



# Speech for the defense of a radically constructivist sociology of (criminal) law

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## Abstract

If the idea that crime is a social construct is commonsensical in various sociologically informed criminologies, sociological apprehensions of criminal law are still quite reluctant towards its implied epistemological stance. The main objective of this contribution is—by focusing on the idea that crime is a social construct—to examine some of the main contours of what a radically constructivist conception of (criminal) law could be. The paper identifies two potential problems, which can be avoided, in perspectives on crime as a social construction. It is proposed to break down any aprioristic relationship between deviance, abnormality and crime, and that we may decompartmentalize law from the juridical in a quite flexible way.

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## 0. Introduction

Debate is limited. Only certain views are allowed. But more than that, the terms of debate, the terms in which the world may be seen, the standards and lack of standards by which men judge of their accomplishments, of themselves, and of other men—these terms are officially or commercially determined, inculcated, enforced (C.W. Mills, *The Cultural Apparatus*, 1959).

In contemporary sociologically informed criminologies as in other academic fields, constructivism—an epistemological stance positing (in its radical form) that “the world as

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it is and the world as it is observed cannot be distinguished” (Luhmann, 2002, p. 11)<sup>1</sup>—has been highly influential. Indeed, one cannot fail to hear/read about the manufactured reality of crime.

One usual way to communicate a constructivist apprehension of crime is to suggest that it is mainly an institutional way to name *some* “conflicting situations”; abolitionists and some critical sociologists thus proposed that crime is the result of the State hegemonic expropriation of the definition and resolution of particular conflicts. Another quite common way to communicate a constructivist stance in the penal field is to propose that (criminal) law is a tool of dominant groups (the power elite, the bourgeoisie) to protect something (particular interests, a ‘moral order’). Indeed, various sociologists have proposed to think of crime as a cultural artefact dependent upon socio-historical contingencies, the constructivist stance growing more and more radical in the last third of the XXth century, and apparently reaching the Everest summit in some postmodernists’ flights of fancy (see below).

If the idea that crime is a social construct is commonsensical in various sociologically informed criminologies, sociological apprehensions of criminal law are still quite reluctant towards its implied epistemological stance. This may be so because of the deep impact of the sociological habit to think of crime in a mandatory relationship with something akin to Ideology, the *conscience collective*, or the Foucaultian a-juridical *pouvoir de la norme*, and because constructivism is often taken as contrary to a truly scientific endeavor, or even as leading social sciences to “self-destruction” (Gauchet, 2005, p. 182). By focusing on the idea that crime is a social construct, the main objective of this contribution is to examine some of the main contours of what a radically constructivist conception of (criminal) law could be.

Sociological perspectives on the social construction of crime often lead to two particular pitfalls: to limit constructivism to particular objects, or (in a wretched oxymoron) to re-essentialize the ‘deconstructed’ crime. These two pitfalls, which can be avoided only within a radically constructivist epistemology, are rapidly discussed in the first section of the paper. The second section of this contribution tries to renovate the terms in which the idea that crime is a social construct is defended, and to draw some conceptual corollaries. This is done by introducing Niklas Luhmann’s self-referential use of the notion of difference (or distinction). The relation between deviance and crime is then discussed. This notably leads me to propose that crime can difficultly be regarded as being, in the first place, a cherry on top of the abnormal sundae that deviance would represent. The last part of the paper explores issues related to legal pluralism, arguing in favor of a conception of (criminal) law guided by the concept of difference (in a Luhmannian, not Derridean, fashion).<sup>2</sup>

## 1. Two potential problems in perspectives on crime as a social construct

Constructivist perspectives on crime posit themselves against ‘traditional’ (sociological, psychological, cultural, political, etc.), viewpoints on crime. Constructivism’s *raison d’être* in the penal field is a political one: to demolish any discourse (knowledge, truth) on the *nature* of crime and criminals. This is done in ways which engage more with criminal justice discourses, practices, and institutions, than with contemporary debates in theories of

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<sup>1</sup>I will address this epistemology (and its radical form) with much more details below.

<sup>2</sup>On proximities and “mutual persecutions between the theories”, see Teubner (2001).

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