.*

3. Patricia EWICK and Susan S. SILBEY, *The Common Place of Law : Stories from Everyday Life*, Chicago, University of Chicago Press, 1998, p. 17.

jective truth ; i.e. there is no truth independent of the knowing subject. The significance of knowledge is socially constructed in the relationship between the observer and the observed. However this proposition has provoked great debate in the North American sociology of law, particularly centered around the Amherst Seminar. Between 1980 and 1995, Amherst, Massachusetts, was home of a discussion group in sociolegal theory called the « Amherst Seminar on Legal Ideology and Legal Process ». For over a decade the most important intellectuals in North American and European sociology of law were invited to the seminar. There was some affinity between the seminar and the LCS. The seminar's aim was to reconstruct an empirical sociology that was at the same time critical. In their evaluation of the seminar's achievements Trubek and Esser state that although the seminar participants were able to leave behind a deterministic and instrumentalist view of legality, the attachment to a conception of empirical science was unchanging, and that created important theoretical problems⁴. Most of the scholars in the Amherst Seminar taught sociolegal research could provide new visions or interpretations of legal phenomena perhaps more adequate, but without the implication of validity or truth being claimed for them. Empirical investigation and the research methodology of the social sciences are not sacrificed and in this regard the empiricist imperative maintains all the vigor of the Law & Society tradition - although the objectivist postulates typical of positivistic social science are renounced. So, its advocates champion a postempiricism that does not conceive of science as authoritative or conclusive knowledge, but one that « continues to keep alive the hope that science can serve as a tool of persuasion, albeit a limited one, in a world with "a multitude of values, knowledge perspectives, and criteria" »⁵.

Empirical research thus changes its subject of analysis in this new version of Law & Society. LCS react against a research tradition dedicated to the study of how legal institutions operate, and, in particular, the courts. LCS also interested itself in judicial work but not from the perspective of the judge or the judge's decision, as the earlier work in Law & Society had done. Instead they examine it from the perspective of the participating actors. In McCann's words, they countered the top-down approach with a « bottom-up jurisprudence »⁶. In these new micro-cultural spaces, ethnographic and anthropological research acquires an overwhelming importance that contrasts with other approaches more concerned with the structural elements of class or hegemony.

In the second place, LCS identified themselves politically with the interests of the subjects of their research - the marginalized, the minorities, the excluded, etc. - and then attempted to imagine alternative social forms through the use of law. The debate that arose inside the Critical Legal Studies (CLS) group about the con-

4. David M. TRUBEK and John ESSER, « "Critical Empiricism" in American Legal Studies : Paradox, Program or Pandora's Box ? », *Law and Social Inquiry*, 14 (1), 1989, p. 3-52. For the complete debate, see *Law and Social Inquiry*, 15 (1), 1990.

5. Austin SARAT, « Off to Meet the Wizard : Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law », *op. cit.*

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

venience of using the law as an instrument of social emancipation is resolved affirmatively here. That is LCS recognizes the possibilities of struggle against hegemony without forgetting that the law can, *de facto*, work in some cases as an instrument of social domination. In this regard the understanding of the relationship law/social change is here much more complex and elaborated than the approach found in Critical Legal Studies.

In the third place, from its origins, those working in LCS joined the Critics in its rejection of the *gap studies* and, in general, ranged themselves against the instrumentalist views of law predominating in Law & Society during the 1970s. In contrast to these approaches, they insisted on the indeterminate character of law. Legal norms give way to multiple, disparate and variable social practices that can only be made sense of by investigating empirically the legal consciousness of concrete social actors. This research shows how social actors, despite being limited by social structures, possess a significant creative, constructive capacity. While the notion of determination or lack thereof in critical studies leads to the structuralist-Marxist debate on the relations between the state/law and the economy, in LCS the same theme directs emphasis toward the cultural and subjective elements of political domination and thus to the adoption of an « interpretive » social theory. Following this perspective, legal consciousness is part of a reciprocal process in which the significance attributed by individuals to their world, and thus to law, « become repeated, patterned and stabilized, and those institutionalized structures become part of the meaning systems employed by individuals »⁷. If legality is a dynamic process of social construction, the instrumentalist approach and determinate character of law lose all explanatory power. In its place arises a concept of law endowed with contingent outcomes that derive from the interaction among individuals and institutions.

II. Anti-Structuralism and the Critical Stance

Studies of legal consciousness bring together, with variants, essential parts of both the « Law & Society » and the critical traditions. From Law & Society they have taken the idea that empirical research is essential to make sense of the way that law functions in the society. From the critical tradition they have adopted the aspiration that sociolegal studies should serve not only to describe how law operates in society but also and above all to contribute to the transformation of society and the defense of the excluded. In relation to this latter aspect, as I mentioned above, these studies have made extremely important contributions, especially with regard to the complexity of individuals' legal strategies, whether of accommodation or resistance. However, despite their critical ambi-

7. The cultural emphasis in these studies is notorious. On this point see *ibid.*

tions, a reading of the LCS leave, from the political point of view, a nostalgic taste of lost revolutionary fervor - recognizing that in this they are not alone - and, from the theoretical standpoint, the sensation of « rigor without imagination », to use one of Pierre Bourdieu's expressions. This despair appears to be due to the adoption of a type of epistemological approach that neglects the role of political domination in sociolegal phenomena. On this point Trubek and Esser seem to be correct when, analyzing these studies, they relate their failure to provide a strong political critique to their attachment to empiricism. According to Trubek and Esser, the Seminar was not able to elucidate the complex relationship between knowledge and politics ; perhaps for that reason, their studies lack the political commitment and the moral richness that is often found in critical studies and in feminist work. Excessive confidence in social science and in the possibility of understanding a sociolegal reality through empirical investigation limits their critical perspective. The fact that only « verifiable » objects of study, according to established social science methods, are accepted minimizes the possibilities of interpretation and critique. Over-dependence on data derived from empiricism generally limited to local social settings means that the critique loses the force of more comprehensive denunciations. I agree with Trubek and Esser on their idea that LCS lack of critical dimension but I take a different argument to explain why that happened. Instead of looking at the way they adopt empiricism I focus on a tension or even an inconsistency in their theoretical background.

The contemporary debate on empiricism and criticism is not what it was when Trubek and Esser wrote their influential essay. Over recent decades, sociolegal theory in Law and Society has joined in with the prevailing tendency in social theory according to which it is necessary to supercede both objectivist positions (functionalism, structuralism) and subjectivist stances (phenomenology, ethnomethodology, interactionism, etc.). This tendency goes by different names, among which the *théorie pratique* of Pierre Bourdieu and the « structuration theory » of Anthony Giddens are outstanding examples. In Legal Consciousness Studies these theoretical positions are generally recognized and adopted under the rubric of a « constitutive theory of law ». The constitutive theory of law is usually an offshoot, on the one hand, of cultural studies, especially drawing on the seminal work of Clifford Geertz, and, on the other, of postmodernism ⁸.

