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The Historical Roots of Legal Consciousness Studies. Susan Silbey as Observer and Actor

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■ Résumé

Aux origines des *Legal Consciousness Studies*. Susan Silbey, observatrice et actrice

Après un bref aperçu de la généalogie des *Legal Consciousness Studies*, la contribution interroge Susan Silbey sur la place qu'elle-même occupe dans la « socio-histoire » de cette sociologie juridique. Comment se situe-t-elle, personnellement, dans ce qu'elle qualifie d'« alliance de dominés » ? Que dirait-elle, aujourd'hui, du lien qu'elle observait entre l'investissement sur le terrain de la sociologie juridique et les enjeux politiques du moment ?

Conscience du droit – Legal Consciousness Studies – Sociologie juridique.

■ Summary

After a brief overview of the genealogy of Legal Consciousness Studies, the contribution investigates Susan Silbey's place in the “socio-history” of socio-legal studies. How does she position herself in what she describes as an “alliance of the dominated”? What would she say today about the link she observed between the investment in the field of socio-legal studies and the political issues of the moment?

Legal Consciousness Studies – Socio-legal studies.

I. Elements of Genealogy

Initially, it was law professors in the United States in the 1930s, anxious to improve the efficiency of the legal system, who opened law up to social sciences and caused the sociology of law to emerge. By mobilizing social sciences' empirical methods, sociological jurisprudence and legal realism, which are at the origin of the distinction between law in books and law in action, their aim was to make judicial decisions more predictable and to attempt to reform an excessively dogmatic, formalist legal system.

The Law and Society Association (LSA) was created in 1964, in that spirit, aiming to "fundamentally change the legal education itself, importing within law schools' curricula social sciences' tools and methods."¹ While positioning itself as a research movement, LSA's approach remains instrumental: sociology in the service of the law. This approach aims at giving law a better grip on social matters; it is not meant to enrich the way in which sociology understands law. LSA researchers remain isolated within the American academic field, whether in law or social science faculties, and overall the LSA discipline remains largely dependent on law professors.²

The late 1970s saw the emergence of a critical current, Critical Legal Studies (Crits), "a current as heterogeneous as ephemeral."³ The criticism concerns both the positioning of the LSA movement—the accessory role played by legal sociology in relation to law—and the substance of its approach, i.e. a conception of law solely as a dependent variable, neglecting the constitutive dimension that it may have on practices. Thus, it appeared necessary at that time to break up the causal relationship between law and society: Law participates in society, it is *part of* society. Crits "analyze how law helps to shape the ways in which the social world is perceived and constructed."⁴

The Amherst Seminar on Legal Ideology and Legal Process, set up in 1982 by Susan Silbey, Austin Sarat, and Christine Harrington, belongs to the Crits current, whilst differentiating itself by adding to the process an essential empirical dimension. This evolution manifests itself by a shift towards a qualitative sociological approach, even towards anthropology. The various works produced, despite their diversity, converge around the unifying concept of legal consciousness.

After some time, Legal Consciousness Studies (LCS) became exposed to criticism: "such empirical claim would be incompatible with real criticism or real political commitment."⁵ Susan Silbey⁶ herself deplores the loss "of critical utility and critical

1. Antoine VAUCHEZ, "Entre droit et sciences sociales. Retour sur l'histoire du mouvement *Law and Society*", *Genèses*, 45, 2001, p. 134-149.

2. Yves DEZALAY, Austin SARAT and Susan SILBEY, "D'une démarche contestataire à un savoir méritocratique. Éléments pour une histoire sociale de la sociologie juridique américaine", *Actes de la recherche en sciences sociales*, 78, 1989, p. 79-93.

3. Antoine VAUCHEZ, "Entre droit et sciences sociales. Retour sur l'histoire du mouvement *Law and Society*", *op. cit.*

4. Jérôme PÉLISSE, "A-t-on conscience du droit ? Autour des *Legal Consciousness Studies*", *Genèses*, 59, 2005, p. 114-130.

