



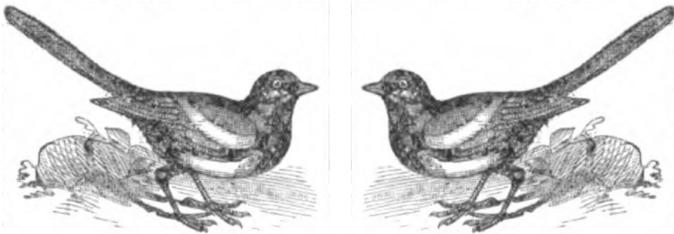
FABLES IN LAW, CHAPTER 3

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

We are pleased to present the third set of what we hope will be an ongoing series of Aesopian legal fables by Judge Hornby.

– *The Editors*



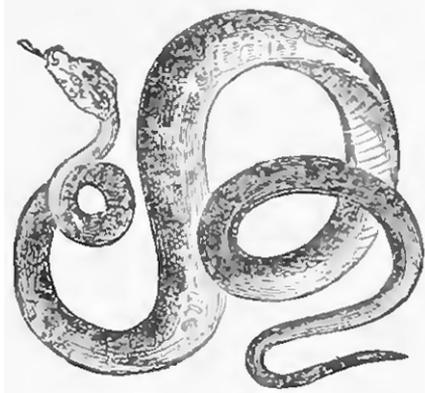
THE MAGPIES' CONVICTION

Owl tried conscientiously to render fair decisions for the Pine Forest denizens. She consciously considered her biases in favor of winged creatures and strove to overcome them. She also consciously recognized that, unlike her, some creatures preferred light to darkness and she tried to set that prejudice aside. Nevertheless,

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the Magpies who wrote the *Forest Glen Gazette* and hosted its webpage were convinced that Owl was always affected by her own heritage and her customs, and that no one in public life could set aside such predilections. As a result, every story the Magpies wrote about Owl's decisions started with: "Owl, who is a bird of the night, decided [as follows]." The premise helped to sell newspapers and advertising, because many denizens of the Pine Forest were ready to assume that all judicial decisions were pre-ordained by prejudice.

Moral: Those who live their lives based on prejudice assume that others must do so as well.



THE SNAKE'S CLOUD OF DOUBT AND JUSTICE

Fox brought Owl a motion for summary judgment, arguing that the important facts really were not in dispute, that the law was clearly in her client's favor, and that no trial was necessary. Fox had a wealthy client and had amassed a mountain of exhibits, depositions, and affidavits to support her argument, and Fox wrote a complicated and lengthy brief. Snake, on the other hand, had a poor client and could not match all Fox's resources and arguments. But Snake created a sufficient cloud of doubt about the dispute that Owl realized that she would have to write a very lengthy opinion to rule in Fox's favor and that she could not be 100% confident that an appellate tribunal ultimately would agree with her. So Owl denied Fox's motion, knowing that Fox could not appeal that decision, and

Owl set the matter for trial. As a result, Fox and Snake had the opportunity to see what a jury of their peers would decide or to settle the case.

Moral: As long as a case can go to a jury for decision, justice remains possible.



THE SQUIRRELS' OPINIONS

The Three Vultures were so overwhelmed with appeals from the Forest Glen that they had to delegate more and more of the opinion drafting to Squirrels, their law clerks. Squirrels were hard-working and very bright, but they lacked practical experience, as well as social experience with the ways of the Pine Forest creatures. The Three Vultures, on the other hand, although not all brilliant, had an abundance of practical experience and knew the ways of the world. They also had a sense of what was important and what was not, whereas Squirrels could not yet make that judgment. The Three Vultures tried to edit the opinion drafts that Squirrels provided them, but time was limited. The result was that the written decisions became progressively longer and longer, belabored the obvious, and in important respects were impractical for Owl to implement as a judge in the Forest Glen court or for advocates there like Snake and Fox to apply.

