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SYMBOLIC POWER WITHOUT SYMBOLIC VIOLENCE?

*Mauricio García-Villegas** ** ***

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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. Thus, social practices are socially constructed at the same time. Neither subjects nor objects existed prior to this work of construction; the nature of reality is therefore always symbolic, discursive.¹ 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 Essay, I propose to analyze some aspects of the reception of that social theory in these sociological 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 that they are premised on different presuppositions about social relations.²

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1. For this concept, see ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARD A RADICAL DEMOCRATIC POLITICS* (1985).

2. See generally JEFFREY C. ALEXANDER, *TWENTY LECTURES: SOCIOLOGICAL THEORY SINCE WORLD WAR II* (1987).

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 symbolism in law; finally I concentrate on a theoretical comparison between Bourdieu and the LCS. 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 L&S began to reconceptualize its movement. The aim was to achieve greater critical commitment in opposition to the predominant position, which, according to critics, was politically and epistemologically perverted through the prevalence of an institutional viewpoint and a public policy bias.³ 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, following McCann and March,⁴ and Ewick and Silbey,⁵ "Legal Consciousness Studies." They include not only those authors referred to in McCann and March,⁶ but also part of the group of sociolegal researchers—especially what Trubek and Esser have named the "Cultural Anthropology" tendency—partially linked to the Amherst Seminar in Massachusetts. All of these authors base their work in a *constitutive theory* of social action and beginning from that point, attack

3. See generally Austin Sarat & Susan S. Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97 (1988).

4. See generally Michael W. McCann & Tracey March, *Law and Everyday Forms of Resistance: A Socio-Political Assessment*, in 15 STUDIES IN LAW, POLITICS, & SOCIETY (Austin Sarat & Susan S. Silbey eds., 1995).

5. See generally PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE ch. 3 (1998) [hereinafter COMMON PLACE]; Patricia Ewick & Susan S. Silbey, *Conformity, Contestation and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992) [hereinafter *Legal Consciousness*].

6. McCann & March, *supra* note 4, at 208-09. In their examination of these sociolegal studies McCann and March concentrate on the following authors: SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS (1990); BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT (1993); *Legal Consciousness*, *supra* note 5; Austin Sarat, "... The Law Is All Over": Power, Resistance and Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990) [hereinafter *The Law*]; Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-Empiricist Sociology of Law*, 15 LAW & SOC. INQUIRY 155 (1990) [hereinafter *Off to Meet the Wizard*]; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). See generally McCann & March, *supra* note 4.

instrumentalist visions of law.⁷ 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.

I will develop my analysis on these LCS mostly in very general terms, understanding that they belong to what is today a dominant trend in sociolegal studies in the United States. I am aware of the fact that, given this level of abstraction, my critique is not suitable to all authors interested in 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.⁸ Accordingly, 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.⁹

The concept of legality is central to this perspective. Patricia Ewick and Susan Silbey point out that "(l)egality 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."¹⁰ One can detect three more or less scattered premises in this reconfiguring of L&S: first, a defense of empirical research without 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 L&S Movement.¹¹ There is no objective truth; that is, there is no truth independent of the knowing subject. The significance of knowledge is socially constructed in the relationship between the observer

7. It is worth noticing that there are some legal theorists who apply the *constitutive theory* to the legal field in rather different terms. See, e.g., JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* (1996); John Brigham, *The Constitution of Interests: Institutionalism, CLS and New Approaches to Sociolegal Studies*, 10 *YALE J.L. & HUMAN.* 421 (1998) [hereinafter *Constitutions of Interests*].

8. 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." *Legal Consciousness*, *supra* note 5, at 737.

9. *Id.* at 741-42.

10. COMMON PLACE, *supra* note 5, at 17.

11. McCann & March, *supra* note 4.

and the observed.¹² 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.¹³ Sociolegal research provides new visions or interpretations of legal phenomena, perhaps more adequate, but without validity or truth being claimed for them.¹⁴ 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 L&S 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.’”¹⁵

Empirical research thus changes its subject of analysis in this new version of L&S. LCS react against a research tradition dedicated to the study of how legal institutions operate, and, in particular, the courts. LCS also interested themselves in judicial work, but not from the perspective of the judge or the judge’s decision, as the earlier work in L&S had done. Instead, they examine judicial work from the perspective of the participating actors. In McCann’s words, they countered the top-down approach with “*bottom-up jurisprudence*.”¹⁶ In these new micro-cultural spaces, ethnographic and anthropological research acquire an overwhelming importance that contrast with other approaches that are more concerned with the structural elements of class or hegemony.

12. See Christine B. Harrington & Barbara Yngvesson, *Interpretative Sociolegal Research*, 15 LAW & SOC. INQUIRY 135, 148 (1990).

13. David M. Trubek & John Esser, “Critical Empiricism” in *American Legal Studies: Paradox, Program, or Pandora’s Box?*, 14 LAW & SOC. INQUIRY 3, 3-52 (1987). 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 problems. For the complete debate, see generally *Review Section Debate*, 15 LAW & SOC. INQUIRY 135, 135-80 (1990).

14. See *Off to Meet the Wizard*, *supra* note 6, at 166.

15. *Id.* at 165.

16. MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 21 (1994).

Additionally, LCS identified themselves politically with the interests of the subjects of their research—the marginalized, the minorities, the excluded, etc.—and then attempted to create alternative social forms through the use of law.¹⁷ This Essay affirmatively resolves the debate that arose inside the Critical Legal Studies (CLS) group about the convenience of using the law as an instrument of social emancipation. LCS recognize the possibilities of struggle against hegemony without forgetting that the law can, *de facto*, work in some cases as an instrument of social domination.¹⁸ In this regard, the understanding of the relationship between law and social change is much more complex and elaborate than the approach found in CLS.¹⁹

Also, from its origins, those working in LCS joined critics in rejecting the *gap studies* and, in general, positioned themselves against the instrumentalist views of law predominating in L&S during the 1970s. In contrast to these approaches, they insisted on the indeterminate character of law.²⁰ 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.²¹ 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[s] repeated, patterned, and stabilized, and those institutionalized structures become part of the meaning systems employed by individuals.”²² 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 of individuals and institutions.

17. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); see generally White, *supra* note 6.

18. Adelaide H. Villmoare, *The Left's Problems with Rights*, 9 *LEGAL STUD. F.* 39, 41-43 (1985).

19. See MCCANN, *supra* note 16.

20. *Legal Consciousness*, *supra* note 5, at 742; see also COMMON PLACE, *supra* note 5.

21. See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

22. *Legal Consciousness*, *supra* note 5, at 741. The cultural emphasis in these studies is notorious. On this point, see MCCANN, *supra* note 16.

II. ANTI-STRUCTURALISM AND THE CRITICAL STANCE

Studies of legal consciousness bring together, with variants, essential parts of both the L&S and critical traditions. From L&S they have taken the idea that empirical research is essential to make sense of the way law functions in 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 mentioned above, these studies have made extremely important contributions, especially with regard to the complexity of individuals' legal strategies, whether of accommodation or resistance.²³ Despite their critical ambitions, however, 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 LCS' failure to provide a strong political critique to the studies attachment to empiricism.²⁴ 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.²⁵ Excessive confidence in social science and in the possibility of understanding a sociolegal reality through empirical investigation limits their critical perspective. The fact that, according to established social science methods, only “verifiable” objects of study 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.²⁶ I agree with Trubek and Esser on their idea that LCS lack 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.

23. See generally MCCANN, *supra* note 16; McCann & March, *supra* note 4.

24. See generally Trubek & Esser, *supra* note 13.

25. *Id.* at 33-34.

26. See generally Boaventura de Sousa Santos, *Room for Manoeuver: Paradox, Program, or Pandora's Box?*, 14 *LAW & SOC. INQUIRY* 149 (1989); Joel F. Handler, *Postmodernism, Protest and the New Social Movements*, 26 *LAW & SOC'Y. REV.* 697 (1992).

The contemporary debate on empiricism and criticism, however, is not what it was when Trubek and Esser wrote their influential essay. Over recent decades, sociolegal theory in L&S has joined in with the prevailing tendency in social theory, according to which it is necessary to supersede both objectivist positions (functionalism, structuralism) and subjectivist stances (phenomenology, ethnomethodology, interactionism, etc.).²⁷ This tendency goes by different names, among which the *theorie pratique* of Pierre Bourdieu and the “structuration theory” of Anthony Giddens are outstanding examples. In LCS, these theoretical positions are generally recognized and adopted under the rubric of a “constitutive theory of law.”²⁸

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.²⁹ In this Essay, I argue that the domestication of critique in the LCS is linked to a certain dissonance between their empirical studies and the theoretical grounding. This dissociation has an explanation not only in a certain geographical division between empirical research with a strong influence of North American empiricist traditions³⁰ and a theoretical bases

27. See, e.g., *ADVANCES IN SOCIAL THEORY AND METHODOLOGY: TOWARD AN INTEGRATION OF MICRO- AND MACRO-SOCIOLOGIES* (K. Knorr-Cetina & A. V. Cicourel eds., 1981) [hereinafter *ADVANCES OF SOCIAL THEORY AND METHODOLOGY*], in which articles by Anthony Giddens, Pierre Bourdieu, J. Habermas, Randall Collins, and others are included; MICHAEL BURAWOY ET AL., *ETHNOGRAPHY UNBOUND, POWER AND RESISTANCE IN THE MODERN METROPOLIS* (1991); Anthony Elliot, *Introduction*, in *THE BLACKWELL READER IN CONTEMPORARY SOCIAL THEORY* (Anthony Elliot ed., 1999).

28. See JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* (1996); COMMON PLACE, *supra* note 5, at 274; MCCANN, *supra* note 16, at 303; Harrington & Yngvesson, *supra* note 12, at 141; *Legal Consciousness*, *supra* note 5. For a more general overview of the contributions of this theory in law, see ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW* (1993). Legal consciousness studies (LCS) are not alone in employing this theory, see, e.g., Ruth Margaret Buchanan, *Context, Continuity and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999 (1994). For its theoretical antecedents, see DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (Douglas Hay et al. eds., 1975); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Karl Klare, *Lawmaking as Praxis*, 40 TELOS 123 (1979). The constitutive theory of law is usually an offshoot of cultural studies, especially drawing on the seminal work of CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983) and MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall trans., 1984) and of postmodernism; see Handler, *supra* note 26; LACLAU & MOUFFE, *supra* note 1.

29. Handler, *supra* note 26.

30. C.G.A. Bryant argues that a positivist approach to the social sciences has predominated U.S. departments of sociology since 1940. CHRISTOPHER G.A. BRYANT, *POSITIVISM IN SOCIAL THEORY RESEARCH* 133 (1985); see also Alan Sica, *Social Theory's "Constituency,"* 20 AM.

of European origin³¹ emphasizing critique, but also in a differentiation with political roots as the dissociation between theoretical model and empirical investigation originates in the existence of divergent “theoretical presuppositions”—to employ 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 who study society as a terrain of conflict, stratified and marked by struggle,³² and theorists who, without ignoring the existence of conflict, posit that society is better characterized by features such as interaction and culture. 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.³³ In a more general sense, however, this tension continues to have meaning and manifests itself in different ways.³⁴

In short, I hypothesize that there is a dissociation in LCS between two types of theoretical foundations. On one hand, they seem to adhere to a general theory primarily developed in Europe by theorists working within a social conflict tradition.³⁵ This framework is supposedly aimed at nourishing what LCS call a constitutive social theory, by which the structure/agency dichotomy would be overcome. On the other hand, however, 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 were almost forgotten. Symbolic interchange obscures symbolic violence.

In other terms, there seems to be a gap between interpretivist theoretical models—society as constructed—based in assumptions close to the conflict tradition, and empirical investigations associated with a sort

SOCIOLOGIST 227, 227-41 (1989).

