

LAW WITHOUT LAWYERS, LAWYERS WITHOUT LAW

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Abstract

Luca Siliquini-Cinelli thinks that there can be law without lawyers. American legal realism thinks that there can be lawyers without law. The truth is perhaps somewhere in between. Law forces individuals to fit into categorical rules. Focusing on its Procrusteanism leads one to imagine the possibility of law without lawyers: law is a set of rules, albeit a complex set, that can be applied consistently to a whole array of situations. But law can also take on shifting shapes and forms to suit the circumstances. Focusing on its Proteanism leads one to imagine the possibility of lawyers without law: law is just whatever lawyers make it out to be. Perhaps law is somewhere between Procrustean and Protean. Therefore, Siliquini-Cinelli and American legal realism may, each, be half-right.

Keywords: legal realism; law; lawyers; logic; knowledge; experience; Holmes.

[A] INTRODUCTION

Lawyers are experts in the law. They work the legal system and make the legal system work. With due credit to Frank Sinatra, one might say that law and lawyers go together like a horse and carriage, you can't have one without the other. "Try, try, try to separate them, it's an illusion. Try, try, try, and you will only come, to this conclusion."¹ Separating them is exactly what Luca Siliquini-Cinelli tries to do in *Scientia Iuris*, and he comes to the opposite conclusion. Siliquini-Cinelli argues that lawyers are not essential to law: there can be law without lawyers.

Siliquini-Cinelli's position is the inverse of the position held by some American legal realists, who argue that law is not essential to the work of lawyers: there can be lawyers without law. Although they overlap in their goal of severing the connection between law and lawyers, one does so by dispensing with lawyers, the other with law. Comparing Siliquini-

¹ Frank Sinatra was talking, or rather singing, about "Love and Marriage" (1955).

Cinelli's position with American legal realism will clarify and amplify the distinctness of Siliquini-Cinelli's argument. A good place to start is with the oft-quoted remark by Oliver Wendell Holmes that the life of the law "has not been logic, but experience" (1963: 5). In a footnote, Siliquini-Cinelli describes this remark, not only as a cliché, but as a deceptive one at that (2024: 141). Cliché or not, Holmes's remark must surely be deceptive from Siliquini-Cinelli's perspective because Holmes's position is the direct inversion of Siliquini-Cinelli's. The reason that law does not need lawyers, on Siliquini-Cinelli's view, is that law is based on logic, not experience. If Luca Siliquini-Cinelli is right, then Holmes is wrong. Either law is based on logic (in which case Siliquini-Cinelli is right), or it is based on experience (in which case Holmes is right).

Holmes has frequently been credited as the progenitor of American legal realism based on his famous definition of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (1897: 460ff). Holmes and the American legal realists emphasize the lived experience of lawyers, while Siliquini-Cinelli emphasizes the independent logic of the law. On Holmes's view, it requires the lived experience of lawyers to predict accurately what a particular judge in a particular court will do in a particular case. No amount of learning the rules and working out the internal logic of the law will help you do that. The only way to learn the law is through lawyering. Some may attribute this difference in approach to the difference between civil and common law. Civil law is based on a code, whereas the common law is based on the reiterative practice and interaction between judges and lawyers in resolving concrete disputes. However, this explanation is not one that Siliquini-Cinelli is prepared to accept. Siliquini-Cinelli wants to expand his thesis to include both civil and common law. It is the application of his thesis to the common law that this review essay will put under the spotlight. This review will proceed in two parts: it will first outline Siliquini-Cinelli's argument ("Law without lawyers") before presenting the American legal realist counterargument ("Lawyers without law").

[B] LAW WITHOUT LAWYERS

Siliquini-Cinelli begins with a puzzle that immediately sets up a contrast between law and lawyers. Law is thriving, while lawyers are in crisis. That law is thriving can be seen from the ever-expanding domain and dominion of law. Ronald Dworkin says at the start of his book, *Law's Empire*, that "we are subjects of law's empire, liegemen to its methods and ideals" (1986: vii). Towards the end of the book, Dworkin writes that "the

courts are the capitals of law's empire, and judges are its princes" (1986: 407). To convey Siliquini-Cinelli's point using Dworkin's metaphor, it seems that law's empire is expanding at the same time as its capitals are crumbling and its princes are on life-support. This anomaly proves that the intuitive picture that law and lawyers rise and fall together is false, and the explanation for this anomaly must lie elsewhere. The answer lies, so Siliquini-Cinelli argues, in law's artifactuality: "as a product of the intellect, law is a matter of knowledge, not experience", which "explains why it possible for law to be flourishing as a regulatory phenomenon while the very places where it is taught, studied, and practised undergo a crisis" (2024: 1).

Once experience has been abstracted and transformed into knowledge, the substratum of experience is voided and can be discarded. While knowledge needs a repository (which Siliquini-Cinelli variously calls an "ontic entity" and "factual medium") to contain it, that repository of knowledge need not be human. It could just as well be a machine or an artificial intelligence. The knowledge floats free from the experience and becomes its own thing, an artifact. As law is knowledge, any person (or thing), even one with no prior experience of the law, can acquire knowledge of the law. Once transformed into knowledge, it can be acquired and transmitted independently of experience. Siliquini-Cinelli separates knowledge from experience, just as he separates law from lawyers. Knowledge is impersonal, ethereal, informational, metaphysical and abstract, whereas experience is bound to one's own facticity, finite, immanent, subjective and individualized. Knowledge can be replicated from one subject to another, just as a computer file can be copied and pasted from one folder to another, but experience cannot. Experience makes each individual unique, whereas knowledge makes each individual irrelevant.