Despite this theoretical « agreement » around the notion of a constitutive theory of law - an agreement which moreover is proposed in very general terms -, the empirical research of the LCS seem to be marked, in practice, by an underestimation of the structural elements privileging individual action. In this essay I argue that the domestication of critique in the LCS is linked to a cer-

8. Clifford GEERTZ, *Local Knowledge : Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983 ; Michel DE CERTEAU, *The Practice of Everyday Life*, translated by Steven F. Rendall, Berkeley, University of California Press, 1984. And on postmodernism, see Joel F. HANDLER, « Postmodernism, Protest, and The New Social Movements », *Law and Society Review*, 26 (4), 1992.

tain dissonance between their empirical studies and the theoretical grounding. This dissociation has an explanation not only in a certain geographical division between, on one side, empirical research with a strong influence of North American empiricist traditions and, on the other, a theoretical bases of European origin⁹ and emphasizing critique, but also in a differentiation with political roots : The dissociation between theoretical model and empirical investigation originates in the existence of divergent « theoretical presuppositions », to employ J. Alexander's concept, from which the proposed theoretical models are constructed. Let me explain. One possible division in social theory is that which differentiates between those positions that study society as a terrain of conflict, stratified and marked by struggle, and theorists who, without ignoring the existence of conflict, posit that society is better characterized by features such as interaction, culture, etc. This tension between conflict and consensus in social theory harks back to a debate that exercised functionalist and Marxist scholars during the 1960s and which today is considered to have been superseded. However, in a more general sense, this tension continues to have meaning and manifests itself in different ways, as Randall Collins reviews in his text *Four Sociological Traditions*.

In short, I hypothesize that a dissociation can be seen in LCS between two types of theoretical foundation. On one hand, they seem to adhere to a general theory, primarily developed in Europe by theorists working within a social conflict tradition (Bourdieu, Foucault, Giddens, Touraine, etc.). This framework is supposedly aimed at nourishing what LCS call a constitutive social theory, by which the dichotomy structure/agency would be overcome. However, on the other hand, empirical research in LCS seems to be grounded in a typically American social theory that we may term, following Collins, microinteractionist. According to this approach, and in opposition to conflict theories, elements linked to agency, like individual consciousness, communication among actors and symbolic interchanges, prevail. Given the preeminence of empiricism over theoretical analysis in LCS, this dissociation leads to a situation in which actors and their consciousness and practices turn out to be much more important than social structures working to restrict actors. Thus cognitive matters became central in the analysis, whereas political elements are almost forgotten. Symbolic interchange obscures symbolic violence.

In other terms, there seem to be a gap between, on one hand, interpretivist theoretical models - society as constructed - based in assumptions close to the conflict tradition and, on the other, empirical investigation associated with a sort of cultural microinteractionism. This dichotomy also appears as a lack of accord between, on one hand, defenders of a cultural perspective on legal practices (for instance, Pal Kahn's recent book *The Cultural Study*

9. In theoretical matters, North American sociologists of law have been somewhat dependent on European tendencies. On this point, see Boaventura DE SOUSA SANTOS, « Room for Manoeuver : Paradox, Program, or Pandora's Box ? », *Law & Social Inquiry*, 4, 1989 ; David M. TRUBEK and John ESSER, « "Critical Empiricism" in American Legal Studies : Paradox, Program or Pandora's Box ? », *op. cit.*

of Law¹⁰) and, on the other hand, proponents of a conflict theory. The fact that all these authors share the idea to overcome the dichotomy between structure and agency - which characterizes constitutive social theory - does not seem sufficient to marry them into a unitary model. So, the dissociation between the theoretical and the empirical in LCS is also evidenced as a divergence with respect to the use of interpretive social theory : While some employ the idea of the interconnection between structure and agency to show the cognitive importance of social construction premised on agency, others use this supposition to illustrate how domination is originated and produced. In short : I claim that a theory such as that of Bourdieu or Giddens confuses more than it enlightens when it is incorporated into the theoretical model termed « the constitutive theory of law ».

This argument is worth developing in more detail. In the cultural vision that underlies Legal Consciousness Studies the law is seen as a symbolic or discursive object. This *symbolic vision* on law is different from the concept of the *symbolic use* of law that Bourdieu, among others, proposes¹¹. While the first concept refers chiefly to a problem of knowledge, the second adds an element of social domination. (This difference, as we will see below, is not at all clear in the treatment that has been accorded to the symbolic in North American sociology of law. In other words, clarity does not exist concerning the meaning and scope of law understood as symbol that constitutes and is constituted in these practices.) Given the plurality and malleability of the legal symbols in the conception of Legal Consciousness Studies, given that the meaning of such symbols is never fixed, law has a social character that is essentially weak and almost random. Sarat¹², for instance, claims that disadvantaged citizens do not accept a « myth of rights » ; individuals in his stories seem able to resist legal symbols. This clearly contrasts with its strong and almost inevitable character, in social and political terms, in the work of Bourdieu and other authors who refer to the symbolic use of law as a political phenomenon working in a hierarchical society.

Let me put this in other terms : A constructive or interpretive vision of society entails that the explanation of society is reduced to the relation between agency and structure or between subjects and objects. The social reality is therefore constructed, relational, discursive, and cultural. No pure elements outside this relation. If this is the case, the problem here is how to understand law as a discursive or cultural devise ? What is the symbolic efficacy of law in a social setting ? And it is precisely in relation to these questions that LCS and Bourdieu advance different conceptions of the law as legal practice.

I will develop these ideas as follows : First, I will undertake a succinct explication of the concepts of symbolic in legal scholar-

10. Paul W. KAHN, *The Cultural Study of Law : Reconstructing Legal Scholarship*, Chicago, University of Chicago Press, 1999.

11. Danièle LOSCHAK, « Droit, normalité et normalisation », in CURAPP (ed.), *Le droit en procès*, Paris, PUF, 1983 ; Georges BALANDIER, *Le pouvoir sur scènes*, Paris, Balland, 1992 ; José Eduardo FARIA, *Eficácia jurídica e violência simbólica. O direito como instrumento de transformação social*, São Paulo, Universidade de São Paulo, 1988 ; Mauricio GARCÍA VILLEGAS, *La eficacia simbólica del derecho : análisis de situaciones colombianas*, Bogotá, Uniandes, 1994.

12. Austin SARAT, « "The Law is All Over" : Power, Resistance and Legal Consciousness of the Welfare Poor », *Yale Journal of Law and the Humanities*, 2, 1990, p. 343-379.

ship, and I will show its different uses in North American ; then, I will illustrate how the concept of *symbolic uses* of law is developed in Bourdieu as contrasted to the concept of *symbolic vision* in LCS.

III. The Concepts of the Symbolic in Legal Scholarship

The symbolic is not a way to manufacture meanings, but is rather a modality of textual interpretation. It entails not only a presumption of analogy between symbols and objects, but also a fundamental uncertainty in meaning structures. The symbolic relies mainly on what Umberto Eco calls the « cloudiness of the content ». In contrast, metaphors function precisely *in terms of* meaning. Metaphors « allow us to understand one domain of experience in terms of another »¹³. However, a metaphor cannot be *interpreted* literally, says Umberto Eco, whereas the meaning of symbols can still be taken literally. Thus, the symbolic involves interpretation and justification in pragmatic contexts. This is called pragmatic understanding of language and has had an extraordinary influence on twentieth century theory. It is associated with the elimination of the subject/object dichotomy in social theory, with the prevalence of hermeneutic approaches both in the social sciences and law, with rhetorical approaches in legal theory, with the analysis of symbols and symbolism in anthropology, and with the study of sociolegal interactions.

In terms of social action, the symbolic is contrasted with the instrumental. The transformation of social reality through pragmatic measures characterizes instrumental action, whereas actions oriented to the production of meaning in the context of communication and interpretation characterize symbolic actions. Here, as Gusfield has noted, « the goal is reached in the behavior itself rather than in any state which it brings about »¹⁴. This distinction is similar to the difference between denotative and connotative discourses : In denotation the focus is on a referent, which is the same for everyone who refers to it ; connotative references, by contrast, are inherently ambiguous.