31. In theoretical matters, North American sociologists of law have been somewhat dependent on European tendencies. See de Sousa Santos, *supra* note 26; Trubek & Esser, *supra* note 13.

32. Here I am referring in general terms to all social theories that emphasize conflict, especially between groups and classes, as a central element of social practices and of social theory.

33. See generally ANTHONY GIDDENS, *SOCIOLOGY* 1 (1993).

34. As Randall Collins reviews in his text, RANDALL COLLINS, *FOUR SOCIOLOGICAL TRADITIONS* (1994).

35. Such theorists include Bourdieu, Foucault, Giddens, and Touraine.

of cultural microinteractionism. This dichotomy also appears as a lack of accord between defenders of a cultural perspective on legal practices³⁶ and proponents of a conflict theory.³⁷ The fact that all of these authors share the idea to overcome the dichotomy between structure and agency—which characterizes constitutive social theory—does not seem sufficient to include them under 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 LCS the law is seen as a symbolic or discursive object.³⁸ This *symbolic vision* on law is different from the concept of the *symbolic use* of law that Bourdieu, among others,³⁹ proposes. While the first concept

36. See, e.g., GEERTZ, *supra* note 28; PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); Susan Silbey, *Making a Place for Cultural Analyses of Law*, 17 *LAW & SOC. INQUIRY* 39 (1992); Barbra Yngvesson, *Inventing Law in Social Setting: Retinking Popular Legal Culture*, 98 *YALE L. J.* 1689 (1989).

37. See, e.g., PIERRE BOURDIEU, *RAISONS PRATIQUES: SUR LA THÉORIE DEL 'ACTION* (1994); ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS* (1979) [hereinafter *CENTRAL PROBLEMS*]; ANTHONY GIDDENS, *SOCIOLOGY* [hereinafter *SOCIOLOGY*]. Bourdieu explains the production and reproduction of hierarchical social systems with reference to the way that cultural resources, social processes, and institutions maintain individuals in a continual competition for social dominance. On the adoption of a social theory of conflict in Bourdieu, see DAVID SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* (1997). Giddens, in turn, argues that all social systems

can be studied as incorporating or expressing modes of *domination* and it is this concept more than any other that provides the focal point for the investigation of power. Social systems that have some regularized existence across time-space are always “power systems,” or exhibit forms of domination, in the sense that they are comprised of relations of autonomy and dependence between actors or collectivities of actors.

ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* 8 (1987).

38. The sociolegal literature alludes to this as “interpretive.” Trubek & Esser, *supra* note 13, at 13-14. In Europe the term “discursive” is more frequently used.

39. See generally GEORGES BALANDIER, *LE POUVOIR SUR SCÈNES* (Ballard ed., 1992); JOSÉ EDUARDO FARIA, *EFICACIA JURIDICA E VIOLENCIA SIMBOLICA: O DIREITO COMO INSTRUMENTO DE TRANSFORMAÇÃO SOCIAL* (1984); Danièle Loschak, *Droit, normalité et normalization*, in *LE DROIT EN PROCESS* (Danièle Loschak ed., 1983); MAURICIO GARCÍA-VILLEGAS, *LA EFICACIA SIMBOLICA DEL DERECHO: EXAMEN DE SITUACIONES COLOMBIANAS* (1993).

refers chiefly to a problem of knowledge,⁴⁰ the second adds an element of social domination.⁴¹ Given the plurality and malleability of the legal symbols in the conception of LCS, and given that the meaning of such symbols is never fixed, law has a social character that is essentially weak and almost random.⁴² Sarat, for instance, claims⁴³ that disadvantaged citizens do not accept a “myth of rights”;⁴⁴ 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—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 problems 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 the symbolism in legal scholarship, and I will show its different uses in North America; 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 SYMBOLISM IN LEGAL SCHOLARSHIP

Symbolism is not a way to manufacture meanings, but is rather a modality of textual interpretation.⁴⁵ 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

40. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 21 (1983) (referring to this perspective as “conceiving of social life as organized in terms of symbols . . . whose meaning . . . we must grasp if we are to understand that organization and formulate its principles”).

41. 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 a symbol that constitutes and is constituted in these practices.

42. MERRY, *supra* note 6, at 147.

43. *E.g.*, The Law, *supra* note 6, at 374.

44. See generally STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

45. UMBERTO ECO, SEMIOTICA E FILOSOFIA DEL LINGUAGGIO 225 (1984); ROLAND BARTHES, MITOLOGIAS 211, 214, 226 (1980).

calls the “cloudiness of the content.”⁴⁶ In contrast, metaphors function precisely in terms of meaning. Metaphors “allow us to understand one domain of experience in terms of another.”⁴⁷ Thus, symbolism involves interpretation and justification in pragmatic contexts. This is called pragmatic understanding of language⁴⁸ and has had an extraordinary influence on twentieth century theory. It is associated with the elimination of the subject/object dichotomy in social theory,⁴⁹ with the prevalence of hermeneutic approaches both in the social sciences⁵⁰ and law,⁵¹ with rhetorical approaches in legal theory,⁵² with the analysis of symbols and symbolism in anthropology,⁵³ and with the study of sociolegal interactions.⁵⁴

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

46. ECO, *supra* note 45, at 226; *see also* ROLAND BARTHES, *MITOLOGIAS* 211, 214, 226 (1980).

47. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 117 (1980).

48. Regarding the distinction between semantics, syntax, and the pragmatic, *see* Charles W. Morris, *Foundations of the Theory of Signs*, in *INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE* (Otto Neurath ed., 1938). For the pragmatic uses of language, *see* H.P. Grice, *Meaning*, 64 *PHILOSOPHICAL REV.* 337, 377-88 (1957). For the relationship between linguistic pragmatics and power, *see* BOURDIEU, *supra* note 37; V.N. VOLOSINOV, *MARXISM AND THE PHILOSOPHY OF LANGUAGE* (1973).

