

Florida State University Law Review

Volume 11 | Issue 1

Article 4

Spring 1983

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Recommended Citation

Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 Fla. St. U. L. Rev. 153 (1983) .
<https://ir.law.fsu.edu/lr/vol11/iss1/4>

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ESSAY

EXPLAINING JUDICIAL LAWGIVERS*

ROBERT P. SMITH, JR.**

In *Pilgrim at Tinker Creek*, Annie Dillard tells an engaging story of mantises, aphids, otters and other things living and moving in the Roanoke Valley.¹ *Tinker Creek* makes only one point, really, but makes it again and again: that nature has afforded so rich a variety of life in her valley only because she is willing to throw so much of it away.

On the one hand, nature desires all the possibilities equally. It is not sufficient, she seems to say, that the valley has 1,000 varieties of winged legged things in the color brown; she will conjure 10,000. Therefore the valley is given outrageous particularities: a female mantis, say, devouring her lover joint by crackling joint while he consummates the last pleasure he will ever know. Nature enacts that spectacle, and Dillard portrays it, not as a model for all of life, nor to say that a mantis consumed by love is more remarkable than a beaver swimming, but to show how well nature loves her particularities, her conceits.

But too, nature voraciously consumes her creatures. Creation itself consumes, for to make a particular butterfly is to abandon, at least for then, the nascent alternates. Some creatures are called to life in mutated vulnerability. For others, there is the predator. For the rest, some other mortality. Various created, they are variously consumed. To go to Tinker Creek with Annie Dillard is to learn a parable, that nature is profligate, constantly birthing and consuming her creation with wild extravagance.

In nature's own way, judicial lawgiving celebrates the particular both for its own value and as parable. By little essays the writing judges locate the particular affairs of mostly private persons in the moral and historical perspective that is the ken of courts; then of that stuff the judges make stories having lessons. By such parables,

* From the author's "explanation" to nonlawyer friends and colleagues, members of the Society for Values in Higher Education meeting at St. Mary's College, South Bend, Indiana, August 19, 1976. Footnotes signaled by daggers contain material newly added for this publication in 1983.

** Judge of the District Court of Appeal, First District, State of Florida, since 1975, and Chief Judge 1981-83; B.A., Washington & Lee University, 1954; J.D. replacing LL.B., University of Florida, 1957.

1. A. DILLARD, *PILGRIM AT TINKER CREEK* (Harper Rowe, 1974).

well known to us as *Marbury v. Madison*, *Brown v. Board of Education*, *Escobedo v. Illinois*, and *Miranda v. Arizona*, persons otherwise wholly unknown to most of us, *William Marbury*, *Oliver Brown*, *Danny Escobedo*, and *Ernesto Miranda*, became carriers of truth newly perceived and told.²

In studying the parables of judicial lawgiving, one mustn't be distracted by celebrities. Among Tinker Creek inhabitants one may prefer the Monarch butterfly because she is pretty, or because she flies 2,500 miles to winter in central Mexico, or for other arbitrary reasons. But the valley's law of particularity is that nature spends herself no less generously on the doomed male mantis. And though you may never have learned the parables of Paul Micallef and Franklin Palmer, let alone their personal names, they too inhabit the valley of legal reality as surely as *Marbury*, *Brown*, *Escobedo* and *Miranda*.

Paul Micallef, of Farmingdale, New York, ran a printing press for Lincoln Graphic Arts.³ It was the great model RU 1, capable of 20,000 sheets per hour, which Lincoln bought from the manufacturer. Occasionally, Paul and his fellows knew, debris they called "hickies" stuck to the printing plates. As they also knew, hickies would transfer to a piece of plastic slipped momentarily between the grinding plates, and so could be removed without stopping the press. This they called "chasing hickies on the run." They chased hickies on the run because the great model RU 1, once stopped, needed three hours to begin printing again. One day, while feeding a piece of plastic to the plates, Paul Micallef's hand was drawn in and crushed.

In an earlier parable called *Campo v. Scofield*,⁴ the New York Court of Appeals had said that the manufacturer of a dangerous machine is not liable for design negligence if the danger was open and obvious to users. By that teaching, though a simple guard on the RU 1 would have kept Paul's hand safe while chasing hickies, the manufacturer Miehle still would not be responsible to Paul for negligence in failing to supply the guard. As a result of Paul's action, however, the New York court abandoned the old teaching and announced in Paul's name a new perception of broader manufacturer's responsibility. By that parable, at pages 571 to 579 of Vol-

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (N.Y. 1976).