5. David M. TRUBEK and John ESSER, "'Critical Empiricism' in American Legal Studies: Paradox, Program or Pandora's Box?", *Law and Social Inquiry*, 14 (1), 1989.

dimension” in many Legal Consciousness works. It is not enough to analyze what those involved think and do, it is also important to highlight the hegemonic strength of the law and the resistance it triggers. She speaks of “domestication” of the concept of legal consciousness: because of the lack of interest for the hegemonic strength of the law, this concept is instrumentalized; it ends up putting law in the service of certain groups of interests. By reviewing various research (quantitative or ethnographic), Susan Silbey found many different views, sometimes even contradictory, on the place and uses of law in people's lives; but none of these views explain how experiences, interpretations, and attitudes cumulate to produce an ideology or a hegemony of law. Thus, she presents *The Common Place of Law, Stories of Everyday Life*, which she published in 1998 with Patricia Ewick, as answering to these paradoxes and integrating “Attention to and appropriation of the venerable traditions of European social theory” (p. 328).

II. Susan Silbey, Observer and Player

This quick overview of the LCS genealogy is an opportunity, before an epistemological and/or methodological reflection is led by other authors in this issue, to question Susan Silbey on what might be called a “socio-historical analysis”⁷ or a “social history”⁸ of the American legal sociology her work belongs to. Such questioning involves, in addition to the work produced in the seminar,⁹ a reflection led by Susan Silbey herself with Yves Dezalay and Austin Sarat,¹⁰ as well as two French researchers, Antoine Vauchez¹¹ and Jérôme Pélisse.¹²

The article published in the *Actes de la recherche en sciences sociales* observes the lack in this field of any socio-analysis approach—a lack, or even a meaningful denial, that the authors seek to remedy. What does this lack manifest? The “ambivalence of sociologists and their fascination with social status and the symbolic dimension of their object.”¹³

6. Susan SILBEY, “After Legal Consciousness”, *Annual Law Review of Law and Social Science*, 1, 2005.

7. Antoine VAUCHEZ, “Entre droit et sciences sociales. Retour sur l'histoire du mouvement *Law and Society*”, *op. cit.*

8. Yves DEZALAY, Austin SARAT and Susan SILBEY, “D'une démarche contestataire à un savoir méritocratique”, *op. cit.*

9. Regarding the seminar in which this contribution was developed, see the introduction to the dossier.

10. *Ibid.*

11. Antoine VAUCHEZ, “Entre droit et sciences sociales. Retour sur l'histoire du mouvement *Law and Society*”, *op. cit.*

12. Jérôme PÉLISSE, “Les *Legal Consciousness Studies*: une sociologisation domestiquée des *Critical Legal Studies*?”, in Hourya BENTOUHAMI, Anne KUPIEC, Ninon GRANGÉ and Julie SAADA (dir.), *Le souci du droit. Où en est la théorie critique?*, Paris: Sens et Tonka, coll. “Théorie critique”, 2010, p. 223-238.

13. The development of this observation is rather appetizing: “*Faire de la sociologie du droit, c'est d'une certaine manière rentrer dans le temple du droit, par la petite porte et sur la pointe des pieds. Un privilège que les sociologues paient par un respect exagéré. Comme si, en s'identifiant à cet objet sacré, on pouvait espérer accéder à son tour au statut de la noblesse de robe!*” (“Doing sociology of law is a means of entering the temple of law, through the back door and on tip-toes. Sociologists pay exaggerated respect for this privilege, as if by identifying with this sacred object, they could hope to join the nobility of the robe!”), Yves DEZALAY, Austin SARAT and Susan SILBEY, “D'une démarche contestataire à un savoir méritocratique”, *op. cit.*

For the authors, “The unequal alliance between jurists and sociologists, with on the one hand lawyers marginalized in the field of law while enjoying its prestige, and on the other hand sociologists, more or less fascinated and trapped by the social and symbolic status of their object, structures this field of research and always makes its independent development and institutionalization precarious, except when socio-political conjuncture reinforces and stabilizes—at least temporarily—this alliance of the dominated.”

