



# FABLES IN LAW

## LEGAL LESSONS INSPIRED BY PIERO CALAMANDREI

*D. Brock Hornby*

Never fear, Judge Hornby will return with more “Lessons from Field, Forest, and Glen” in future issues of the *Green Bag*. In the meantime, he has other creatures-and-law stories to tell. What we have here is his first set of fables inspired by the work of another useful and entertaining lawyer-author.

— *The Editors*

THE ITALIAN LAWYER and university professor Piero Calamandrei first published *Eulogy of Judges* in 1934.<sup>1</sup> Worth reading in its entirety, it is full of aphorisms. One of those aphorisms — “*Clarity and brevity are the most admirable qualities of oratory; they are most eloquently expressed in silence*”<sup>2</sup> — is a more elegant statement of the moral I composed — “*Sometimes it is better to say less*” — for one of my *Fables in Law*.<sup>3</sup> I have devised fables to illustrate some of Calamandrei’s other nuggets of wisdom.

---

<sup>†</sup> D. Brock Hornby is a Senior District Judge on the U.S. District Court for the District of Maine.

<sup>1</sup> B.S. Markesinis, *Introduction to Piero Calamandrei, Eulogy of Judges*, at xix (50th Anniversary ed. 1992).

<sup>2</sup> *Id.* at 36.

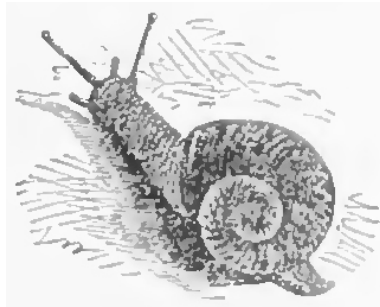
<sup>3</sup> D. Brock Hornby, “The Destruction of the Porcupine,” *Fables in Law*, 17 *Green Bag* 2d 357, 361 (Spring 2014).



## THE USEFULNESS OF THE OLD FROG

Frog was an elderly advocate. Over the years, he had tried to keep his clients out of court because of the expense, uncertainty and administrative distraction it would cause them. Although they were sometimes disappointed in his unwillingness to get caught up in their enthusiasm to sue and in his constant message of moderation, Frog's clients generally realized after measured reflection that his advice had been sound. Frog became revered as a pillar of the community.

*Moral: "The lawyer's social usefulness can be measured by the number of times [that lawyer] advises [the] client that [the client] has no cause of action."<sup>4</sup>*



## SAVING THE SNAIL

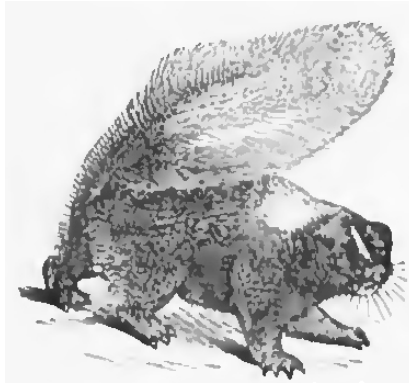
Gopher graduated from law school and hung out her shingle. One of her first clients was Snail. Snail wanted to sue the Forest Glen Recreational Center because it had refused to let Snail enter the Forest Glen's

---

<sup>4</sup> Piero Calamandrei, *Eulogy of Judges*, at 67.

annual road race. Gopher worked very hard on Snail's lawsuit, and Snail's claim was scheduled for a hearing before Owl. The Recreational Center hired the well-known Donkey of Barnyard fame to represent it. At the argument, Donkey argued that the case should be dismissed out of hand. Donkey was brilliant, sarcastic and humorous, distinguishing the famous tortoise/hare contest on the basis that even tortoises have four legs, and arguing that the Recreational Center could legitimately limit the Forest Glen's road race to creatures that had more than one foot. It was apparent to all observers that Owl was hanging on Donkey's every word, smiling and nodding at many of his points. Gopher in response was halting and uncertain. Nevertheless, Owl asked Gopher questions that developed the thrust of Gopher's discrimination argument better than Gopher had stated it initially, and ultimately Owl refused to dismiss the case.

*Moral: "[W]here the powers of the opposing attorneys are unequal, the judges are generally disposed to bestow their admiration on the more brilliant and to give their protection to the least talented."*<sup>5</sup>



