

## Common Law: Co-Counsel S5, Ep. 7: Susan Silbey

[THEME MUSIC IN, THEN UNDER]

**Risa Goluboff:** Laws and social norms are so much a part of our lives that most of the time, we follow the rules without even thinking about them. In this episode, we'll talk with MIT professor Susan Silbey about why people and organizations do and don't obey the law.

**Susan Silbey:** It's a game. It's a game of resourceful, skillful players. But it's something that you can make work for you.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

**Risa Goluboff:** Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean. We're now in the home stretch of our fifth season, in which several of my faculty colleagues are helping us interview experts in their fields. For today's show, I am happy to welcome back co-host Greg Mitchell, who has been connecting us with scholars in law and social science.

**Greg Mitchell:** Glad to be here again, Risa, thanks for having me.

**Risa Goluboff:** As our listeners may know by now, on top of being a lawyer and a law professor, Greg has a Ph.D. in psychology, and his research looks at legal judgment and decision-making, expert evidence and public attitudes toward the law and legal institutions. Greg, that sounds right in line with some of Susan's work. So tell us more about Susan Silbey.

**Greg Mitchell:** Sure. Susan is the Leon and Anne Goldberg Professor of Humanities, Sociology, and Anthropology at MIT, as well as a professor of Behavioral and [Policy] Sciences at MIT's Sloan School of Management. As you can tell by the fact that she's connected with those two schools, her work reaches into a variety of fields. Susan is a leading scholar in law and society studies, and her book with Patricia Ewick, titled "The Commonplace of Law: Stories from Everyday Life" is one of the most important studies of how people experience and make use of the law in their daily lives. Most recently, Susan has been studying how members of organizations deal with legal demands in their daily activities. I thought Susan's research would be a nice complement to our discussion last year with Tom Tyler on the importance of procedural

justice in people's willingness to obey the law and our discussion this year with Jim Gibson on public acceptance of Supreme Court decisions.

**Risa Goluboff:** As I was re-reading some of her work in preparation for this episode, I was reminded how important her insights are about the pervasiveness and the quiet power of the law. The popular conception is that law happens at the Supreme Court or in criminal courts or when legislators make laws, and she really disrupts that perception, and has improved our understanding of how law works at the micro level and the macro level. That's a perspective that really appeals to me, as I've explored in my own work how individuals, plaintiffs, lawyers, other parties, all make legal history happen.

[THEME MUSIC CREEPS IN]

**Risa Goluboff:** So I can't wait to talk with her. We will be right back with Susan Silbey.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

**Risa Goluboff:** Susan, it is such a pleasure to have you here. Welcome to our podcast.

**Susan Silbey:** Well, thank you for having me. It's a pleasure for me too, to have conversations about my work.

**Greg Mitchell:** Thanks for joining us, Susan. Let's start with the basics. You work in a field that's often called law and society, or socio-legal research. Talk about some of the key questions that field focuses on and what you have focused on in your own work.

**Susan Silbey:** Let's start with what do social scientists have to contribute to the understanding of the law? We're not law professors like you are. I take your responsibility and occupation to be to train future lawyers on what it takes to be an accomplished and responsible lawyer. You have to know how the law works.

**Greg Mitchell:** Right.

**Susan Silbey:** The classic way to describe the difference is "the law on the books." This is Roscoe Pound, 1910. You have an obligation to make sure that the law students know what the texts say, how to be

interpreted, how to be mobilized. We look at what gets mobilized, the law in practice. So I would say that's the distinction.

**Risa Goluboff:** So one of the things that's so interesting about your work, Susan, is not just which relationships you're looking at, but also which kind of law and which kinds of relationships. So I think the other major innovation is you're not necessarily talking about people who violate the law, right?

**Susan Silbey:** That's right.

**Risa Goluboff:** You're thinking about everyday people and the norms that they follow.

**Susan Silbey:** That's right.

**Risa Goluboff:** Can you talk a little bit more about that?

**Susan Silbey:** You put your finger on something that I think is terribly important, and it truly was a little light bulb eureka moment for me when I had this insight, that when you looked at the early social science of law, even going back to the realists at the early 20th century, what they ended up writing and publishing turned out to be places where the law was – let's call it failing or not doing what was expected, where there was this gap between practice and the letter of the law. And it occurred to me over time that we were looking at failure. Well, what about all the times that the law just seems to organize life? It was an insight. I think it's at the end of the "Commonplace of Law." I was in a traffic jam coming out of the airport to go into the tunnel to the city. And everybody was very calm, cars piling up and they were slowly feeding each other into the lanes. There was a toll booth. And it just struck me how organized, how systematic, how peaceful this all was, everybody doing what was expected of driving a car, staying in your lane, paying your toll. This is all legally structured. And that's when I started paying attention to the ways in which so much of our everyday life is organized, constructed, by legal rules. But we forget the rules. You know? We, in this country, ride on the right side. I was recently in Ireland. Well, my daughter was very nervous driving on the left side of the road. That's normal. But there's no sign that says drive on the right or drive on the left, just the same as there are no signs that when the red light comes, this means stop.