Multiple questions raised by this introduction can be asked of Susan Silbey on two levels: firstly, as the author of this socio-analysis, and secondly, as “one of those ‘passers-on’—jurists converted to the social sciences or social scientists trained later on in the field of law—who offer their trajectory and their disciplinary ubiquity as the prefiguration of a new syncretism of knowledge.”¹⁴

III. “A Socio-Political Conjuncture”

Various elements of socio-political context contributed to the consolidation, even the institutionalization, despite its precariousness, of the LSA movement. The assumption of the authors is that the progression of the sociological approach within the law has always matched periods of major social upheaval: crises, rifts, calling a status-quo into question, and triggering scientific, political, or professional progress. Legal realism was born in the New Deal era, both to account for the discrepancy between law and social reality and to try, thanks to the contribution of social science, to improve the law. It was the era of experts at the service of public policy. The creation of the LSA was contemporaneous with a questioning of the political order (the civil rights campaign, the Vietnam War...). Young lawyers proclaimed themselves as spokesmen of disadvantaged people with the creation of legal clinics, class actions, etc. The central theme of the socio-legal work of the time was the one of access to justice. The expansion and remodeling of the academic landscape, the competition that arose between the historic law schools of the East coast and the newcomers were other factors in the reassessment of this research field in the 1960s.¹⁵ The issue of funding, linked to the issue of interest in these matters from new audiences, is also mentioned.

And to conclude: “the investment in the field of legal sociology is directly proportional to the political stakes of the moment” and “the history of legal sociology is that of a series of flows and refluxes which originate in the political history.”

Is this equation true today? What is Susan Silbey’s view of the status of socio-legal studies in the academic field, but also in the American political field? How do the current political and social issues (Islamic terrorism, the election of Donald Trump, etc.) impact on socio-legal studies: on their nature—expertise and/or criticism, theoretical criticism or emphasis on empiricism—and on the “unequal alliance” between lawyers and sociologists?

14. Antoine VAUCHEZ, “Entre droit et sciences sociales. Retour sur l’histoire du mouvement *Law and Society*”, *op. cit.*

15. *Ibid.*

IV. “An Alliance of Those Dominated”

The history of socio-legal studies is also the history of personal journeys and strategies, which may be at odds with this form of narrative, or be undermined by it. The socio-analysis carried out by Susan Silbey with Yves Dezalay and Austin Sarat was based on the observation of “the ambivalence of sociologists and the fascination exercised over them.” The authors talked about “an alliance of the dominated.”

How does Susan Silbey analyze her personal journey? Her role in the university institution? Her relationship with lawyers? With political activism? The importance of her initial training (as a political scientist? as an anthropologist?) in changing her work methodology? She provides her reflections in the response that ends this dossier.

■ About the author

Anne Wyvekens is senior researcher at the French National Center for Scientific Research (CNRS), member of the Institute of Social Sciences of Politics (ISP, Cachan). She has been working for a long time on local safety policies. She now works on the relationship between the judiciary and cultural diversity. Among her publications:

- “The Place of Cultural Expertise in the Field of Family Justice in Belgium and France” (with Barbara TRUFFIN and Caroline SIMON), in Livia HOLDEN (ed.), *Cultural Expertise in Socio-Legal Studies*, special issue of *Studies in Law, Politics, and Society (SLPS)* (forthcoming);
- “La justice pénale face à la ‘diversité culturelle’ : la défense culturelle en questions”, *Revue de droit pénal et de criminologie*, 11, 2017;
- “Justice familiale et migration. De la diversité culturelle à la double appartenance”, *Recherches familiales*, 13, 2016.