4. 301 N.Y. 468, 95 N.E.2d 802 (N.Y. 1950).

ume 348 of the Northeastern Reporter, Second Series, in libraries around the world, the particular hand of Paul Micallef is the carrier of historic judicial lawgiving.

So it was also with Franklin Palmer, who lived in the Gulf Coast town of Southport, Florida.⁵ He and his friends drank late at the Seahorse Lounge, then evidently decided to break and enter Libby's Bait Shop. A suspicious bartender later called the police, who found Palmer and the others with a carload of fishing tackle, cigarettes and beer, evidently Libby's property. During Palmer's trial for larceny, the trial judge charged the jury, as requested by the prosecutor, that *the unexplained possession of recently stolen goods gives rise to an inference that those in possession are thieves.*

After his conviction, Palmer appealed to Florida's First District Court of Appeal and complained about that jury instruction. The court, or at any rate two of the three judges, generally agreed with Palmer that in jury trials the prerogative to draw incriminating inferences or not, from someone's "unexplained possession of recently stolen goods," was exclusively that of common-sense jurors, free from influence by inferences declared as law. But as other judicial parables of ancient lineage taught contrary lessons, the court was put to explaining why those precedents were obsolete and why new standards should control Palmer's and future cases.

The court wrote that the decisive mutation in the law, transforming the nature of the problem and its solution, was latter-day sensitivity to Palmer's constitutional right to be silent when accused, and to suffer no penalty for it. So Franklin Palmer became the carrier of that mutation. Personally he received a new trial, and the parable bearing his name is preserved in Volume 323, page 612, of the Southern Reporter, Second Series.

There can no longer be serious doubt that the writing judges are lawgivers. In 1921 Cardozo delivered his Yale lectures on *The Nature of the Judicial Process* and brought clearly to the consciousness of that earlier generation the fact of judicial lawgiving.⁶

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I

5. *Palmer v. State*, 323 So. 2d 612 (Fla. 1st DCA 1975), *cert. denied*, 336 So. 2d 108 (Fla. 1976).

6. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10-11 (35th printing 1975).

refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making.

Cardozo helped liberate us from the fiction that judicial decisions are made in the manner of an accurate deduction, as by formal logic, from an accepted proposition embodied in precedent. As Llewellyn seems to suggest in *The Common Law Tradition*,⁷ we never really had such a system and it is hypocrisy to bemoan the fact that we don't have it any more.

Nor is judicial lawgiving confined to the common law, the ceded realm of judges. Statutes, even, are stuff for judicial lawmaking. Justice Traynor of California described the task of statutory interpretation, and its range: "Rare are the statutes that rest in peace beyond the range of controversy. Large problems of interpretation inevitably arise. Plain words, like plain people, are not always so plain as they seem."⁸

Judicial labor upon statutes does not always stop at interpretation. Occasionally statutes hoary with age will be taken as lattice-work for new judicial formulations, new rights, new adjustments of relationships within society. Consider, for example, the 1976 United States Supreme Court decision desegregating a private school in Virginia.⁹ That was not required by the fourteenth amendment, which inhibits only state action. Rather the Court found that an Act of Congress *passed in 1866* had that effect. In 1968, the Court found for the first time that the 1866 Act forbade racial discrimination in private contracts. After 102 years, a dormant mutation suddenly gained vitality, and in 1976, acting on the student body of a particular school in Virginia, it transformed private education.

7. K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

8. Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 618 (1961).

9. *Runyon v. McCrary*, 427 U.S. 160 (1976).

That episode of judicial creativity must be considered remarkable even by those who enthusiastically support the purpose of it and are accustomed to judicial lawgiving. As Justice Stevens said, concurring in the decision, "There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it." Nevertheless, he said, if that construction of the 1866 Act "did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today."¹⁰

There is still something scandalous in the revelation that judges are influenced by factors external to "the facts" of a case and "the law" narrowly conceived. The legitimation of such influences has multiplied decisional choices not only in the great causes before the United States Supreme Court but in every case in every court. From knowledge of the facts of judicial life arise the temptations of dishonest rationalization, misstatement of facts, disregard of impediments to a desired result, deliberate misinterpretation of precedent, misleading emphasis, and silence when explanation is impossible.

What works for continuity in a system where the decisional ground surges and splits in response to private preference and social force? What works for confidence in a system where unspeakable intellectual aberrations are not only possible but seemingly inevitable? What works for society accepting the judgments of an enclave of writers who have no army, no taxing power, no patronage to effectuate their will?