In legal scholarship, the idea of the symbolic is most widespread in the area of constitutional law, but it has also been developed in criminal law, labor law, and in environmental law. Sociolegal scholars have developed different approaches to the symbolic. The significance of this concept varies widely depending on which era or which « school » one looks at ; the meaning given to it can even vary with the same author at different times. At least four different approaches can be distinguished.

13. George LAKOFF and Mark JOHNSON, *Metaphors We Live By*, Chicago, University of Chicago Press, 1980.

14. Joseph R. GUSFIELD, *Symbolic Crusade : Status Politics and the American Temperance Movement*, Urbana, University of Illinois Press, 1963.

The first approach views the symbolic in terms of the *inherent force of legal discourse*. In this schema, the law is the authorized language of the State through which its legitimacy is produced and reproduced. No State is able to survive through the use of physical coercion alone. An authorized justification for the use of physical constraints is first needed, and law exists to furnish it. Legitimated power and the law exist in a state of symbiosis : State actions are justified through legal norms and legal norms are effective when they are backed by the State power. Some sociolegal scholars also emphasize this difference. Danièle Loschak argues that the force of law does not reside exclusively in its recourse to authorized physical violence, but also in the fact that it authorizes certain speech acts - and not others - as « true » and « legitimate »¹⁵. In the United States, Sally Merry, for example, had argued that « law works in the world not just by imposition of rules and punishments but also by its capacity to construct authoritative images of social relationships and actions »¹⁶. This particular property of law may be called symbolic to the extent that it does not operate through instrumentalities, at least in the first instance, but rather through political meaning. Political science, constitutional legal studies and even legal theory frequently employ this understanding of the symbolic use of law.

A second approach focuses on the process of implementation of norms as a matter of *public policy*. It defines its unit of analysis in terms of an efficacious legal system created and supported by public agencies. The crucial distinction between *law-in-action* and *law-in-books* became for many sociolegal scholars a rationale in the search for institutional consistency between both elements, instead of a mechanism for critical analysis. Marginality, contradiction, and indeterminacy, as observed features of the law, are here converted into problems of legal *implementation*¹⁷. These « inconsistencies » are seen as problems of administration and public adjustment, rather than, for example, mechanisms for the production of political hegemony. From this perspective, the distinction between the symbolic and instrumental effects of law is collapsed into the problem of « dysfunctional law », which policy-makers - aided by sociolegal knowledge - were supposed to solve. The strong link in the early 1970s between academic researchers and State policy reformers led these studies to overestimate the identification of the State and official law. The relatively progressive political agenda that was born with the Law and Society movement was eventually smothered by the weight of its debt to State policy reform. « The alliance between sociolegal scholarship and policy elites of the liberal State, Sarat and Silbey argue, is sufficiently strong and subtle that research apparently critical of aspects of

15. Danièle LOSCHAK, « Droit, normalité et normalisation », *op. cit.*

16. Sally E. MERRY, *Getting Justice and Getting Even : Legal Consciousness among Working-Class Americans*, *op. cit.*

17. In the US, this process of conversion is frequently found in *Policy Analyses*. For an example of it in the European context, see Simon CHARBONNEAU and Jean G. PADIOLEAU, « La mise en œuvre d'une politique publique réglementaire : le défrichement des bois et forêts », *Revue française de sociologie*, 21 (1), 1980, p. 49-75.

American legal institutions works, paradoxically, to reinforce fundamental assumptions of liberal legalism¹⁸. »

According to a third point of view, the influence or social efficacy of law should be sought more in the institutional creation of a reified legal consciousness whereby social reality appears as something natural, not constructed and not so much in the instrumental determination of social behaviors through rewards and sanctions. This position has been argued by scholars in the Critical Legal Studies tradition. However, their lack of agreement with respect to the balance between the cultural and the economic affects the clarity of the movement when it comes to the concept of the symbolic use of law. Let me explain this idea : The rejection of legal instrumentalism was not sufficient to unify the critics. This is because in the 1970s Neo-Marxist debate on the possible autonomy of the state with respect to the economy an unavoidable tension was latent between the cultural dimension of political legitimation and the structural character of the economy¹⁹. This tension has divided the critics. Some adhered to the position of Poulantzas that state autonomy - and that of law - is only relative and that therefore the legal order is determined « in the last instance » by the structure of the capitalist mode of production. Others, however, relying on a Marxist analysis with a cultural emphasis argued that the law offers social movements genuine maneuverability derived from the needs that the state apparatus has to make concessions in order to maintain or increase its legitimacy. While the first position emphasized the determining character of the economic structure, the second highlighted the state's need for legitimation. In this respect James Boyle argues that when this debate began economic structuralism was dominant, but by the end the subjective dimension predominated²⁰.

The majority of the critical theorists consider that the symbolic effects of law operate only to the benefit of State institutions and their aims of political manipulation²¹. However, too much emphasis on the unitary character of State domination led these CLS scholars to a rather simplistic image of law as an institutional mechanism for social control. The strength of State legal domination undermines the possibility - even if often remote - of emancipation from hegemonic structures through progressive norms, which were supposed to have only symbolic effects. Others, however, more disposed to accept a certain cultural autonomy in the symbolic use of law, consider that, while a considerable institutional advantage may exist relative to the possibilities of appropriation and political manipulation of legal meanings, social movements and individuals can also use these meanings in their favor. The concept of hegemony in Gramsci, understood as an

18. Austin SARAT and Susan S. SILBEY, « The Pull of the Policy Audience », *Law and Policy*, 10 (2/3), 1988, p. 97-166.

19. Clyde W. BARROW, *Critical Theories of the State : Marxist, Neo-Marxist, Post-Marxist*, Madison, University of Wisconsin Press, 1993.

20. James BOYLE, « The Politics of Reason : Critical Legal Theory and Local Social Thought », *University of Pennsylvania Law Review*, April 1985.

21. See Mark TUSHNET, « An Essay on Rights », *Texas Law Review*, 62, 1984 ; David KAIRYS (ed.), *The Politics of Law : A Progressive Critique*, New York, Basic Books, 1998.

arena of struggle for political meaning, is important for the defense of this position.

In fact it is not only the critical theorists who hold this idea of the symbolic use of law as a practice of legitimation and domination. Organizational theory both in Europe and in the United States has shown how institutions respond to social problems in such a way that the aim of legitimation and communication predominates over the achievement of the proposed objectives²². Of course there is a clear rapprochement between this position and the first one outlined above. The difference lies in emphasis: Organizational theory insists that institutional legitimation is a strategy, while in the perspective that understands the symbolic as an inherent element of law legitimation is rather an outcome.

A fourth approach to the symbolic use of law can be found in studies emphasizing the cultural aspect of ordinary citizens' legal consciousness; the law is viewed here as a social practice which « operates as both an interpretive framework and a set of resources with which and through which the social world (including that part known as the law) is constituted »²³. « Law », argues Sarat, is both a metaphorical trap and a material force. According to this perspective, rather than an external force impressing itself upon social life, the law is an emergent feature of social relations and a socially constructed system of action. Drawing upon reflexively informed social theory – subjects as products and producers of society – Legal Consciousness Studies emphasize the symbolic dimension of legal practices. From this point of view, *all practices* – including legal practices – are analyzed in terms of their degree of symbolic efficacy. The symbolic is seen here as something that characterizes both the perception of reality as well as the practices derived from it. This discursive or interpretive approach to the symbolic contrasts with a descriptive or positivist stance, according to which there is an external reality apart from the subject who knows it.