**Risa Goluboff:** Right. We just assume that drivers already know the rules and will follow the law without having to be asked.

**Susan Silbey:** One of my favorite tropes about this is in urban settings in the Northeast when it used to snow, people would shovel out parking spots and put a chair in it. Well, I have a little slideshow on my webpage, and I've written a whole article about this in the Journal of Comparative Law. It's my favorite paper. It's called "J. Locke, op. cit.: Invocations of Law on Snowy Streets."

**Risa Goluboff:** I am so sad I haven't read this one yet!

**Susan Silbey:** Oh, it's wonderful. It is. But the point I make in the slideshow and in the article is that you cannot understand this practice of putting a space saver in a shoveled-out parking spot without legal concepts, concepts of property, of labor, of trespass, of right. Historic notions that are so embedded in our culture that Boston, New York, Chicago, people understand this. They never read Locke. They don't need to know the law of property. The law has helped to constitute our lives and there's nobody standing behind it with force. It's historic, it's cultural. It's become taken for granted by people. But that's my favorite example.

**Greg Mitchell:** I wanted to draw out a corollary of what you were just saying, and that I think is, as you've made clear in your writings, that most people, most of the time are law-abiding.

**Susan Silbey:** Oh, yes.

**Greg Mitchell:** Right?

**Susan Silbey:** Yeah.

**Greg Mitchell:** And one of the reasons that I wanted us to talk to you was to just get your take on why people commonly – so commonly – abide by the laws. I worked with Tom Tyler and we've had Tom Tyler on the podcast, and of course he has a theory of legal compliance that really emphasizes procedural justice and the notions of the law that I think you would put in your narrative "before the law."

**Susan Silbey:** That's absolutely fair. And I think Tom and I agree about that part.

**Greg Mitchell:** I think you would say Tom's got it partly right?

**Susan Silbey:** Absolutely.

**Greg Mitchell:** Tom and others who do higher-level psychological research or political science research – what are we missing?

**Susan Silbey:** Well, they want to describe what motivates people. I want to describe what sustains the system of law. And while I don't think they're wrong that procedure matters – I think it matters a whole lot – but it isn't the whole story. And so, in our work, we show that people care about the rules. They want disinterested rule-makers, and that this system of disinterested decision-making enables action of all kinds. It's a game. It's a game of resourceful, skillful players and that enables people to mobilize it. So it's not just the passivity of procedure, but it's something that you can make work for you.

**Risa Goluboff:** So I know you and Patty Ewick have coined a few terms that describe how people talk about the law – before the law, within the law, and after the law. Can you explain those terms for us and how you came to identify them?

**Susan Silbey:** We started out to find out what place law had in people's everyday lives. Interviewed people about their lives. I think it's very important to know the method we used, which also distinguishes it from some of the political scientists and psychologists. We did not ask about the law. We asked about their lives. We asked about problems in their lives because we did start with the theory that the law is available to handle people's disputes. And we would ask them if they had problems in their neighborhood, problems shopping, problems in schools, problems in family. And when they said they had a problem, we then would say, "Well, tell us what you did. Who did you talk to? Who else could you have talked to? What happened?" And we collected these from 400 and some odd people, and then we analyzed the transcripts.

**Risa Goluboff:** What did you find when you analyzed all that data?

**Susan Silbey:** We ended up finding three different ways that people talked about the law. One we called "before the law." We used Kafka's story "Before the Law" as the icon for that, where the law is something distant from ordinary people's lives, where it is someplace special that

you go and people of disinterested reason help you to solve the problem. And they use existing rules. We call that "before the law."

**Greg Mitchell:** So for instance, this may be going to court and having a judge decide your case or third-party dispute resolution, that sort of thing?

**Susan Silbey:** Right. But at the same time, they would tell us stories about – ohhhh – how they got their return on a car that was a lemon. Or they would tell us stories about engaging in a dispute and how clever either the lawyer was or they were and they told a story that had the spirit of engagement, of contest and of besting somebody. And we call that "with the law" and we describe it as a game, played with existing rules.