The judge's essential instrument of both power and self-control is the written opinion. Justice Traynor says a judge writes to "persuade his colleagues, make sense to the bar, pass muster with the scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it."¹¹ Indeed that is so. But beyond the purpose to placate the *Micallefs* and *Palmeres*, whose fate we decide, and to satisfy peers near and far, who may decide our own, in writing these parables we judges explain ourselves, our place in the story told and in the telling. Thus did Annie Dillard write of the valley. In her case and ours that works for a true story.

It is a peculiar distortion of what we properly demand of judges

10. *Id.* at 189, 191.

11. Traynor, *supra* note 8, at 621.

and of professionals in general to confuse *impartiality*, the ability to weigh fairly various competing considerations and to render considered judgments accordingly, with the impersonal denial and alienation of the self. Impartiality, properly understood, may be an intensely personal expression of deep emotional and intellectual capacities of the self, but they are capacities which are sensitive to and engaged by reasonableness in weighing just and proper claims fairly. In the case of judges in the law, such impartiality in the articulation of rights, far from requiring impersonal detachment, requires the deepest and most responsible engagement of the person of the judge in searching within the recesses of the self for the foundations of one's integrity as a person which, *qua* person, one universalizes to all persons alike. Like persons in general, a judge cannot escape his or her ultimate personal responsibility for such judgments which engage the authentic resources of the self to establish meaning and moral coherence.†

As a mode of explanation an opinion is multifaceted. It is the decisive end of a particular controversy between identifiable parties. It is a piece of formal argument, a dance through compulsory figures as predictable as those of any quadrille or reel. It appeals to self-evident truths for permission to advance one step. It is a carrier†† of ideas that will decide controversies yet unborn. It is personal, autobiographical literature.

Various tools are required for the task of explanation. In overruling one's own prior decision, as did the New York court in *Micallef's* case, little more is required than a straightforward declaration that we were previously wrong, or that new information has become available. In *Micallef* the new data included sustained criticism by scholars, an increasing number of other courts that had abandoned the old rule, and a growing conviction that "in our highly complex and technological society, we fall victim to the manufacturer who holds himself out as an expert in his field."¹² Against such forces the old rule of *Campo v. Scofield* could not stand.

In *Palmer's* case, the court's task of discrediting the old rule was

† D. Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171, 209 (1979).

†† Here and elsewhere I have introduced the metaphor "carrier" into the 1976 text. This by way of commending to the reader the writing of Milner S. Ball, professor of law at the University of Georgia. His use of imagery in describing law is vastly instructive and liberating. See, e.g., Ball, *Of Rocks and Dams, PVC and Poetry: Conceptual Metaphors for Law*, 36 THE GEORGIA REVIEW 7 (1982).

12. *Micallef*, 39 N.Y.2d at 383, 348 N.E. at 576, 384 N.Y.S.2d at 120.

not so simple. A frontal attack as in *Micallef* was impossible, for the rule approving jury instructions on incriminating inferences was embedded in decisions of a superior court. The only possible course, therefore, was more circuitous: to show how the old rule cohabited with fifth amendment values only through laborious and unsatisfying rationalizations; to declare the jury instruction error in Palmer's case even if otherwise proper, because no one proved that Palmer in fact did not explain, when he was found in possession of goods from Libby's Bait Shop; and finally to doubt that proof of that sort, essential if we are to beckon inferences from one's *unexplained* possession of recently stolen goods, could ever be supplied without asking the prisoner questions forbidden by the fifth amendment. Said the court: "It is not clear to us why, without custodial interrogation, an innocent person would spontaneously explain when apprehended how he came to possess goods he did not steal or know were stolen."¹³

In writing about the leeways of precedent, Llewellyn counted and listed sixty-four distinct "available impeccable precedent techniques" and suggested the existence of many more such tools on the appellate workbench.¹⁴ The flat overruling of an outworn precedent, as in *Micallef*, is number forty-eight. *Palmer* contained elements of several of Llewellyn's categories.

Unlike *Micallef*, which in a stroke obliterated an old principle and raised up a new one for prospective application in New York, the immediate effect of the *Palmer* decision was only to gain Palmer a new trial. Its effect in future trials will be to give the prosecutors concern over whether the proof justifies requesting the jury instruction. Conceivably the *Palmer* decision could one day assist the Supreme Court of Florida in deciding whether to adhere to the precedents that *Palmer* avoided but could not overturn. It is also quite possible that, like some latently powerful mutation at Tinker Creek that might have transformed otters but somehow didn't, the *Palmer* mutation will be cancelled or diverted, or will simply fail of effect.†††

When Annie Dillard put her face close to the moth larvae, she

13. *Palmer*, 323 So. 2d at 618.