49. PIERRE BOURDIEU, *LE SENS PRATIQUE* 43 (1980) (“Among all oppositions artificially dividing social science the most unfortunate and ruinous is that established between subject[] and object[].”); *SOCIOLOGY*, *supra* note 37, at 158 (noting that the study of natural languages is central both to the understanding of actions as “meaningful,” and to the process of communication in social interactions); JEAN-FRANÇOIS LYOTARD, *LA CONDITION POSTMODERN* 67 (1979) (“*le lien social est langagier*”).

50. *SOCIOLOGY*, *supra* note 37, at 149.

51. *See* RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985). *See, e.g.*, Fiss, *supra* note 28 (explaining judicial work as neither a discretionary nor mechanical activity); *see also* Gordon, *supra* note 28.

52. The pragmatic relations between the speaker and audience in the context of legal argumentation have been explored extensively by CHAIM PERELMAN, *LOGIQUE JURIDIQUE* (1979); CHAIM PERELMAN, *LE RAISONNABLE ET LE DÉRAISONNABLE EN DROIT* (1984).

53. Classical works include: CLAUDE LEVI-STRAUSS, *ANTROPOLOGIA STRUCTURAL* (1984); BRONISLAW MALINOWSKI, *TEORIA SCIENTIFICA DELLA CULTURA ED ALTRI SAGGI* (1949); M. MAUSS, *TEORIA GENEERALE DELLA MAGIA ED ALTRI SAGI* (1965).

54. For example, “symbolic interactionism” has been applied to law in different ways. For examples of the various approaches, *see* JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963); Thomas Meisenhelder, *Law as Symbolic Action: Kenneth Burke's Sociology of Law*, 4 *SYMBOLIC INTERACTION* 43, 43-57 (1981); Carolyn R. Miller, *Public Knowledge in Science and Society*, 3 *PRE/TEXT* 31, 31-49 (1982).

about.”⁵⁵ 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.⁵⁶

In legal scholarship, the idea of the symbolic is most widespread in the area of constitutional law,⁵⁷ but it also has been developed in criminal law,⁵⁸ labor law,⁵⁹ and in environmental law.⁶⁰ 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.

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.”⁶¹ In the United States, Sally Merry, for example, has argued that “law works in the world not just by imposition of rules and punishments but also by its capacity to

55. GUSFIELD, *supra* note 54, at 21.

56. *Id.* at 170.

57. In the United States there is a large bibliography on the symbolic effects of constitutions; see, e.g., JOHN BRIGHAM, *THE CULT OF THE COURT* (1987); SCHEINGOLD, *supra* note 44; *Constitutions of Interest*, *supra* note 7; Max Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290 (1937). For the Latin American context, see MARCELO NEVES, *A CONSTITUCIONALIZACAO SIMBOLICA* (1994); GARCÍA-VILLEGAS, *supra* note 39.

58. Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 *LAW & SOC'Y REV.* 329, 329-353 (1988), for example, emphasizes the symbolic dimensions of rape law as an indicator of women's contemporary legal status, rather than as an instrumental mechanism for the achievement of specific policy goals. Juvenile law is also frequently analyzed in symbolic terms.

59. William J. Moore & Robert J. Newman, *The Effects of Right-to-Work Laws: A Review of the Literature*, 38 *INDUS. & LAB. REL. REV.* 571, 571-585 (1985). Moore & Newman have argued that the impact of the right-to-work (RTW) laws on union membership, wages, and industry location is more symbolic than substantive. *See id.*

60. Pauline Lane, *Ecofeminism Meets Criminology*, 2 *THEORETICAL CRIMINOLOGY* 235, 235-48 (1998); Pierre Lascoumes, *La Formalisation Juridique du Risque Industriel en Matière de Protection de L'environnement*, 31 *SOCIOLOGIE-DU-TRAVAIL* 315, 315-33 (1989).

61. Danièle Loschak, *Driot, Normalite Et Normalization*, in *LE DROIT EN PROCESS* 54 (1983).

construct authoritative images of social relationships and actions. . . .”⁶² 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,⁶³ constitutional legal studies,⁶⁴ and even legal theory⁶⁵ 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*.⁶⁶ 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

62. MERRY, *supra* note 6, at 9.

63. Political science approaches often examine the processes by which government actions shape public beliefs, perceptions, and behaviors. *See, e.g.*, MURRAY EDELMAN, *POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL* (1977); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964) [hereinafter *SYMBOLIC USES OF POLITICS*]; Kitty Calavita, *The New Politics of Immigration: “Balanced-Budget Conservatism” and the Symbolism of Proposition 187*, 43 *SOC. PROBS.* 284, 284-305 (1996).

64. The symbolic dimension of a constitution is often seen as an important and necessary political effect which conditions the constitution’s instrumental efficacy. On this view, constitutions have the symbolic function of framing a civic identity for people. *See* Giorgio Rebuffa, *Legality and Illegality, in the Constitution; Legalità e illegalità nella Costituzione*, 37 *QUADERNI-DI-SOCIOLOGIA* 97, 97-104 (1993).

65. Even the instrumental efficacy of law presupposes this symbolic efficacy. Moreover, the idea of validity in legal theory is very often linked to the symbolic acceptance of the legal system. *See* H.L.A. HART, *THE CONCEPT OF LAW* (1961).

66. In the U.S., this process of conversion is frequently found in policy analyses. *See, e.g.*, JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT’S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING A SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION OF RUINED HOPES* (1973). For an example of it in the European context, see Simon Charbonneau & Jean G. Padioleau, *La Mise En Oeuvre d’une Politique Publique Réglementaire Défrichement Des Bois et Forêts*, 21 *REVUE FR. DE SOCIOLOGIE* 49, 49-75 (1980); J.D. Dellay & L. Mader, *Que faire des objectifs dans une étude de mise en oeuvre de la législation?*, 7 *REVUE SUISSE DE SOCIOLOGIE* 385, 385-97 (1981).

policy reformers⁶⁷ led these studies to overestimate the identification of the state and official law. The relatively progressive political agenda that was born with the L&S Movement was eventually smothered by the weight of its debt to state policy reform.⁶⁸ “[T]he 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 American legal institutions works, paradoxically, to reinforce fundamental assumptions of liberal legalism.”⁶⁹