**Risa Goluboff:** Okay, so that's your first two categories, before the law and with the law. There's also this third category you identified of how people talk about the law. What's that category?

**Susan Silbey:** We also heard from people who were quite – I wouldn't say cynical – but they had a more critical notion about the way the world works. They felt up against the law. They said, "Look, the law gives people rights, but doesn't help people like me. Because if I try to tell somebody that I've been discriminated against because I'm an older man, well, they're just going to fire me." They didn't believe that the rights could be made real in their situation. And what we found is that when they would tell these stories of winning in such a situation, they were using a very astute sense of the social structure, that they would tell lies. They would pretend to be somebody they were not, but almost always a more subordinate person, a younger person, a person who was not able because they thought somebody would help them or they would jump over hierarchies in bureaucracies.

**Risa Goluboff:** Can you give us an example?

**Susan Silbey:** I'll give you one story that I love. It's an African American woman in a house that was meticulous, actually reminded me of my grandmother's house because she had plastic covers on all the furniture, which my grandmother used to do.

**Risa Goluboff:** My grandmother did too.

[LAUGHING]

**Susan Silbey:** And she told me that she had a consistent problem with the telephone. It would stop working. And when she would call the telephone company for service, she just wouldn't get it. She was a woman of some experience because she told me she had worked in the Civil Rights Movement and she knows how the world works, she told me. She said, "So one day, I realized from an article in the paper that the last name of the president of the telephone company was the same name" as hers. So she thought, "Well, I'll just call him up." And she called him up. She said, "Well, you don't get through right away. So I told them I was his maid. and they put me through just like that."

[LAUGHING]

**Susan Silbey:** "Well, I told him his name is the same as my name, maybe we related way back when." But he sent a serviceman the next day. She used her subordinate position as an African American woman with a distinctive accent so that the secretary believed that she was a maid. She wasn't a maid. And she used that and she got what she wanted. Well, we call that leapfrogging. She leapfrogged over the hierarchy. Those kind of stories were told across the racial, ethnic, class divide. And so I would say that these examples of resistance are not violent. They're not illegal. They are using and finding the cracks that exist in every social world. And that's what the third category is.

**Greg Mitchell:** Earlier, you mentioned that these are not different kinds of people invoking the narratives, but you see it across ...

**Susan Silbey:** Yeah.

**Greg Mitchell:** ... different groups and I, I think that's an important point to bring out because, often there's this idea that members of disadvantaged group may be under a veil of ignorance or something about their plight.

**Susan Silbey:** Yes.

**Greg Mitchell:** I think you've found that even members bearing the brunt of inequalities understand often their position and are, and are sometimes fighting back against it – more so than we may appreciate.

**Susan Silbey:** Absolutely. Otherwise they couldn't survive.

**Greg Mitchell:** So you and Patty Ewick outlined those three categories in your book, "The Common Place of Law," which was first published in 1998. What kind of pushback did you get?

**Susan Silbey:** Two kinds of criticisms. One I thought was friendly and smart was, "You know, you studied all these individuals and you've built a nice institutional model, but you really ought to study organizations, because in organizations there are competing norms. And then you would find how law worked or didn't, or what its role was when there was something strong competing with it." So I thought, "that sounds reasonable." The second criticism we got was from some socio-legal colleagues who said, "Oh, you do all this fine work, you collect all this information, but you're really just studying ordinary people and they don't make the world, you ought to study elites." Well, I got angry, [it] missed the point and it was arrogant and all the rest. And so I decided I would study elites, but not who he thought were elites. I'll study scientists. They're elites, they're cognitive elites. They're just not judges and lawyers who he wanted me to study.

**Greg Mitchell:** So this is when you turned your attention to the role that the law plays in organizations, specifically science labs in universities, which the EPA had begun to regulate in the nineties. Can you tell us about that?

**Susan Silbey:** When I discovered that the EPA was investigating university laboratories, I thought, "Oh my goodness, this is another innovation," because most people who study the relationship between law and science, they study what happens to the science when it enters – let's call it – the house of law, as evidence or as intellectual property. I'll study what happens when the law enters the house of science, the lab. So I started interviewing scientists. I wasn't sure how to do this. But when I sent out the letters, asking them if they'd let me come interview, I said that I was studying the organization of science. And then I'd get there and they'd say, "Oh, I looked you up. You don't study science, you study law." I said, "Oh, that's okay. I'm switching topics."