In what follows I will concentrate on the latter two perspectives: That is, on one hand, on the critical idea that the symbolic is approached as an institutional strategy – or as an institutional use – destined to serve the aims of legitimation, and, on the other, the epistemological idea – or that of constitutive social theory – in which the symbolic is understood as a form of cultural consciousness that constitutes and in turn is constituted by the society. I will refer to them with the terms *symbolic use of law* and *symbolic vision of law* respectively. Clarity in the distinction between the two will, I think, aid in comprehending the problems that derive from the extant theoretical model in Legal Consciousness Studies.

22. On this point, see Michel CROZIER and Erhard FRIEDBERG, *L'acteur et le système : les contraintes de l'action collective*, Paris, Seuil, 1977. In Europe and in the United States, see the authors of the school called « new institutionalism » in sociology: Walter W. POWELL and Paul J. DIMAGGIO (eds.), *The New Institutionalism in Organizational Analysis*, Chicago, University of Chicago Press, 1991.

23. Patricia EWICK and Susan S. SILBEY, *The Common Place of Law : Stories from Everyday Life*, *op. cit.*

IV. Symbolic Effects of Law in Bourdieu and in the LCS

Pierre Bourdieu is one of the most respected and most often cited authors in the works of Legal Consciousness Studies. His work is frequently referred to by sociolegal researchers affiliated with the LCS school, as supportive of both a constructive theory of practice of law and a symbolic understanding of social relations. Those belonging to LCS are particularly attracted to his idea that the keys to understanding how social structures are produced and reproduced are found in concrete social practices. The practices constitute the structures quite as the practices themselves are determined by the structures ; the structures are socially constructed in the practices of social actors in their everyday lives. The concept *habitus* is of particular importance in this effort to get beyond the subject/object dichotomy. According to Bourdieu, *habitus* is « a system of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them »²⁴. In short, *habitus* is understood as a set of deeply internalized master dispositions that generate action. In short, the empirical dimension of Bourdieu's postulate and the relevance of everyday practices fits well with LCS interests. It could even be said that as Bourdieu has the aim to write a « general theory of practices », LCS is attempting to write a general theory of legal practices. In both cases there is a underlying question : How are the discourses and social practices produced and reproduced ?

Bourdieu's interest in this question is located in the fact that, through its elucidation, a better comprehension of political domination in society can be obtained, or, in its own terms, this question suggests another more profound one which is the following : How is it possible that hierarchically based systems of domination persist and reproduce themselves through social practices ? Bourdieu views society as a stratified and differentiated space in which individuals struggle to defend positions and interests. Now, domination, more than something linked to the use of physical violence, is articulated through, and experienced through, the use of symbolic violence. The ones who are dominant in society do not achieve that position merely through possession of economic capital. They also attain it thanks to the cultural capital that they possess and to the close connection between these two forms of capital. This articulation operates in such a way that the symbolic systems - through which we establish classifications and determine

24. Pierre BOURDIEU, *The Logic of Practice*, Stanford, Stanford University Press, 1990. For an application of this concept to the field of law, see Frédéric OCQUETEAU and Francine SOUBIRAN-PAILLET, « Champ juridique, juristes et règle de droit : une sociologie entre disqualification et paradoxe », *Droit et Société*, 32, 1996, p. 9-26.

the essential categories of social inclusion and exclusion - do not have only a cognitive and social structuration function²⁵, but also a political function of domination. The symbolic is also an inherently violent practice to the extent to which it imposes meaning on the world and on social relations in which economic and political power lose their original arbitrary and exclusive connotation and appear as something normal and acceptable. Here Bourdieu's idea of « misrecognition » is important. Activities and resources gain in symbolic power to the extent that they become separated from underlying material interests and hence are « misrecognized » - disguised as disinterested forms of activities and resources. The application of this idea to law can be seen in Bourdieu's article « La force du droit »²⁶. Not only is all action interested, but much action can be carried out successfully only if its interested character is « misrecognized ».

The law is a good example of symbolic violence. The possibility that legal workers have to establish essential classification for the social order - legal/illegal, just/unjust, true/false - entails enormous political privilege. According to Bourdieu, the official law is the privileged space for the production and exercise of symbolic power. The law possesses the « magic effect of nomination »²⁷. It also has the power to establish the official, the legitimate, and the authorized worldview. Legal authority is the privileged form of power, especially in terms of legitimate symbolic violence - monopolized by the State - which the State both produces and practices²⁸. The symbolic capital embedded in legal norms creates a type of force that functions independently of their implementation. According to Bourdieu, this type of legal force is defined by its opposition to both the simple non-implementation (failure) of legal norms, and to the implementation of legal norms through sanctions.

In understanding the symbolic force of law or its legitimizing effect, we must avoid not only those materialistic accounts that see nothing but power relation in the explanation of law, but also those idealistic who explain it through the general recognition of the universal values carried out by its norms. « We can no longer ask whether power comes from above or from below », says Bourdieu in a reference to the debate between critical and doctrinal explanations of law. Against the materialistic account Bourdieu maintains that « we need to recover the profound logic of juridical work in its most specific locus ». However, this postulate does not prevent him to recognize that, « given the essential role it plays in social reproduction, the judicial field has a smaller degree of autonomy than other fields, like the artistic or the literary ».

25. According to Bourdieu, « the cognitive structures which social agents implement in their practical knowledge of the social world are internalized "embodied" social structures » (Pierre BOURDIEU, *La distinction : critique sociale du jugement*, Paris, éd. de Minuit, 1979).

26. Pierre BOURDIEU, « La force du droit : éléments pour une sociologie du champ juridique », *Actes de la recherche en sciences sociales*, 64, 1986, p. 3-19.

27. *Ibid.*

28. This idea of symbolic power is also usefully explored by Georges BALANDIER, *Le pouvoir sur scènes*, *op. cit.*, and Harry PROSS, *La violencia de los símbolos sociales*, Barcelona, Anthropos, 1989.

Symbolic power here is not only an institutional power but also a power that is clearly linked to the economic structure of society. The efficacy of symbolic capital in terms of social differentiation and hierarchy relies on its correspondence with other forms of capital, among which economic capital is primary. In Bourdieu's words : « Given that symbolic capital is none other than economic or cultural capital when it is known and recognized according to the categories of perception that it itself imposes, the relations of symbolic power tend to reproduce and to reinforce the power relations that constitute the structure of social space ²⁹. » For this reason the schema for perceiving the world are not simply systems of knowledge, they are also systems of social domination that demonstrate the importance of the objective division between social classes. Loïc Wacquant explains how in Bourdieu « the sociology of knowledge or of cultural forms is *eo ipso* a political sociology, that is a sociology of symbolic power » ³⁰.

In other terms : The symbolic dimension of law is made of two elements. One is the cognitive element, according to which actors give meaning to their practices. The second is the political element, which put the emphasis on the different types of uses of the symbolic in order to improve domination. My argument is that this second aspect is neglected in LCS and it is so because it is an aspect of the symbolic that seems to be relevant only in a conception of society that draws upon a conflict theory, which is strange to LCS.

