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JUDGES AS LIARS

MARTIN SHAPIRO*

I agree with much of what Professors Graglia and Merrill have said, but I view them both as excessively optimistic.[1] They fail to regonize and accept a fundamental paradox inherent in our courts.

Courts, by their very nature, are institutions designed to resolve conflicts between parties.[2] In any judicial system in which present resolutions of conflict—such as individual case decisions—have some degree of precedential weight, courts do make law, public policy, or at least public choices.[3] Thus, one part of the paradox is that courts occasionally make public policy decisions or law. In that sense, the "rule of law," to the extent that the concept is intended to mean that judges apply only pre-existing law, can never exist.[4] Judges often make rules for decision of future cases and are, therefore, making law.

The other side of the paradox is that precisely because all courts, including the Supreme Court, resolve conflicts between the parties before them, judges must have something to tell the loser.[5] Presumably, courts could tell the loser: "You have lost because we, the judges, have chosen that you should lose. We have so chosen because we think society would be better off if you lost."

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1. *See* Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119 (1994); Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137 (1994).

2. *See* BLACK'S LAW DICTIONARY 352 (6th ed. 1990) (defining the term "court" as "[a]n organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice").

3. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989) ("In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to 'make' law.").

4. *See* Karl N. Llewelyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1238-39 (1931) (arguing that the "rule of law" has never really existed because judges have always made law using "rules" to make their decisions seem plausible); *cf.* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring) ("[J]udges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than what it is today *changed to*, or what it will *tomorrow* be.") (emphasis in original).

5. *See* Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 817-20 (1992).

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Courts have decided, however, in all of the societies that have a modern judicial system, to avoid the appearance of deciding cases based on judicial whim. As Professor Merrill discussed, in all modern societies, and in all cases, judges tell the loser: "You did not lose because we the judges chose that you should lose. You lost because the law required that you should lose." That is the answer arrived at to satisfy the losers through hundreds of years of experiments in numerous societies.[6]

This paradox means that although every court makes law in a few of its cases, judges must always deny that they make law. I neither criticize nor defend courts as an institution; I simply assert their existential position in the world. They live that paradox; they have lived it in the past and will continue to live it in the future. There is nothing we can do about it, and there is nothing they can do about it.[7] That makes courts part of a distinctive subset of political institutions: one that must always deny that they are wielding political authority when they in fact *do* wield political authority. Such is the nature of courts. They must always deny their authority to make law, even when they are making law.

One may call this justificatory history, but I call it lying. Courts and judges always lie. Lying is the nature of the judicial activity. One must get over the moral *angst* about that and quarrel instead about what law judges make, when, and how fast. Worrying about whether judges ought or ought not to lie is foolhardy. Judges necessarily lie because that is the nature of the activity they engage in.

I conclude by remarking that throughout the last day and certainly now, as the worst blizzard to hit the East Coast during this century rages outside, a song has been running through my mind. It is a song by Dave Frischberg titled "Marooned, Marooned, Marooned in a Blizzard of Lies."

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6. *See* Merrill, *supra* note 1, at 137-38.

7. *But see* Scalia, *supra* note 3, at 1187:

> All I urge is that those modes of analysis be avoided where possible; that the Rule of Law, the law of rules, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.

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