## THE SKUNKING OF THE SKUNK

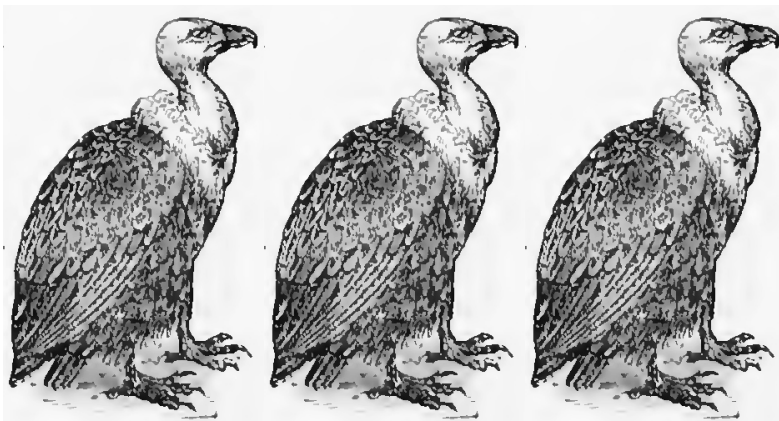
Woodchuck was representing Skunk in a public nuisance case over whether Skunk's indiscriminate use of his scent was making it impossible for other Forest denizens to pursue their affairs without interference. Woodchuck thought that he had done a particularly good job of cross-

---

<sup>5</sup> Id. at 5.

examining his opponents' expert witness. When it came time for closing arguments, Woodchuck decided to dramatize the expert testimony and remind the jury of its weaknesses (in Woodchuck's mind) by sitting in the witness box himself and repeating the answers as if he were the witness. Owl watched with concern as Woodchuck climbed into the witness box to do so, fearing that his actions would detract from the solemnity of the proceedings, but she could also see the jurors' facial expressions and concluded that it was not her responsibility to save Woodchuck from himself. The jury was indeed offended by Woodchuck's melodramatic behavior during closing argument and rendered its verdict against Woodchuck's client Skunk.

*Moral: "The most malicious thing a judge can do to a lawyer is to let him talk on without interrupting him when he is talking uselessly or to the detriment of his client."*<sup>6</sup>



### THE THREE CLEVER VULTURES

The Three Vultures developed a novel approach in a particular case to a recurrent legal conundrum that had bedeviled the tribunal and others like it for years. In the resulting written decision, the Vultures proudly presented the analysis as their own. It was lucid and persuasive, and the Vultures received great acclaim from Professor Beaver and others for the

---

<sup>6</sup> Id. at 40.

elucidation. Only those who took the time to read each of the appellate briefs carefully realized that Fox had actually suggested this analysis in her brief, although she did not develop it as much as the Vultures did.

*Moral: "A lawyer should be able to suggest the arguments which will win [the] case so subtly to the judge that the latter believes he[ /she] has thought of them him[ /her]self."*<sup>7</sup>



### THE BRILLIANT INFERIORITY OF PROFESSOR BEAVER

Professor Beaver tried to convert his classroom fame and skills into an extra-curricular career as a practicing advocate. As a result, he appeared before Owl for an oral argument. The hearing involved a simple evidentiary issue but Beaver, with his tail slapping the floor for emphasis, spoke as he did in class, pausing to look at courtroom personnel for approval, referring to authorities of whom Owl had never heard, and using esoteric terminology familiar to academics but not to ordinary arbiters. Owl was bewildered and offended, and gave more credence to Fox's simple argument in response.

*Moral: "The [lawyer] who adopts classroom tactics in court, ostentatiously showing off [the lawyer's] knowledge, burdening the court with unusual and erudite concepts, may well be a great jurist, but . . . is a poor psychologist and, therefore, an inferior lawyer."*<sup>8</sup>

---

<sup>7</sup> Id. at 19.

<sup>8</sup> Id. at 15.



## THE ABLE WOODCHUCK

In their decision on Woodchuck’s appeal, the Three Vultures referred throughout to Woodchuck as an “able” and “learned” advocate who had made certain arguments. But Woodchuck lost the appeal, and all who read the opinion knew that the appellate tribunal had made mincemeat of Woodchuck’s arguments.

*Moral: “If in writing [the] decision a judge speaks of one of the attorneys as ‘able’ or ‘learned,’ it is usually done to soften the blows which are to follow.”<sup>9</sup>*

## THE GLEN’S ADVOCATES — NAMELESS, FACELESS, . . . AND GREAT

Owl and the Three Vultures, like other arbiters, were all infamous for their inability to remember advocates’ names and faces outside of court. When any one of the arbiters was individually wandering the Glen on personal pursuits, he or she would nod and mutter a response to advocates who uttered a greeting, but most advocates were persuaded that the arbiters did not really remember who the advocates were. Yet when the arbiters met privately among themselves, they would remark about the high quality of advocacy in the Glen and recount with admiration and delight the elegance of particular arguments that had moved them, even though long ago, and without named attribution.

---

<sup>9</sup> Id. at 90-91. The same precept applies when the appellate tribunal calls the trial judge learned or able.



*Moral: "If a judge forgets a lawyer's face and . . . name, . . . voice and . . . gestures, and still remembers the arguments which, coming forth from that nameless toga, won the case — that [advocate] is a great lawyer."<sup>10</sup>*

*GB*

---

<sup>10</sup> Id. at 18.