Law takes individual experiences, in all their random messiness, and subjects them to the rationalization of a rule. Law thus combines reason and rule, by subjecting human conduct to the rule of reason. What results then is the transformation of subjective experience into "rational behaviour as a captivated and standardised form of conduct" (Siliquini-Cinelli 2024: 3). That is how law performs its essential function of social ordering. Siliquini-Cinelli argues that law's social ordering can be achieved without lawyering: "to appreciate this, it would suffice to think of how most of the time law shapes our daily existence without the direct intermediation of (some of) its officials" (2024: 47). While it is indisputably true that, in most run-of-the-mill cases, law works perfectly well without the involvement of lawyers, that truism should not be taken

to be synonymous with the much stronger claim that law can function without any lawyers working somewhere within the system. It is true that most disputes do not end up in court, but that does not mean that the legal system does not need courts with lawyers, even if only as a forum of last resort. Lawyers may very well only come in at the tail end of the legal process, but as American legal realists assert, this is the tail that wags the dog. It is to this tail that we will now turn.

[C] LAWYERS WITHOUT LAW

In an inversion of Siliquini-Cinelli's position, American legal realism claims, in its strongest formulation, that there is no law; there are only lawyers. By lawyers, I include judges, as they too are supposed to be human "legal experts". On Siliquini-Cinelli's view, law's operation depends on "logical and analogical forms of analysis", of which "judicial reasoning is a perfect case study" (2024: 170). Legal realists would agree that judicial reasoning is a perfect case study, but for a completely different reason: it shows, not law's dependence on logic, but its dependence on the choices of lawyers, including judges. To predict accurately how a particular judge would decide a particular case thus requires, not logic, but experience. "The common law is not a brooding omnipresence in the sky" (*Southern Pacific Company v Jensen* (1917: 222)) To an American legal realist, if one wants to understand law, one needs to look at what lawyers do.

Felix Cohen calls all the references to the logic of the law "transcendental nonsense", which he lampoons with a stinging satire of a German jurist, who dreamt of being transported to "a special heaven reserved for the theoreticians of the law", where he would meet "face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life" (1935: 809). Cohen's "transcendental nonsense" is Siliquini-Cinelli's "*scientia iuris*". Where Siliquini-Cinelli transforms experience into knowledge, legal realists want to transform it back into experience. In place of *scientia iuris*, Cohen advocates a "functional approach", which turns the attention from law to lawyers. Law is simply what lawyers make of it, or make up. On this legal realist perspective, law recedes from view, to be replaced with the activities of lawyers. "A judicial decision is a social event" (Cohen 1935: 843). As a social event, it is the outcome of various social factors and forces pulling in different directions. These social dynamics are the hard facts of law. To abstract from them and transform them into legal knowledge is to run away from the hard facts. There is nothing but these hard facts. Anything more, or anything else, is just "transcendental nonsense". A successful lawyer is one who is able to use these hard facts to predict the behaviour of judges.

It is no accident that American legal realism developed out of a common law system. Siliquini-Cinelli refers to Costantini's "excarnation *vs* incarnation" antithesis, which posits that the civil law tradition "excarnated" its rules in legal codes, whereas the common law "incarnated" its rules in the activities of lawyers (2007: 22, 79). This antithesis would carve up the Western legal tradition into two halves: *scientia iuris* in the civil law tradition and practical lawyering in the common law tradition. However, Siliquini-Cinelli refuses to rest content with this easy binary explanation. Drawing on the work of Postema on the common law tradition, Siliquini-Cinelli argues that *scientia iuris* is equally present in the common law tradition through the construction of "artificial reason" (1989: 30). Artificial reason proceeds through reasoning by analogy from case to case in a gradual and incremental fashion. Common law, as much as civil law, cannot do without *scientia iuris*, with its own internal logic, independent of what lawyers do. On Siliquini-Cinelli's view, the common law's artificial reason is akin to Prometheus' gift to humankind. It is a technique that allows us to create legal order out of social chaos. To recur to social forces, as the legal realists are wont to do, would be to return to the social chaos that legal order is meant to rescue us from.

[D] CONCLUSION

It is often said that law is Procrustean: it forces individuals to fit into categorical rules. However, the lesson to be taken from American legal realism is that law may, in fact, be Protean: it can take on shifting shapes and forms to suit the circumstances. The truth is perhaps somewhere in between: law is somewhere between Procrustean and Protean. Focusing on its Procrusteanism leads one to imagine the possibility of law without lawyers: law is a set of rules, albeit a complex set, that can be applied consistently to a whole array of situations. Conversely, focusing on its Proteanism leads one to imagine the possibility of lawyers without law: law is just whatever lawyers make it out to be. Law may be a multifaceted thing. It can be looked at it from different angles. Thus, law may be Promethean, Procrustean and Protean, all at the same time, and therefore, Siliquini-Cinelli and Holmes may, each, be half-right.

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