[LAUGHING]

**Susan Silbey:** And they said, "Well, you know, there's no law here." I said, "What do you mean?" They said, "Well, okay, we have rules about



hiring, we have rules about budget, but it has nothing to do with science, you know?" And then I'd go and ask if I could see their lab. And the doors of the labs are all pasted with signs, "bio level hazard one," "bio level hazard two," "radiation," "wear your protective glasses." I mean, the corridors were just papered with all these signs, which the scientists said to me, there's no law here.

**Risa Goluboff:** And why do the scientists think there is no law?

**Susan Silbey:** Well, because they don't pay attention really. That's the final answer. They didn't see it as law. Those scientists who were oblivious to it took it as just normal practice. This is what you have to do. They did not see the state standing behind them. They did not see enforcement. They thought, this is just good science.

**Greg Mitchell:** But you found some real variation in the way different scientists respond to the law regulating their labs, is that correct?

**Susan Silbey:** You're quite right. For the biologists, this was an intrusion because they didn't care quite so much about contamination as the chemists did. And the chemists are a much older discipline – much older –and was in fact an industry long before biology. And we found documents where the American chemists and their professional association were asking the federal government for regulation in 1880 to standardize the shipping, to standardize the bottles. So they had incorporated hoods and safety apparatuses in chemistry from about the late 18th century on. But biology is a new science, and it became an industry in the 1980s at a moment of deregulation, anti-government and lot of libertarian ideology.

**Risa Goluboff:** So how did that history affect how they responded to these new EPA rules governing how labs could operate?

**Susan Silbey:** When they first introduced all the new rules, there was a biology department meeting. One of the first speakers says, "Why don't we just tell them we're not going to do this?" And then another one says, "We're not the problem. The problem's in every kitchen of what they're pouring down their kitchen sinks. Tell them to leave us alone." And they were very hostile. They didn't want to do this. Their students had no time for this. And one of the chemists says to the biologist, "You know, you can't be a scientist one way and an environmental citizen another. They're all the same." The biologists didn't buy that. And they didn't go

along in the beginning. And then the university says, “Okay” – the usual answer – “We’ll hire somebody to do this.” And the minute they were going to hire somebody to oversee all this, the biologists were on board, no problem. But the chemists, no, no, no. They’re not having strangers. Strangers don’t know chemistry. They won’t know what the real hazards are. And it took them three different hires before they found a person they could live with.

[LAUGHING]

**Susan Silbey:** And so I, I wrote this paper comparing them. And it wasn’t just the history of the disciplines, it was also the way they actually build and organize their labs.

**Risa Goluboff:** What do you mean?

**Susan Silbey:** Well, biologists, they’re all standard model. All the biology labs look exactly the same. Every chemistry lab was built to the preferences of that chemist. The biology labs are very hierarchical. They have managers, they have technicians, they have lots of postdocs and very few students. Chemistry labs? No managers, no technicians. It’s all the professor and his or her students, very flat. Now, importantly, when you ask, they both went along. They don’t have, you know, real serious problems in these labs anymore. But they do it in a different way. The biologists delegate it. The chemists internalize it. That’s an answer to you that it can’t be one rule for everybody.

**Greg Mitchell:** Right. And because there was play in the joints, it worked out for both.

**Susan Silbey:** That’s right.

**Greg Mitchell:** Yeah. And I think it is important to say the EPA came back in, audited and they passed the audits.

**Susan Silbey:** They passed. And they made this particular system a model for others.

**Greg Mitchell:** But I think why I find your narrative framework so helpful is because I think successful organization or institutions do figure out how to navigate the ideals and the on-the-ground game. And some

obviously can more strictly hold to the ideal, but it would be surprising to me if any organization can survive with too much strictness.

**Susan Silbey:** Well, I think you've put your finger on what is our real problem: In most organizations and events, we can't be just perfectly rule-following because the rules don't really describe all the variation that's going to be on the ground. And all the work I've been doing for the last 20 years on the regulation of science and science labs is exactly about that.

[THEME MUSIC CREEPS IN]

**Risa Goluboff:** Well, Susan, this has been an utter delight and we're so glad that you were able to join us for this conversation.

**Susan Silbey:** It's been fun and enlightening. You've given me a lot to think about.

**Greg Mitchell:** Thank you so much. I really enjoyed this.

**Susan Silbey:** Me too.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

**Risa Goluboff:** What a fabulous conversation, Greg. I can't tell you how much I enjoyed that. I'm so glad that you invited Susan on the show.