Legal Consciousness Studies also take an interest in knowing how legal discourse and legal practices are produced and reproduced over time. They conceive of the law as a set of concrete practices of ordinary people and not as an institutional discourse that is imposed upon them. The law is seen as a complex repertoire of discursive strategies and symbolic parameters that structure meaning and social practices. Thus, and in opposition to a dogmatic view, the law is a phenomenon characterized by the pluralism, indeterminacy and contingency of legal practices. The symbolic is a central element of this theory to the extent to which reality is constructed through representations and interpretations and not in concrete realities. However, in contrast to Bourdieu's work, here the emphasis is placed on the cognitive aspect of the symbolic dimension of law. This explains the importance attributed to legal culture, understood as a complex set of discourses and symbolic framework through which individuals give meaning to their legal performances ³¹. The cultural point of view and the constitutive viewpoint can even at times seem to be the same thing : « This cultural or constructivist understanding, McCann says, sees legality as an ongoing human production ³². »

29. Pierre BOURDIEU, *Choses dites*, Paris, éd. de Minuit, 1987.

30. Pierre BOURDIEU, with Loïc J.D. WACQUANT, *An Invitation to Reflexive Sociology*, Chicago, University of Chicago Press, 1992.

31. LCS consider themselves to be « studies of legal culture », Susan S. SILBEY, « Making a Place for Cultural Analyses of Law », *Law and Social Inquiry*, 17 (1), 1992, p. 39-48 ; Michael W.

MCCANN, *Rights at Work : Pay Equity Reform and the Politics of Legal Mobilization*, *op. cit.*

32. Michael MCCANN, *Rights at Work*, *op. cit.*, p. 31.

Structure is conceived of in terms of cultural schema that organize and normalize social interactions. These cultural schema, unlike something external and unitary that is imposed on subjects, are composed of myriad complex interrelated significations that are difficult to disentangle. Consciousness, argue Ewick and Silbey in *The Common Place of Law*, is not an effect of structure but rather an integral part of it. « It is participation in the production of structures³³. » Accordingly ideology is not a set of abstract ideas but a complex process through which meaning is produced, reproduced, and transformed. Ideology, they argue in a somewhat confused way, can be understood to represent an intersection between structure and consciousness. « If we use the term *consciousness* to name participation in the production of structures, *ideology* refers to the processes that produce a specific pattern in social structure³⁴. » Whatever the explanation, the concept of legal ideology is reduced to the level of everyday legal practices as a complex process through which meanings are produced, reproduced and changed beginning from experience of shared power³⁵. Likewise, Christine Harrington and Barbara Yngvesson are opposed to a modern conception of power grounded in « the distinction between ideology and practice »; such a conception place ideology « outside » of social relations, and thus creates a two-dimensional world, one part of which (« culture », « the symbolic », « the State », « law ») is given and constitutes the other³⁶. For that purpose they remove the concept of ideology from the institutional level and they reduce it to the level of everyday legal practices as a complex process through which meaning is produced, reproduced and changed. The reconceptualization of these terms - culture, consciousness, structure, ideology - supposes an erasure of their dividing lines; the subsumption of structure in consciousness makes the difference between culture, structure, consciousness and ideology a very subtle one and frequently confusing³⁷.

The « de-materializing » of the concept of ideology and its assimilation to that of consciousness has even been the object of criticism in authors sympathetic to the position argued in Legal Consciousness Studies. This is the case of Michael McCann and Tracy March. For them the problem with this conceptual equation is that it obscures or reduces the analytic attention paid to the interactive relationship between the individual and the institutional and between the institutional and subjectivity. Once the institutional dimension of ideology is played down, those social spaces where the poor live are magnified. Not only is resistance overestimated in terms of political practices, but also those who suffer poverty are presumed virtuous or their actions justified in all circumstances. Their practices are presumed to be violence free. Not

33. Patricia EWICK and Susan S. SILBEY, *The Common Place of Law*, *op. cit.*, p. 224.

34. *Ibid.*, p. 225-226.

35. *Ibid.*, p. 225.

36. Christine B. HARRINGTON and Barbara YNGVESSON, « Interpretative Sociolegal Research », *Law and Social Inquiry*, 15 (1), 1990, p. 135-154 (p. 142).

37. I admit with McCann, however, that Merry's analysis (Sally E. MERRY, *Getting Justice and Getting Even : Legal Consciousness among Working-Class Americans*, *op. cit.*) of this relation is different to the extent that she establishes a distinction between ideology and discourses.

only this perspective does not help to distinguish the actions of the excluded according to their merits, but in fact it works actively to obscure the way that powerful groups routinely defy and resist legal norms, which frequently implies a considerable cost for those with whom LCS authors identify. Moreover, the idea of resistance that they hold is not related to social classes, race or workplace struggles but rather to tactical maneuvers against judges, clerks, mediators, administrators or other state officials³⁸.

The fact that both the collective and the contextual dimension of individual practices is not considered leads these studies to conceptualize resistance as something rather romantic and innocuous. In almost all the narratives chosen by these authors, practices of resistance are reduced merely to intentions of resistance that are supposed to be heroic but in fact are mostly useless, ephemeral, even in terms of individual fights. Bourdieu again, in his *Méditations pascaliennes* says :

« Symbolic power is exerted only with the collaboration of those who undergo it because they help to *construct* it as such. But nothing would be more dangerous than to stop short at this observation (as idealist constructivism, in its ethnomethodological or other forms, does). This submission is in no way a “voluntary servitude” and this complicity is not granted by a conscious, deliberate act ; it is itself the effect of a power, which is durably inscribed in the bodies of the dominated, in the form of schemes of perception and dispositions (to respect, admire, love, etc.), in other words, beliefs which make one sensitive to certain public manifestations, such as public representations of power³⁹. »

On reading the stories presented by LCS one gets the impression that, despite of their own interpretations of practices, the final obstacle actors face in their fight for emancipation is a structural one : race, poverty, education, and so on. It is striking that the authors overlook this element in their analysis. In the story of Millie Simpson told by Ewick and Silbey⁴⁰ for instance, it is clear that she - a poor black woman - succeeds in her resistance only when her boss, a powerful white man, decides to help her. If this is the case, why then are structural and institutional elements, which undoubtedly are important for the understanding of legal reality and legal culture, so disregarded ? I claim that it is because culture, domination and hegemony are reduced to consciousness.

In Bourdieu, conversely, culture cannot be understood outside the economic and cultural conditions in which subjects act. Cultural tastes are never disinterested and can only be understood by starting from a theory of symbolic power⁴¹. Culture is a set of dispositions internalized by individuals through a process of socialization that constitute schemas of perception and understanding of the world. These work only to the extent that there is a certain correspondence with the hierarchical order that they repre-

38. Michael McCANN and Tracy MARCH, « Law and Everyday Forms of Resistance : A Socio-Political Assessment », *op. cit.*

39. Pierre BOURDIEU, *Méditations pascaliennes*, Paris, Seuil, 1997, p. 204-205. For an explanation of Bourdieu's opposition against the celebration of resistance, struggles and creative practices of the dominated, see Pierre BOURDIEU, with Loïc J.D. WACQUANT, *An Invitation to Reflexive Sociology*, *op. cit.*

40. Patricia EWICK and Susan S. SILBEY, « Conformity, Contestation and Resistance : An Account of Legal Consciousness », *op. cit.*, p. 31.