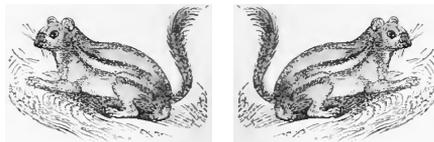
Moral: Practical experience and insight should trump analytical brilliance and grunt work.



THE FOOTNOTES FOR BEAVER

One of the Three Vultures always had to take the lead role in writing an opinion on appeal. Sometimes the cases were complicated, and law clerk Squirrel, hoping to impress his boss and remembering things he had learned at law school, raised every possible issue in the draft, even issues not addressed by the lawyers. The Three Vultures were reluctant to decide issues that had not been argued, but sometimes in the final version they would allow a footnote saying: “We note, but do not decide, the following issue,” either to placate Squirrel or to ensure that law professor readers like Beaver saw that they were alert. The consequence, however, was that lawyers in future cases, fearing malpractice, now had to raise and contest that same issue before Owl, and Owl had to decide it without guidance, all increasing legal fees greatly during the several years until a proper case finally reached the Three Vultures that they could decide.

Moral: Judicial opinions should clarify the law, not create new uncertainty.



THE SORTING OF THE GOPHERS

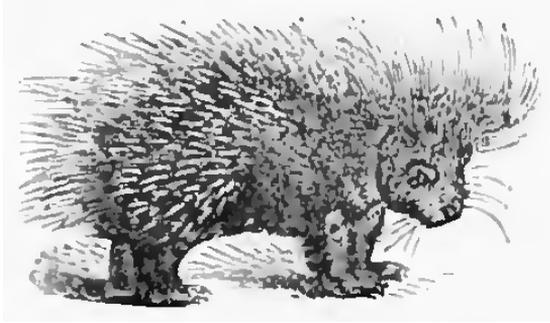
In their first year of law school, Gophers jostled among themselves in figuring out who would succeed the most. Some Gophers regularly volunteered to speak on Professor Beaver’s invitation, while

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others were silent unless called upon. At the time, the generally accepted wisdom among Gophers was that the ones always speaking were the brightest and most likely to succeed. Then came the papers to write and examinations to take, and to the surprise of many, some of the most loquacious did poorly and some of the silent Gophers received high grades and were recognized throughout law school as a result.

After law school, still a different Gopher-sorting process took place, with those who knew best how to maintain a professional relationship and inspire confidence gaining the most clients and prestige.

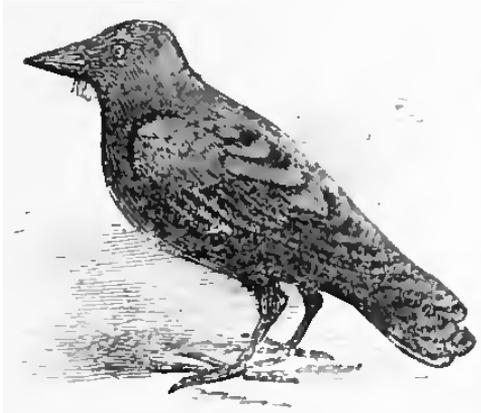
Moral: The best talkers aren't always the best students; the best students aren't always the best lawyers.



THE DESTRUCTION OF THE PORCUPINE

Turtle had finished her oral argument before the Three Vultures. They had pretty much made mincemeat of her and when it was his turn to respond, Porcupine stood up to continue what he hoped would be Turtle's complete destruction. As he began to pick up on some of the points the Three Vultures had made in challenging Turtle, Porcupine was dismayed to discover that the Three Vultures immediately turned upon him, and it was he who was destroyed. Waiting for their turn to be heard were Snake and Woodchuck. Woodchuck went first and suffered the same attack as Turtle. When it was Snake's turn, he said "I rest on my written brief unless the court has questions." There were none, and he sat down unscathed.

Moral: Sometimes it is better to say less.