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 constructed⁷⁰ and not so much in the instrumental determination of social behaviors through rewards and sanctions. This position has been argued by scholars in the traditional CLS. Their lack of agreement with respect to the balance between the cultural and the economic, however, 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 is 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 economy.⁷¹ 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. According to this—present in Balbus for example—the possibilities of social emancipation through progressive juridical reforms are practically nonexistent. Others, however, relying on a Marxist analysis with a cultural emphasis,⁷² argued that the law offers social movements genuine maneuverability derived from the needs that the

67. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U.L. REV. 4 (1990), has also pointed to the importance of funding to this uneasy alliance: “[s]ince there was no agency ready to provide adequate financial support for an autonomous ‘discipline’ of law and society, their product was often tailored to meet the needs of government agencies and foundations which had policy goals that might be served by law and society knowledge.” *Id.* at 29.

68. *See id.* at 28-30.

69. Sarat & Silbey, *supra* note 3, at 113.

70. Robert W. Gordon, *Some Critical Theories on Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 3d ed. 1998)

71. *See* CLYDE W. BARROW, CRITICAL THEORIES OF THE STATE: MARXIST, NEO-MARXIST, POST-MARXIST (1993).

72. Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC’Y REV. 11 (1985).

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 predominated.⁷³

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 manipulation.⁷⁴ 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 that were supposed to have only symbolic effects.⁷⁵ 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 also can use these meanings in their favor. The concept of hegemony in Gramsci, understood as an arena of struggle for political meaning, is important for the defense of this position.⁷⁶

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 objectives.⁷⁷ 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

73. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 779 (1985).

74. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392-93 (1984). See generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 70; Joan Roelofs, *Judicial Activism as Social Engineering: A Marxist Interpretation of the Warren Court*, in SUPREME COURT ACTIVISM AND RESTRAINT (Stephen C. Halpern & Charles M. Lamb eds., 1982); Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Athiest*, 19 NOVA L. REV. 909 (1995).

75. See generally Marc Galanter, *The Radiating Effect of Courts*, in EMPIRICAL THEORIES OF COURTS (Keith O. Boyum & Lynn Mather eds., 1983); MCCANN, *supra* note 16, at 218.

76. See generally Gordon, *supra* note 70.

77. On this point, see M. CROZIER & FRIEDBERG, *L'ACTEUR ET LE SYSTÈME* (1977) in Europe, and, in the United States, see the authors of the school called "new institutionalism" in sociology: P. DIMAGGIO & WALTER POWELL, *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 8, 112 (1991). A similar perspective from outside this current can be found in, *THE SYMBOLIC USES OF POLITICS*, *supra* note 63, where social problems are constructed by institutions in accordance with their need for legitimation.

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."⁷⁸ "Law," argues Sarat, "is both a resource and a constraint."⁷⁹

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, 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 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 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 aid in comprehending the problems that derive from the extant theoretical model in LCS.

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 LCS.⁸⁰ His work is frequently referred to by

78. COMMON PLACE, *supra* note 5, at 23.

79. Austin Sarat "... *The Law is All Over*" *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 377 (1990).

80. *E.g.*, EWICK & SILBEY, COMMON PLACE, *supra* note 5, at 39 (when explaining their theoretical framework they state: "[w]e draw on a recent and growing body of literature in sociology that attempts to bridge these dualisms by redefining the relationship between the individual and social structure, reconfiguring what was understood to be an oppositional relationship as one that is mutually defining." To that end, they cite first Bourdieu and then Giddens, Swidler, Sewell, and Steinberg. In theoretical studies of sociology of law, Bourdieu is frequently cited to justify a theoretical framework). Buchanan, *supra* note 28; *see also* McCann &

sociological 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 as much 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.⁸¹

The empirical dimension of Bourdieu's postulate⁸² and the relevance of everyday practices fit well with LCS interests. One could even say 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 an underlying question: how are the discourses and social practices produced and reproduced?

Bourdieu's interest in this question is located in the fact that one can obtain, through its elucidation, a better comprehension of political domination in society. In other words, this question suggests another more profound one: 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.⁸³ Now, domination,

March, *supra* note 4, at 217; MERRY, *supra* note 6.

81. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (1990). For an application of this concept to the field of law, see Frédéric Ocqueteau & Soubiran-Paillet, *Champ juridique, juristes et règle de droit: Une sociologie entre disqualification et paradoxe*, in *DROIT ET SOCIÉTÉ* 9, 9-26 (1996).

82. It is worth noting that in Bourdieu this does not lead to a positivist outlook on the social sciences. Bourdieu considers erroneous the opposition of theory and practice or that of quantitative and qualitative methods. Both "theoreticism," understood as speculation divorced from reality and "methodologism" (methods as an end in themselves) have no reason to exist in sociology. See generally Pierre Bourdieu & De San Martin, *Le patronat*, in *ACTES DE LA RECHERCHE SCIENTIFIQUE* (1978).

83. SWARTZ, *supra* note 37, at 63. According to Wacquant, PIERRE BOURDIEU & J. D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 14 (1992), Bourdieu's work can be interpreted as a materialist anthropology of the specific contributions of the different symbolic

more than something linked to the use of physical violence, is something 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 cultural capital and the close connection between the two forms of capital.⁸⁴ This articulation operates in such a way that the symbolic systems—through which we establish classifications and determine the essential categories of social inclusion and exclusion—do not have only a cognitive and social structure function,⁸⁵ 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 connotations 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*.⁸⁶ 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."⁸⁷ 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 practices.⁸⁸ The symbolic capital embedded in legal norms creates a type

violences on the reproduction and transformation of the structures of domination.

84. SWARTZ, *supra* note 37, at 136-37.

85. According to Bourdieu, the cognitive structures which social agents implement in their practical knowledge of the social world are internalized "embodied" social structures. *See generally* PIERRE BOURDIEU, *LA DISTINCTION; CRITIQUE SOCIAL DU JUGEMENT* (1979).