41. According to Swartz, interpreting Bourdieu : « If his theory of practices extends the idea of interest to culture, then his theory of symbolic power extends culture to the realm of interest with the claim that all forms of power require legitimation » (David SWARTZ, *Culture and Power : The Sociology of Pierre Bourdieu*, Chicago, University of Chicago Press, 1997).

sent. « There is a correspondence between social structures and mental structures, between the objective division of the social world – particularly between dominators and the dominated in the different spaces – and the principles of worldview and classification that agents apply to that world ⁴². » This correspondence fulfills essential political functions in society. Thus symbolic systems are not only tools of knowledge but, first and foremost, instruments of domination. Cultural capital works similarly to economic capital and of course is intimately related to it. All cultural production is oriented to the production of dividends, *i. e.* to a reward ⁴³. According to Wacquant's reading of Bourdieu, the concepts of *habitus*, *capital* and *space* expand the scope of interests while reducing that of utility and consciousness. The concept of *legal consciousness* in the LCS does just the opposite.

A central objective of Bourdieu's work is to show how cultural and social class correlate. Ideology, for its part, is a tool that operates to disguise social reality and therefore to maintain a certain *status quo* that allows domination and differentiation among individuals. Ideology is then synonymous with symbolic violence and consists in the capacity of a social and institutional power to impose legitimate meanings, in such a way that the power relations that undergird this power are hidden ⁴⁴. So the law is an essential element of political domination and its nature is domineering, potent, almost inevitable. In contrast, for LCS law is always polyphonic, contingent, variable and therefore weak ⁴⁵.

The studies of legal consciousness tend to neglect the postulate according to which the different schema for perception, interpretation and action originate in the positions that social actors occupy in the economic sphere. In *The Common Place of Law*, Ewick and Silbey, for example, differentiate three ideal types that aid in the comprehension of this complex reality; they term them: « before the law », « with the law », and « against the law ». The first, « before the law », reflects those practices that depend on a reified view of law, understood to be a coherent, majestic institution with all the formal trappings. This is the view derived from the history it authorizes, the story it wants to tell. The second possibility, « with the law », comprises a vision of the law as a playing field on which different actors and institutions compete. The third, « against the law », encompasses those attitudes that see the law as a space of confrontation and, at times, emancipatory struggle.

This classification enriches the phenomenon of ordinary people's legal representations and shows the complexity of the resistance to law that had been oversimplified by some critical legal studies. However, it does not appear to give sufficient weight to the power of certain material factors to restrict pluralism, contin-

42. See Pierre BOURDIEU, *Le sens pratique*, Paris, éd. de Minuit, 1980.

43. In the selection or rejection of cultural styles is implicit a search for profit analogous to the quest for economic advantage (Pierre BOURDIEU, *Raisons pratiques : sur la théorie de l'action*, Paris, Seuil, 1994).

44. However, in his *Méditations pascaliennes*, Bourdieu warns about the concept of ideology (Pierre BOURDIEU, *Méditations pascaliennes*, *op. cit.*, 1997).

45. Austin SARAT, « "The Law is All Over" : Power, Resistance and Legal Consciousness of the Welfare Poor », *op. cit.*, p. 343-379.

gency and legal practices. Ewick and Silbey, for example, do not seem interested in investigating why some types of legal consciousness appear to prevail over others and what relationship exists between this tendency and the existence of a hierarchically divided society. In the same Silbey and Ewick research there is a clear correlation between social marginality and the legal consciousness termed « before the law » ; likewise, to have some cultural and economic capital and the representation of law as a game appear to go hand in hand. However this correlation does not show up in their analysis, not even as an interesting element. Because they are interested in what kind of legal consciousness people possess without asking what kind of material conditions make this legal consciousness possible, the concept of domination exists but does not seem to hold a central place.

For these authors, social practices structure a social reality that, in turn, affects these practices, but the process is not directed toward political domination. Their interest lies in legal consciousness and individual practices of resistance, as they form part of a process in which the meaning given by individuals to their law become repeated, and stabilized, and those institutionalized structures become part of the meaning systems that are employed by actors. But their narration of consciousness and practices of resistance do not explain why, even in their own examples, actors are not only inevitably isolated but also they are unable, despite their resistance, to modify their situation of subordination and marginality. This is so because they are not interested in exploring the conditions under which an actor's legal consciousness is produced and reproduced in society. Whatever the case, the act of limiting oneself to recounting individual stories of resistance to hegemonic power, without taking into consideration the obstacles to this resistance, obscures the phenomenon of power in society, including that of local power to the extent to which this exists in a relation to other powers ⁴⁶.

In the face of the crushing imposition of official law on individuals' mental representations and on their practices, Ewick and Silbey speak of « reification » ; Bourdieu, in comparison, refers to « symbolic violence ». These are not mere nuances of meaning. They presented and revealed two different theoretical options, one of them centered in problems of knowledge and the other in problems of power. In one, human agency is privileged, while in the other the State's imposition of a worldview is emphasized. Neither does this refer simply to a question of emphasis ; above all it is a difference underlying three essential concepts in a critical legal theory : legal culture, legal consciousness and legal domination.

Both LCS and Bourdieu employ insistently an idea of the symbolic, in opposition to an instrumentalist, view of law. However, for LCS this notion has an epistemological use that refers to the

46. Michael BURAWOY *et al.*, *Ethnography Unbound : Power Resistance in the Modern Metropolis*, Berkeley, University of California Press, 1991 ; Boaventura DE SOUSA SANTOS, *Toward a New Common Sense : Law, Science, and Politics in the Paradigmatic Transition*, New York, Routledge, 1995.

construction of a legal reality premised on a systems of communication and interchange among individuals, while in Bourdieu this idea has not only a constitutive connotation (it *creates* the social world although this world first creates the law), it has, first and foremost, a clear political presentation since to create and order social reality confers a permanence upon it that is typical of things. However, in order not to fall into a sort of radical nominalism *à la* Foucault, Bourdieu sustains that law's power to name and to create « can function effectively only to the extent that the symbolic power of legitimation (or naturalization) reproduces and heightens the immanent historical power which the authority and the authorization of naming reinforces or liberates »⁴⁷. As a consequence, the political function of symbolic legitimation is superimposed on a cognitive or merely creative dimension that the law possesses as constructor of society. Law is seen as an instrument strategically employed by social actors in conflict.

Legal Consciousness Studies, conversely, seem to give greater importance to the cultural or constitutive dimension than to the political dimension, or at least they do not center their attention on the latter. This weighting derives from the assumption they adopt, in contrast to conflict theorists, that social actors do not necessarily act in a strategic and self-interested manner. Bourdieu's critique of phenomenological and ethnomethodological positions in sociology is perfectly appropos here :

« While they are right to recall, in opposition to the mechanist vision, that social agents construct social reality, they fail to address the question of the social construction of the principles of construction of that reality which agents implement in the individual and also collective work of construction, and to consider the contribution of the State to that construction [...]. In modern societies, the State makes a decisive contribution towards the production and reproduction of the instruments of construction of social reality⁴⁸. »

LCS accept that violence is exercised through law and that this violence favors hegemonic power ; however, and in concordance with the *cultural turn* prevailing in social theory over the last decade, it appears as if the explanations lodge here and go no further. The relationship between the violence in law and class domination is not developed. For Yngvesson, the way law names the world and the way legal professionals construct meanings is hegemonic, but that hegemony assumes plurality : It does not passively exist as a form of dominance. It has continually to be renewed, recreated, defended, and modified⁴⁹. Sarat explains this accent on resistance stating that « meanings that seem natural, or taken-for-granted, are described as hegemonic, but because the construction of meaning through law is, in fact, typically contested, scholars show the many ways in which resistance occurs »⁵⁰. I think that this

47. Pierre BOURDIEU, *Le sens pratique*, *op. cit.* ; Id., *Choses dites*, *op. cit.*

48. Pierre BOURDIEU, *Méditations pascaliennes*, *op. cit.*, p. 208-209.

49. Barbara YNGVESSON, « Inventing Law in Local Settings : Rethinking Popular Legal Culture », *The Yale Law Journal*, 98, 1989, p. 1693.