THE CROW'S COLD RECORD

The Three Vultures were reviewing Owl's decision in a hard-fought controversy from the Forest Glen in order to determine whether Owl had behaved impartially and whether the evidence supported her decision. Crow had kept the record of the Glen controversy and certified it to the Three Vultures. Porcupine and Turtle were arguing the appeal, although neither had been present in the Glen for the trial. Porcupine pointed out that according to Owl, Chipmunk had said "I do not like red currants," whereas Crow's transcript showed that Chipmunk said "I do like red currants." Moreover, Porcupine argued that Owl had shown her partiality by treating Chipmunk disrespectfully, interrupting his testimony at one point to say "Well, things really are getting foggy now, aren't they!" Turtle had nothing to say in response to these points, and the Three Vultures reprimanded Owl in their decision. Those who were present in the Forest Glen, however, knew that a branch on which Crow was perched had snapped just as Owl reported what Chipmunk had said about red currants and prevented Crow from hearing the "not" that Owl heard. They also knew that in fact physical fog had rolled in heavily that morning, prompting Owl's comment about things getting foggy.

Moral: Never trust a cold or surprising transcript, especially when the advocates on appeal were not present at trial.



THE WOLVERINE'S LIBERTY

Following principles announced by the Three Vultures, Owl ordered Wild Boar to be confined for a prolonged time due to his repeated dangerous behavior, and the Three Vultures affirmed the sentence. Thereafter, Wild Boar took every opportunity to petition to reduce his sentence, but Owl and the Three Vultures regularly rejected his petitions.

As the number of creatures in the Forest grew, as they continued to misbehave as was their wont, and as the resulting punishments became harsher, more and more of the Forest creatures were confined for long periods of time like Wild Boar, and they also petitioned to reduce their confinements. Owl and the Three Vultures were frustrated by the resulting volume. They developed almost a visceral reaction against reexamining these punishments, especially because these were creatures who had already consumed hours of the tribunals' time, and their petitions were usually meritless and, on top of that, unusually difficult to understand. Therefore, the tribunals developed rules to prevent the already-sentenced creatures from bringing new petitions.

However, there came a time when the Three Vultures announced a new, more lenient, rule for future offenders like Wild Boar. Wolverine, a new offender, received this more lenient treatment, with a substantially lower sentence than Wild Boar. Wild Boar petitioned again, asking to have the more lenient rule retrospectively applied to him. Owl and the Three Vultures gave elaborate explanations why

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they would not reconsider Wild Boar's punishment. They believed that they were behaving responsibly, justly and carefully, preventing the Forest wheels of justice from becoming clogged through re-examination of cases. But every day Wild Boar saw Wolverine and fumed over the recognition that Wolverine had received a much milder punishment for the same conduct as Wild Boar. Wild Boar's family and friends also brooded over the inequalities, with a deep sense of injustice.

Moral: Injustice looks different depending upon which end of the telescope you are using.



THE OWL'S DELUSION

From time to time, Owl was asked to speak at meetings of the Forest Glen advocates. She delighted in the glowing introductions she received, and in how the advocates applauded her talks, laughed at her stories and seemingly hung on her every word. As the years passed Owl decided that she had developed remarkable skills as a raconteur and public speaker. Behind her back, however, Fox, Snake and the other advocates talked about how insufferable Owl had become.

Moral: Be skeptical of compliments from those who want something from you.



THE HERON'S VISIT TO THE MOUSE

The management committee had a difficult topic to take up with one of the law firm partners. Committee chair Frog, being an older gentleman, sent the partner a written memo. Centipede, also on the committee but somewhat younger, sent an email. Toad, the youngest, sent a text message. None of them actually spoke directly to Mouse, the object of their concern. Mouse put Frog's written memo on her desk and every morning when she came in, it irritated her and she became more intransigent about the management committee's request. She printed Centipede's email to the same effect and also re-examined it on her iPad. Similarly for Toad's text message on her cellphone. Heron, on the other hand, finally went to speak to Mouse. Heron watched Mouse's reactions to what she had to say, modulated her tone-of-voice and modified some of her statements accordingly. Heron and Mouse came to an understanding. But Mouse refused to speak to Frog, Centipede, and Toad.

Moral: Face-to-face communication remains the best way to convey difficult information.

To be continued . . .