86. Pierre Bourdieu, *La force du droit; elements pour une sociologie du champ juridique*, in *ACTES DE LA RECHERCHE EN SCIENCES SOCIALES* 64 (1986) [hereinafter *La force du droit*](French version, preferred); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 814-53 (1987) [hereinafter *The Force of Law*](English version). However, I use here the original French version.

87. *See* sources cited *supra* note 86

88. *Id.* at 3. This idea of symbolic power is also usefully explored by BALANDIER, *supra* note 39; HARRY PROSS, *ESTRUCTURA SIMBOLICA DEL PODER* (1980); HARRY PROSS, *VIOLENCIA SOCIAL DE LOS SIMBOLOS* (1989).

of force that functions independently of their implementation.⁸⁹ 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.⁹⁰

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 accounts that 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.⁹¹ Against the materialistic account Bourdieu maintains that, "[w]e need to recover the profound logic of juridical work in its most specific locus"⁹² However, this postulate does not prevent him from recognizing 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."⁹³

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, "[g]iven 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."⁹⁴ For this reason the schema for perceiving the world are not simply systems of knowledge, they also are systems of social domination that demonstrate the importance of the objective division between social classes.⁹⁵ Loic 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."⁹⁶

89. GARCÍA-VILLEGAS, *supra* note 39.

90. *La force du droit*, *supra* note 86, at 14.

91. *Id.* In the United States this debate was specially intense between CLS scholars and the legal mainstream.

92. *La force du droit*, *supra* note 89, at 3-4.

93. *Id.* at 18.

94. PIERRE BOURDIEU, *CHOSSES DITES* 160 (1987).

95. Social class, according to Bourdieu, does not have an objective reality as Marx thought. See BOURDIEU, *supra* note 37. What exists is "a space of differences, in which class exists, shall we say, virtually . . . not as a datum but rather as something that is being invented" *Id.* at 28.

96. BOURDIEU & WACQUANT, *supra* note 83, at 14.

In other words, 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, the political element, puts 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.

LCS also take an interest in knowing how legal discourse and legal practices are produced and reproduced over time.⁹⁷ 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 frameworks through which individuals give meaning to their legal performances.⁹⁸ The cultural and constitutive viewpoints can, at times, seem to be the same: "[t]his cultural or constructivist understanding sees legality as an ongoing human production."⁹⁹

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.¹⁰⁰ Consciousness, argue Ewick and Silbey, is not an effect of structure but rather an integral part of it. "[It] is participation in the production of structures."¹⁰¹ Accordingly, ideology is not a set of abstract ideas but a complex process through which "meaning is produced, challenged,

97. Silbey, *supra* note 36, at 41-42; *Legal Consciousness*, *supra* note 5, at 26; COMMON PLACE, *supra* note 5, at 45, 247.

98. Critics consider LCS to be "[s]tudies of legal culture." Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 26 LAW & SOC. INQUIRY 39 (1992); MCCANN, *supra* note 16, at 15.

99. COMMON PLACE, *supra* note 5, at 31.

100. It is difficult to comprehend the meaning of a cultural order according to Clifford Geertz, *Ideology as a Cultural System*, in IDEOLOGY AND DISCONTENT 47, 56-57 (David E. Apter ed., 1964). Cultural studies are marked by this skeptical position with respect to the possibilities of understanding the structural elements that infringe on agency. ALEXANDER, *supra* note 2, at 235.

101. COMMON PLACE, *supra* note 5, at 224.

reproduced, and transformed.”¹⁰² 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 structure.”¹⁰³ 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 with the experience of shared power.¹⁰⁴ Likewise, Harrington and Yngvesson, are opposed to a modern conception of power grounded in “the distinction between ideology and practice”;¹⁰⁵ such a conception places “ideology outside of social relations, and thus creat[es] a two-dimensional world, one part of which (culture, the symbolic, the state, law) is given and constitutes the other.”¹⁰⁶ The reconceptualization of these terms—culture, consciousness, structure, ideology—supposes an erasure of their dividing lines; the subsumption of structure in consciousness¹⁰⁷ makes the difference between culture, structure, consciousness, and ideology a very subtle one and frequently confusing.¹⁰⁸

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 LCS. This is the case of Michael McCann. For him “[t]he 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.¹⁰⁹ 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

102. MICHÉLE BARRETT, *WOMEN'S OPPRESSION TODAY: PROBLEMS IN MARXIST FEMINIST ANALYSIS* 47 (1980), cited in COMMON PLACE, *supra* note 5, at 225.

103. COMMON PLACE, *supra* note 5, at 225-26.

104. *Id.* at 225.

105. Harrington & Yngvesson, *supra* note 12, at 142.

106. *Id.*

107. COMMON PLACE, *supra* note 5, at 225 (stating that, “Structure, which in its conventional formulation tends to be understood as largely material and external to the situations it constrains, is now defined so as to encompass ideas as well as resources.”). I admit with McCann, however, that Merry’s analysis, MERRY, *supra* note 6, of this relation is different to the extent that she establishes a distinction between ideology and discourses.

108. See ALEXANDER, *supra* note 2, at 302-29, on the difficulties of formulating a cultural theory. According to this scholar, following Geertz, the goal of cultural analysis is interpretation and not theory. *Id.* at 328.

109. McCann & March, *supra* note 4, at 213.

actions justified in all circumstances.¹¹⁰ Their practices are presumed to be violence free. But this is an illusion, as Bourdieu has explained: “[a]nd the populist illusion which is nowadays nourished by a simplistic rhetoric of ‘resistance’ tends to conceal one of the most tragic effects of the condition of the dominated—the inclination to violence that is engendered by early and constant exposure to violence.”¹¹¹ Not only does this perspective 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.¹¹² Moreover, the idea that the resistance holds is not related to social classes, race, or workplace struggles, but rather to tactical maneuvers against judges, clerks, mediators, administrators, or other state officials.¹¹³ The fact that both the collective and the contextual dimension of individual practices are 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 resistance¹¹⁴ are reduced merely to intentions of resistance that are supposed to be heroic but in fact are mostly useless or ephemeral, even in terms of individual fights.