50. Austin SARAT, « Redirecting Legal Scholarship in Law Schools », *Yale Journal of Law and the Humanities*, 12, 1999.

approach does not take material constraints seriously. In Stuart Hall's terms, it « replaces the inadequate notion of ideology ascribed in blocks to classes with an equally unsatisfactory "discursive" notion, which implies total free floatingness of all ideological elements and discourses »⁵¹. In other words, legal consciousness scholars have not succeeded in overcoming the agency/structure dichotomy due to the fact that they do not take sufficiently into consideration the analysis of the social reality under which legal consciousness is produced and reproduced in society. They miss the analysis of, as Bourdieu says, the « social construction of the principles of construction of that reality » which is implemented in social practices. « The field of positions, Bourdieu says in *An Invitation to Reflexive Sociology*, is methodologically inseparable from the field of stances or positions-taking (*prises de position*), i.e. the structured system of practices and expressions of agents »⁵².

Sympathetic to a discursive approach to social construction, Susan Silbey maintains that the meanings and values held by social actors « are never fixed, nor stable, nor unitary ». Silbey recognizes, however, that the possibilities of variation in these meanings and values are limited by the specific circumstances in which each individual finds him or herself. But is this sufficient? In LCS the possibilities of social emancipation and competition for the benefits of law appear as probable as the possibilities of social domination. The concept of hegemony becomes malleable and contingent. The position of actors in social space, their economic and cultural capital, is given short shrift while concentrating on the possibility that actors oppose or resist power. This almost random account of the values-consciousness-practice trilogy hides some characteristics that frequently accompany hegemonic power, for example its persistence through time, or its success in imposing legitimated social practices in which stability and the absence of critique are characteristic features. Concepts like domination and hegemony are frequently employed in LCS but they are used in a way that excludes both the ideas of class and the State. The concept of hegemony seems to evoke the image of a dispute among equals and of a fight for different meanings rather than the idea of domination and violence. It is true that occasionally - as Yngvesson has argued⁵³ - the exchange among actors is considered to be an unequal one; however, it seems that this is only the starting point of the struggle and that everything could change thereafter. In any case it is difficult to state the LCS view on this matter because there is only a resounding silence on the question. There is a lack of interest in the elucidation of social asymmetries even as a partial but important source of explanation of the struggle among different meanings.

The problem of power is reduced to disembodied symbols as if the cultural dimension of power could be explained by itself.

51. See Stuart HALL, « The Problem of Ideology : Marxism without Guarantees », in David MORLEY and Kuan-Hsing CHEN (eds.), *Stuart Hall : Critical Dialogues in Cultural Studies*, London, New York, Routledge, 1996.

52. Pierre BOURDIEU, with Loïc J.D. WACQUANT, *An Invitation to Reflexive Sociology*, op. cit., p. 105. It is worth noticing that, unlike LCS, some European legal sociologists take this connection between symbols and material conditions seriously. See, for instance : Boaventura DE SOUSA SANTOS, *Toward a New Common Sense : Law, Science and Politics in the Paradigmatic Transition*, op. cit. ; André-Jean ARNAUD, *Critique de la raison juridique*, Paris, LGDJ, 1981 ; Roger COTTERRELL, « The Sociological Concept of Law », *Journal of Law and Society*, 10 (2), 1983, p. 241-255, etc.

53. Barbara YNGVESSON, « Inventing Law in Local Settings : Rethinking Popular Legal Culture », op. cit.

This is why when they develop the idea of symbolic power they have in mind the idea of a symbolic power without symbolic violence. Indeed, insofar as the social and economic location of the actors in society is not considered, insofar as the socioeconomic hierarchy is not examined, both domination and resistance are equally possible ; I am tempted to say they are « equally random ». Every practice seems to be reduced to a fight among actors holding different meanings, each of which could eventually win. It seems as if there are no tendencies in this game, no hierarchies, no violence. Even the State seems to be only one more actor playing a game. Every practice is a matter of culture, a matter of meaning. The difference between « high » and « low » is therefore erased⁵⁴. It is true that agency and meaning are restricted by structures, but these structures are reduced to discourses and their analysis undermines the question of why in a given social reality only some discourses are possible. In short, LCS are interested in people who are usually poor or even marginalized. However, this is an anthropological interest in symbols and representations rather than a critical interest. Bourdieu is also interested in social marginalization and domination. However, instead of focusing on legal consciousness, he is interested in objective relations between people.

54. *Ibid.*

55. Pierre BOURDIEU, with Loïc J.D. WACQUANT, *An Invitation to Reflexive Sociology*, *op. cit.*, p. 97.

56. A sort of fascination with the concept of power as developed by Foucault in *Le Panoptique* is found in LCS. This enchantment seems to be paradoxical to the extent that the opacity, the submission even, of social actors to power structures is so characteristic of Foucault's thought. What happens is that in North American sociology of law Foucault's conception of power is very often taken up only insofar as it is something fluid, variable and decentralized and not as it is shown to be an omnipresent structure that determines social action. I question whether it is legitimate to dismember Foucault's work in this fashion.

57. Boaventura DE SOUSA SANTOS and Mauricio GARCÍA VILLEGAS (eds.), *El caleidoscopio de las Justicias en Colombia*, Bogotá, éd. Uniandes, Siglo del Hombre, 2001.

« I could twist Hegel's famous formula and say that the real is relational : What exist in the social world are relations - not interactions between agents or intersubjective [sic] ties between individuals, but objective relations which exist "independently of individual consciousness and will", as Marx said⁵⁵. »

The disinterest shown by LCS for macrostructural analysis obscures the underlying factors that determine the relative permanence of social hierarchy and domination ; they give an image of openness, contingency, mobility, malleability and indeterminacy to social relations that in fact does not exist, neither in the United States nor anywhere else. One does not have to be against the dynamic and omnipresent notion of power in Foucault⁵⁶ - as a critique of the conceptualization of the State as an institution centralizing power and violence - to recognize that a healthy chunk of the power in society circulates through State institutions.

It seems to me that domination takes on multiple forms, some of which are efficacious precisely through an invisible or undetectable State. In essence it is common for the State - and for law - to exercise its power through selective doses of intervention or nonintervention in different spaces/times. Or, put another way, institutional power also consists of the selective definition of which social spaces to protect, which to abandon, which to liberate, which to oppress, etc.⁵⁷.

Conclusion

The studies of legal consciousness have the merit of having demonstrated the complexity and creativity of the legal phenomenon in individual and collective spheres that prior to these studies were only seen as passive elements of social regulation. Doubtless these studies offer a more highly developed and complex view of the sociolegal reality. However, a close reading reveals the lack of critical energy that some legal studies formerly possessed. A certain domestication of the critical spirit has occurred, unintended, probably, that wrests analytic strength and interest from the studies of legal consciousness. To what is this domestication due? More than a decade ago Trubek and Esser proposed that the attachment to empiricism was affecting the critical force of these studies. Without ignoring the merits to their argument, in this essay I have attempted to answer this question by following a different line of reasoning. My argument was organized as follows: on the one hand, as a critique of the LCS idea of abandonment of both the institutional and the macro-level perspectives in favor of ethnographic local studies; on the other hand, as a postulate of inadequacy of the theoretical model that sustains the studies undertaken within this micro-perspective.