**Greg Mitchell:** I couldn't agree more.

**Risa Goluboff:** As I was re-reading her work for this podcast, I kept thinking of when I first saw "Casablanca."

**Greg Mitchell:** Hunh.

**Risa Goluboff:** So I didn't see "Casablanca" till I was in college. And when I saw Casablanca, I found it kind of cliched and I realized it's because everything they said is now a cliché and I didn't know where those statements came from that I had heard all my life and I thought, "Oh my God, I know this!" And as I reread her work, I thought, "Wow, I don't think I am aware of all of the ways that she's influenced my work. Right? And I bet there are other people like that too." That her anti-theory theory, right, her anti-generalizing theory means that it's kind of

rooted there and lodged there, and you, you have it in your head as you're going about creating a, a research project or as you're thinking about how people interact with law, but it's not necessarily that you're going to cite to Susan Silbey's article on X .

**Greg Mitchell:** Right. I did want us also to just comment on how enjoyable I thought the conversation was, and I think that comes from Susan just seemed to have really, seems to really enjoy her work.

**Risa Goluboff:** I completely agree, and it was also the pleasure of seeing a mind at work.

**Greg Mitchell:** Mm-hmm.

**Risa Goluboff:** And the pleasure of her taking us through her oeuvre. And the questions that animated her and we don't talk in that register with scholars all that often. And so to talk with someone whose career has spanned so much and who has moved quite far in the way she tackles similar questions, but in different moments and in different institutional locations and in an evolutionary way over the course of her career, it was wonderful to see that. And it was inspirational, right?

**Greg Mitchell:** Right.

**Risa Goluboff:** We all want to look back and be able to say, you know, here are the ideas that I've been playing with. Here are the people I've been interacting with around them. Here's where they've brought me to. Here's where I hope I've had an impact. And so I, I thought it was inspiring.

**Greg Mitchell:** And she clearly has enjoyed the work she's done. I hope we can be so lucky [knocking] in a few more years.

**Risa Goluboff:** I agree.

**Greg Mitchell:** We're not that far behind, but ...

[LAUGHING]

**Risa Goluboff:** I agree. We got a little time, I think.

**Greg Mitchell:** Yeah.

**Risa Goluboff:** The other thing I would say about it, which is definitely one of the pieces I think I've imbibed in my work is: She really loves people and she's really writing about people.

**Greg Mitchell:** Yeah.

**Risa Goluboff:** When she talks about those earlier studies, she's got particular stories about particular people that she remembers and that's a piece of my work, right? I, I want to talk about the humanity of people. I want to understand people and not lose them in the institutions of the law. And seeing her care for those people and how much, years and years later, she still remembers those individual stories, I really appreciate it as well.

**Greg Mitchell:** I thought it would be interesting if you two had just talked about how your work, particularly “Vagrant Nation,” the work behind that book, related to some of her research, because I saw a lot of overlap about how people were using the law creatively to make change, and that would've been a separate, interesting conversation.

**Risa Goluboff:** I thought the same thing. And you know, I have struggled over many of my projects and certainly both of my books with the question of which category is the law – one, two, or three in her categories – and how do I want to portray it and what do I see in the historical sources I'm using? And I often see all three.

**Greg Mitchell:** Mm-hmm.

**Risa Goluboff:** And it often feels when writing history that you have to choose one. Is this a story of triumph or is it a story of failure? Is it a story of the majesty of the law? Is it a story of people manipulating or gaming or trying to, you know, use the law in, in ways that will benefit them? Or is it a story of oppression and a story of the law harming the marginalized? And all three are always there and yet, I often feel a tension about being pulled in one direction or another. So I, I really appreciated her reminding me that people – many people – do hold them in their heads at the same time, and that we as scholars can hold them in our heads at the same time too.

[THEME MUSIC CREEPS IN]

**Greg Mitchell:** Yeah, and indeed having those three narratives can be crucial to the success of the institution.

**Risa Goluboff:** Well, Greg, it has been a real pleasure to co-host this podcast with you. I have loved the people that you've invited and the way you've structured our conversations and thank you so much for doing this.

**Greg Mitchell:** Well, thanks for inviting me. I enjoyed it.

[THEME MUSIC UP FULL, THEN UNDER]

**Greg Mitchell:** That wraps up this episode of Common Law. If you want to learn more about Susan Silbey's work, visit our website, Common Law Podcast dot com. There, you'll also find all of our previous episodes and more.

**Risa Goluboff:** We hope you'll join us next time for more explorations of how law shapes our lives. I'm Risa Goluboff.

**Greg Mitchell:** And I'm Greg Mitchell. Thanks for listening.

[THEME MUSIC UP FULL, THEN UNDER]

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