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 power.¹¹⁵

110. *See id.*

111. PIERRE BOURDIEU, PASCALIAN MEDITATIONS 233 (Richard Nice trans., Stanford Univ. Press 2000, 1997) [hereinafter PASCALIAN MEDITATIONS]. For an explanation of Bourdieu’s opposition against the celebration of resistance, struggles, and creative practices of the dominated, see P. BOURDIEU & LOIC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (1992) [hereinafter INVITATION TO REFLECTIVE SOCIOLOGY].

112. *See* PASCALIAN MEDITATIONS, *supra* note 111, at 219.

113. *See generally* McCann & March, *supra* note 4.

114. M. Becker, *Towards a Substantive Feminism*, in FEMINIST JURISPRUDENCE (Cynthia Grant Bowman & Morrison Torrey eds., 1995).

115. PASCALIAN MEDITATIONS, *supra* note 111, at 171.

On reading the stories presented by LCS one gets the impression that, despite 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.¹¹⁶ In the story of Millie Simpson told by Ewick and Silbey, for instance, it is clear that she—a poor Black women—succeeds in her resistance only when her boss, a powerful White man, decides to help her.¹¹⁷ 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 power.¹¹⁸ 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 represent. “There is a correspondence between social structures and mental structures, between the objective division of the social world—particularity between dominators and the dominated in the different spaces—and the principles of worldview and classification that agents apply to that world.”¹¹⁹ 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 the same way as economic capital and of course is intimately related to it. All cultural production is oriented to the production of dividends, that is, to a reward.¹²⁰ 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.

116. Moreover, some LCS are aware of this fact. Sarat, for instance, insists that the welfare poor do not have a counter hegemonic view of law; neither are they able to challenge the system of legal meaning through which power is exercised and domination maintained. *Off to Meet the Wizard*, *supra* note 6, at 377.

117. See COMMON PLACE, *supra* note 5, at 3-14.

118. SWARTZ, *supra* note 37, at 89 (interpreting Bourdieu, “[i]f 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.”).

119. PIERRE BOURDIEU, *LA NOBLESSE D’ÉTAT: GRAND CORPS ET GRANDES ÉCOLES 7* (1989) [hereinafter *LA NOBLESSE E’ÉTAT*]; BOURDIEU, *supra* note 49, at 206.

120. In Bourdieu’s theory there is a search for profit analogous to the quest for economic advantage in the selection or rejection of cultural styles. See BOURDIEU, *supra* note 37, at 147.

“A central objective of Bourdieu’s work is to show how cultural and social class correlate.”¹²¹ 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.¹²² So the law is an essential element of political domination and its nature is domineering, potent, and almost inevitable.¹²³ In contrast, for LCS law is always polyphonic, contingent, variable, and therefore, weak.¹²⁴

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. 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.”¹²⁵ 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.¹²⁶ This is the view derived from the history it authorizes, the story it wants to tell.¹²⁷ The second possibility, “with the law,” comprises a vision of the law as a playing field on which different actors and institutions compete.¹²⁸ The third, “against the law,” encompasses those attitudes that see the law as a space of confrontation and, at times, emancipatory struggle.¹²⁹

121. SWARTZ, *supra* note 37, at 143.

122. *Id.* at 89. In Bourdieu ideology or symbolic violence is “the capacity to impose the means for comprehending and adapting to the social world by representing economic and political power in disguised, taken-for-granted forms.” *Id.* In his PASCALIAN MEDITATIONS, however, Bourdieu warns about the concept of ideology:

[i]f I have little by little come to shun the use of the word “ideology” this is not only because of its polysemy and the resulting ambiguities. It is above all because, by evoking the order of ideas, and of action by ideas and on ideas, it inclines one to forget one of the most powerful mechanisms of the maintenance of the symbolic order, the *twofold naturalization* which results from the inscription of the social in things and in bodies.

PASCALIAN MEDIATIONS, *supra* note 111.

123. *La force du droit*, *supra* note 86, at 64; BOURDIEU, *supra* note 94.

124. *Off to Meet the Wizard*, *supra* note 6, at 375.

125. COMMON PLACE, *supra* note 5, at 45.

126. *Id.* at 47.

127. *Id.*

128. *Id.* at 48.

129. *Id.* at 48-49.

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 CLS. It does not appear, however, to give sufficient weight to the power of certain material factors to restrict pluralism, contingency, 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 Ewick and Silbey 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.¹³⁰

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 becomes repeated and stabilized, and those institutionalized structures become part of the meaning systems that are employed by actors.¹³¹ 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 are unable, despite their resistance, to modify their situation of subordination and marginality.¹³² 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.¹³³ 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 it exists in relation to other powers.¹³⁴

130. PASCALIAN MEDIATIONS, *supra* note 111, at 67.

131. *Legal Consciousness*, *supra* note 5, at 741.

132. See White, *supra* note 6, at 21-32 (declaring that the narration of Mr. G's history leaves the same impression).

133. PASCALIAN MEDIATIONS, *supra* note 111, at 68.

134. See generally BURAWOY ET AL., *supra* note 27; BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

In the face of the crushing imposition of official law on individuals' mental representations and on their practices, Ewick and Silbey speak of "reification";¹³⁵ Bourdieu, in comparison, refers to symbolic violence. These are not mere nuances of meaning; they presented and revealed two different theoretical options, one centered in problems of knowledge and the other in problems of power. In one, human agency is privileged, while the other emphasizes the state's imposition of a worldview. 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 insistently employ an idea of the symbolic, in opposition to an instrumentalist, view of law. For LCS, however, this notion has an epistemological use that refers to the construction of a legal reality premised on systems of communication and interchange among individuals.¹³⁶ 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, because creating and ordering social reality confers a permanence upon it that is typical of things.¹³⁷ In order not to fall into a sort of radical nominalism à la Foucault, however, 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."¹³⁸ 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.¹³⁹

LCS, 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 apropos here

135. COMMON PLACE, *supra* note 5, at 78-79.

136. In opposition to a conception of law as a set of normative institutionalized controls, see generally Galanter, *supra* note 75, at 117-42.