Concerning the first point, Legal Consciousness Studies are nourished in the political commitment of the Critical Theorists as well as the empirical aims of the Law & Society founders. Nevertheless, they distance themselves both from Critical Legal Studies and from the initial tendency of Law & Society (*gap studies*). With respect to the first they reject the disregard for empirical research and knowledge of the concrete sociolegal reality (*law-in-action*). The distance from the latter is a condemnation of their lack of commitment to a position independent of the dominant political thought and the circles of power. But the way in which LCS achieved this double distancing continues to occasion problems: The excessive emphasis placed on the constituted character of the social world dilutes the distinction between the exterior and interior of subjectivity, in such a way that the critique loses its referent. Everything is reduced to a scattered and random set of consciousnesses and social practices that practically explain themselves tautologically.

A very high price to pay for the « institutionalist errors » of *policy studies*: The absence of a macrosociological lens lessens the capacity to « see » and analyze genuinely efficacious emancipatory options for the excluded. The mental representation of reality leaves aside, or at least underestimates, the ideological influence of State entities on individual consciousness. In this fashion topics such as social action/agency, the fragmentation of power and individual resistance end up cloaking issues such as class domina-

tion, hegemony and alienation. The constructive nature of social action is so strong that it overshadows its structured dimension ; in this way the macro-level of hegemony is hidden and the classist connotation of symbolic violence is cancelled out.

In the second place, the study of consciousness and concrete legal practices lacks a sufficiently clear theoretical framework. It seems to be a certain incompatibility between a constructivist or interpretivist theoretical model and empirical research. This disagreement could be based on the fact that the former appears, at least at times, to be grounded in social presuppositions close to those of the conflict tradition, while the latter appears to be associated with a microinteractionist tradition that gives the subject a central role in social organization. In the more specific terms of this article, the problem occurs because the theoretical agreement around the notion that the symbolic is an essential element in law hides fundamental differences in the way that this idea is conceived and employed by authors belonging to different sociological traditions. The way that the LCS explain both the concept of « legal consciousness » and the symbolic vision of law fits better in constructivist theoretical models, particularly ethnomethodological theories, than in those developed by Bourdieu, Giddens, or Touraine, where the symbolic is treated not only as « symbolic vision » but also and especially - due to its affinity with conflict theory - as « symbolic strategy » or « symbolic uses ».

« Symbolic force, Bourdieu says, that of a performative utterance, and specially of an order, is a form of power which is exercised in bodies, directly and as if by magic, without any physical constraint ; but the magic works only on the basis of previously constituted dispositions, which it “triggers” like springs⁵⁸. »

Of course a certain empathy exists between the explication of the domestication of critique as an effect of empiricism, such as Trubek and Esser argue, and this more general hypothesis of the lack of fit between theoretical model and research. However I think that we do not argue the same point and in fact the explanations are not even similar, one being more particular and the other more general. My point is that empiricism in Law & Society has a conservative character, not because the researchers are conservative or because its use in the explication of reality prevents investigators from adopting a critical stance, but rather due to the type of empirical investigation prevailing there. This type of research - unlike others⁵⁹ - is linked to a theoretical tradition that concentrates on the creative potential of social action in such a way that the connection between agency and structure violates the spirit claimed by the constructivist model. To sum up, I think that this argument is explained less as an epistemological problem of truth - objectivist vs. Interpretivist - than as a problem of political pre-

58. Pierre BOURDIEU, *Méditations pascaliennes*, *op. cit.*, p. 202.

59. For example those of Bourdieu, or even, closer to home, Boaventura DE SOUSA SANTOS, *Toward a New Common Sense : Law, Science and Politics in the Paradigmatic Transition*, *op. cit.* ; see also feminist studies (Martha MINOW, « Interpreting Rights : An Essay for Robert Cover », *Yale Law Journal*, 96, 1987) or critical studies of race (Kimberlé CRENSHAW, « Race, Reform and Retrenchment : Transformation and Legitimation in Antidiscrimination Law », *Harvard Law Review*, 101 [7], 1988) or Latino studies, *LatCrit* (Elizabeth M. IGLESIAS, « Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community », *University of Miami Law Review*, 53, 1999).

supposition in social theory. In the case of the LCS, this problem is manifested in a type of empirical investigation that accentuates aspects related to agency, constructive capacities, and resistance, at the expense of a social theory inclined to put the emphasis on conflict, hierarchy and structure. It is worth noticing that this difference between conflict theory and constitutive theory exists despite their agreement on the necessity to overcome the agency/structure dichotomy or the objectivism/subjectivism dualism. In other words, I claim that LCS have not succeeded in their purpose to overcome the agency/structure dichotomy and that this is due to the fact that they do not take sufficiently into consideration the analysis of the social reality under which legal consciousness is produced and reproduced in society, *i.e.* the analysis of, as Bourdieu says, the « social construction of the principles of construction of that reality » which is implemented in social practices.

The exigency of theoretical coherence in the model adopted, in very vague terms to be sure, by the Legal Consciousness Studies, posits a dilemma. One possibility is to uphold a constitutive theory of a culturalist stripe - which goes from Clifford Geertz to Paul Kahn - according to which local actors in specific discursive or symbolic social contexts in which plurality, contingency, indeterminacy engage in practices of social construction. In this case, my view is that reference to authors such as Bourdieu, Giddens or Touraine is inappropriate. Another possibility is to take seriously the structural aspect in social construction which means taking on the challenge of both 1) the tension between attempts at social change that start from individual or collective action and the barriers, sometimes insurmountable, that inhibit those emancipatory endeavors, and 2) the tension between the micro-level of social action and the macro or institutional level. I think that a critical vision of law, such as that attempted in the studies of legal consciousness, would have much more chance to prosper on this micro/macro terrain ⁶⁰. In sociolegal terms, it would be then a question of combining the symbolic vision of law, inherent in all constitutive social theories, and which is not called into question here, with a theory of the symbolic strategy as a political instrument, whether it be of domination or of social emancipation. But clearly this task still lies ahead ⁶¹.

60. A good example of the theoretical connection between micro and macro can be seen in the concept of the « extended case method » developed by Michael Burawoy ; such a method « attempts to elaborate the effects of the “macro” on the “micro”. It requires that we specify some particular feature of the social situation that requires explanation by reference to particular forces external to itself » (Michael BURAWOY *et al.*, *Ethnography Unbound : Power Resistance in the Modern Metropolis*, *op. cit.*). See also Karin KNORR-CETINA and Aaron V. CICOUREL (eds.), *Advances in Social Theory and Methodology : Toward an Integration of Micro- and Macro-Sociologies*, Boston, Routledge & Kegan Paul, 1981. Concerning socio-legal studies, Santos develops a complex macro/micro framework for the explanation of the role law plays in society as well as for overcoming the dichotomy agency/structure (Boaventura DE SOUSA SANTOS, *Toward a New Common Sense : Law, Science and Politics in the Paradigmatic Transition*, *op. cit.*).

61. A similar version of this article is being published in the *University of Florida Law Review* and a different version will be published in the *International Journal For the Semiotics of Law*. I would like to thank Jane Larson, John Brigham, Sally Merry, Cesar Rodriguez, Diego Lopez, Howard Erlanger, Catherine Albiston, Daniel Lipson, Cris Rggiero, Ruben Garcia, Oscar Guardiola, Jonathan Graubart, Dan Steward, and Austin Sarat, for the valuable comments they provided on an earlier version of this article.