14. K. LLEWELLYN, *supra* note 7, at 77-91.

††† *The Palmer mutation is dead or dormant. Its unstabilizing effect was recognized in Hudson v. State*, 383 So. 2d 954 (Fla. 5th DCA 1980), criticized in *Smith v. State*, 378 So. 2d 313 (Fla. 5th DCA 1980), and expressly disapproved by the Supreme Court of Florida in *Smith v. State*, 394 So. 2d 407 (Fla. 1981). The fate of *Palmer* since this paper was delivered in 1976 perhaps illustrates my theme all the better.

better understood the emerging, well, moth-ness of it. But she did not know the whole point of the valley's parable until she drew away and saw, from a distance, that such particularity is abundant, diverse beyond anyone's planning, achieved through wild extravagance.

Appellate lawgiving is preceded by a trial engaging a judge, lawyers, jurors, witnesses, clerks, bailiffs, process servers and others; by a considered trial court judgment; by laboriously preparing a written transcript of all that was said and done at trial; by gathering and binding all the papers and exhibits; by warehousing it all in the appellate court; by lawyers preparing written briefs and presenting oral argument to the appellate judges; by a collegial decision tentatively arrived at; by preparing, in appropriate cases, a written opinion; by recording it, with any dissent, as judgment; by reproducing and immediately distributing 200 or so copies of it.

Then lawgiving moves into another realm of reality. A national publisher digests and indexes each opinion and publishes it in a volume with the opinions of other appellate courts of the state and region. Palmer's decision occupies seven pages of a volume containing 1,010 pages. That volume is one of 161 volumes of American appellate decisions published in the national reporter system during the year 1975-76.†††† That is more than all published appellate opinions in the history of the English judicial system, which annually adds three or four volumes to its basic library. How many thousands of copies of the volumes containing Micallef's and Palmer's cases are sold throughout the world is a secret well kept by the publisher.

American lawgiving, like nature, is profligate in creation, determined that every one of these mostly unknown persons shall have at least his name and identifying number published and sold to law libraries throughout the world. Paul Micallef's name, perhaps even Franklin Palmer's, will be spoken in public places from time to time, and their parables will be repeated to succeeding generations. They would be astonished.

When bound in buckram and arrayed on library shelves, these volumes symbolize the writing judges' craft and signify reason, continuity and power. Architects have their buildings, surgeons the cool image of the surgical suite, all of steel and lighted glass and sharp things, artists their canvases and sculpture, teachers their publications and gardens of students. But lawyers and judges who

†††† *During 1982 the annual accretion grew to 248 volumes.*

wish to be identified with the symbol of learning, of power, of continuity with Frankfurter and Cardozo and Holmes and Marshall and Coke and Bacon, have their pictures taken before a shelf of law reports.

Karl Llewellyn claims that the abundant particularity of American judicial lawgiving came about as the result of surplus energy at work in society, energy not necessary in the struggle for existence. Like the radio, silk stockings and the motor car, Llewellyn said some years ago, this abundance is a luxury grown into a necessity, "though fewer people are alive to its necessity."¹⁵

I cannot say, or at any rate will not here attempt to say, whether in any absolute sense it is necessary that we have judicial lawmaking as I have described it. Certainly it is no more necessary that the law have Franklin Palmer's parable than that the valley have the doomed male mantis. But whether that is necessary, or in a global view frivolous, or in a cosmic view irrelevant, we writing judges declare by our craft that these mostly unknown persons, and their mostly private affairs, are not replaceable individually or as the stuff of parables. As long as that commitment stands, there will be a craft such as I have described, and necessarily its task will continue to be as John Maguire described it at my investiture in August 1975:†††††

In this go-go era of machine produced instant products, craftsmanship in all fields is fading. A religious-like calling seems required to stay at that desk, to keep probing the texts, to keep seeking the words through which facts are perceived and accounts rendered. But our sustenance and survival depends upon this willingness of judges to be scholars. I take it that constitutional processes are not self-evident, that he who runs will not be able to read, that rendering an interpretation requires probing, reflection, disciplined fashioning of phrases that clearly mirror the mind's intent. That's scholarship.

15. K. LLEWELLYN, *THE BRAMBLE BUSH* 115 (7th printing 1978).

††††† *Delivered August 1, 1975, at the District Court of Appeal, First District, Tallahassee, Florida. John David Maguire was in 1976 president of the Society for Values in Higher Education, at whose Fellows' Meeting this paper was delivered. He was then president of the State University of New York at Old Westbury, and is now president of the Claremont University and Graduate Center, in California. He was and is my old and valued friend who from college days has pondered with me questions like those raised in this paper.*