137. *La force du droit*, *supra* note 86, at 13.

138. *See id.*; BOURDIEU, *supra* note 49, at 206; BOURDIEU, *supra* note 94, at 160.

139. According to Swartz, Bourdieu injects the language of strategy to distance himself from strict structuralist forms of determination by stressing the importance of agency. SWARTZ, *supra* note 37. On the other hand, the concept of strategy does not lead to the acceptance of a rational choice theory. *Id.* at 99.

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 reality.¹⁴⁰

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 violence and class domination is not developed. For Yngvesson,¹⁴¹ 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 modified."¹⁴² Sarat explains this accent on resistance stating that "[m]eanings 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."¹⁴³ I think that this approach does not take material constraints seriously. In Stuart Hall's terms, "[it] replaces the inadequate notions of ideologies ascribed in blocks to classes with an equally unsatisfactory 'discursive' notion which implies total free floatingness of all ideological elements and discourses."¹⁴⁴

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."¹⁴⁵ Silbey recognizes, however, that the possibilities of variation in these meanings and values are limited by

140. PASCALIAN MEDITATIONS, *supra* note 111, at 174-75.

141. See generally Yngvesson, *supra* note 36

142. *Id.* at 1693.

143. Austin Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 140 (2000); see also MERRY, *supra* note 6.

144. Stuart Hall, *The Problem of Ideology: Marxism Without Guarantees*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 25, 41 (David Morley & Kuan-hsing Chen eds., 1996). A similar critique of culturalist positions is found in Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, in 19 THE TANNER LECTURES ON HUMAN VALUES 22 (Grethe B. Paterson ed., 1998); see also BURAWOY ET AL., *supra* note 27.

145. Silbey, *supra* note 98, at 45.

the specific circumstances in which each individual finds him or herself.¹⁴⁶ 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.¹⁴⁷ 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 argued¹⁴⁸—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. 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.”¹⁴⁹ 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

146. *Id.* at. 46.

147. Handler, *supra* note 26, at 700.

148. See Yngvesson, *supra* note 36, 98.

149. MERRY, *supra* note 6, at 8. See generally, *Legal Consciousness*, *supra* note 5. The fact that people go to court, for instance, is considered as a fact of domination: “freedom from the control of the community comes at the price of domination by the State, in the form of the court,” says Sally Merry. MERRY, *supra* note 6. Given however, their lack of interest in class matters and local positions of actors in society, they are not able to explain when and how this domination by courts actually works.

meaning. The difference between “high” and “low” is therefore erased.¹⁵⁰ It is true that agency and meaning are restricted by structures, but these structures are reduced to discourses and this 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 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. “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 intesubjecteive [sic] ties between individuals, but objective relations which exist ‘independently of individual consciousness and will’”¹⁵¹

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 in the United States or anywhere else. One does not have to be against the dynamic and omnipresent notion of power in Foucault¹⁵²—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 and times. Or put another way, institutional power also consists of

150. See generally Yngvesson, *supra* note 36, at 1689.

151. INVITATION TO REFLECTIVE SOCIOLOGY, *supra* note 111, at 97.

152. A sort of fascination with the concept of power as developed by Foucault in *le panoptique*, is found in LCS. See, e.g., COMMON PLACE, *supra* note 5, at 188; *Legal Consciousness*, *supra* note 5, at 731; William L.F. Felstiner & Austin Sarat, *Enactments of Power Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992). 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, 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. See Buchanan, *supra* note 30 (including a more elaborate analysis of Foucault).

the selection of which social spaces to protect, which to abandon, which to liberate, which to oppress, etc.¹⁵³

V. 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. It is doubtless that these studies offer a more highly developed and complex view of the sociolegal reality. A close reading, however, reveals the lack of critical energy that some legal studies formerly possessed. A certain domestication of the critical spirit has occurred, probably unintended, 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: first, as a critique of the LCS idea of abandonment of both the institutional and the macro-level perspectives in favor of ethnographic local studies; second, as a postulate of inadequacy of the theoretical model that sustains the studies undertaken within this micro-perspective.

Concerning the first point, LCS are nourished in the political commitment of the Critical Theorists as well as the empirical aims of the L&S founders. Nevertheless, they distance themselves both from CLS and from the initial tendency of L&S (*gap studies*). With respect to the first point, LCS 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

153. Boaventura Santos, *Bogotá: Uniandes, Siglo del Hombre*, in *EL CALEIDOSCOPIA DE LAS JUSTICIAS EN COLOMBIA* (2001).

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 domination, 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. There 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 Essay, the problem occurs because the theoretical agreement around the notion that the symbolic as 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 springs.¹⁵⁴

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. I think, however, 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 L&S has a conservative character, not because the researchers are conservative or because its use in the explication of reality prevents

154. *La noblesse d'état*, *supra* note 118, at 169.

investigators from adopting a critical stance, but rather due to the type of empirical investigation prevailing there. This type of research—unlike others¹⁵⁵—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 versus interpretivist—than as a problem of political presupposition 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 sufficiently consider the analysis of the social reality under which legal consciousness is produced and reproduced in society, 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 LCS, 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, and indeterminacy engage in practices of social construction. In this case my view is that all reference to authors such as Bourdieu, Giddens, or Touraine should be abandoned. 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

155. For example, those of Bourdieu. See also BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (discussing feminist studies); Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61 (1988); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). For critical studies of race see, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. (1988). For Latino studies, see Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 LA RAZA L.J. 147 (1994); Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

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,¹⁵⁶ would have much more chance to prosper on this micro/macro terrain.¹⁵⁷ 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 will not be an easy one and still lies ahead.

156. See McCann & March, *supra* note 4, at 209.

157. 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." BURAWOY ET AL., *supra* note 27, at 9; see also ADVANCES IN SOCIAL THEORY AND METHODOLOGY, *supra* note 27. 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. DE SOUSA SANTOS, *supra* note 134, at 275.

