Fables in Law, Chapter 12

Legal Lessons from Field, Forest, and Glen

D. Brock Hornby

How the Vultures Dealt with Harmful Errors

One region of the Forest Glen regularly gave the Vultures the most difficulty in appeals. For a variety of reasons, prosecuting advocates from that region had cultivated highly aggressive tactics in pursuing their desire to convict and imprison miscreants. In their advocacy they often let their emotions outrun their better judgment. Owl's counterparts as arbiters in that region seemed unable or unwilling to rein in the prosecutors. The prosecutors violated the rules the Vultures laid down for fair advocacy and appealed to jurors' fears and prejudices, arguing for example that it was the jurors' role to ensure the safety of the Forest Glen against drugs and violence and that they could do so only by convicting the particular defendant on trial. The Vultures repeatedly chastised the prosecutors for such behavior, pointing out that the jury's role was not preservation of public safety, but only to determine whether the evidence proved the de-

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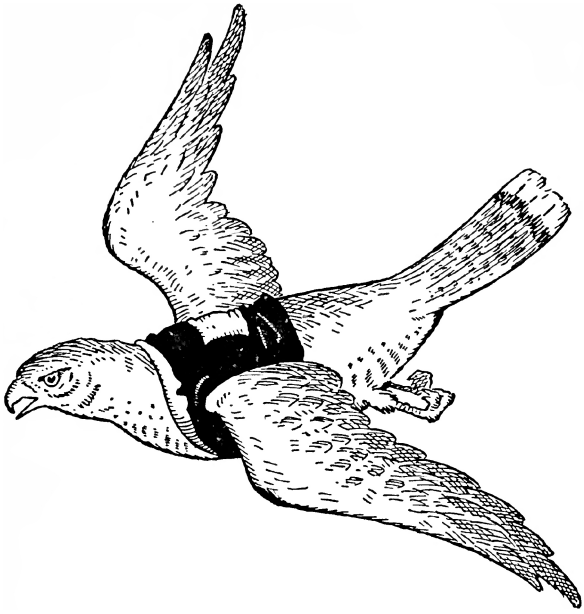
fendant's guilt beyond a reasonable doubt. Nevertheless, the Vultures were reluctant to reverse the convictions and send the cases back for a new trial because there was usually abundant evidence showing that the miscreant really was guilty and the Vultures did not want to waste resources for a repeat performance. So the Vultures usually found the flagrant abuse of advocacy to be "harmless error" and affirmed the convictions. As a result, prosecutors in that region continued their misbehavior because it worked, and because the criticism from the Vultures was easy to shrug off when there was no penalty.

Moral: To be credible in efforts to correct behavior, it is sometimes necessary to impose a painful penalty.

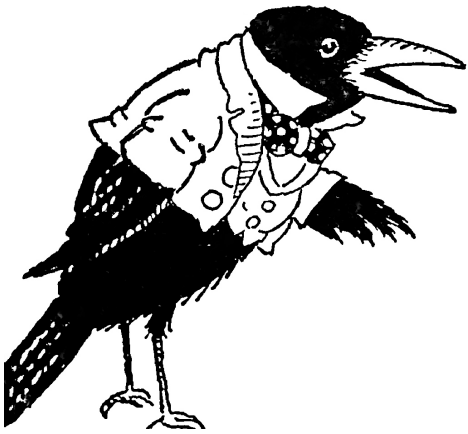


How the Hawks Preserved Peace in the Courtroom

Hawks provided security for the Forest Glen tribunal and as part of their duties supervised offenders in custody. They grew accustomed to dealing with all sorts of offenders – polite, rude, aggressive, timid, violent, or otherwise. Hawks' professional training led them to treat all offenders with dignity and to de-escalate tense situations. As a result, offenders felt

respected and came to trust Hawks' fairness, and many potentially violent situations were avoided. For example, when Wolf came to court to be sentenced for violently assaulting Sheep, Hawks carefully restrained him physically, but spoke to him in measured tones, adjusted his restraints to make him comfortable, and did not demean him. As he was about to be sentenced, Wolf commented aloud on the decent treatment Hawks had provided.

Moral: Dignified and fair treatment of offenders avoids many potential confrontations.



Why the Crow's Complete Reports Did Not Count as Data

Owl, Condor, and the other arbiters labored long and hard in deciding what sentence to impose on a miscreant creature and in explaining it thoroughly and aloud to the advocates and the creature being sentenced. Crow recorded everything that they said. But the Forest Commission, which promulgated sentencing guidelines, wanted empirical data about the arbiters' sentences. The Commission was not satisfied with Crow's transcript of what the arbiters said at sentencing hearings, because then the Commission had to take the extra step of reading and categorizing the arbiters' sometimes lengthy reasoning. Instead, the Commission designed mandatory forms to be completed after every sentencing, with various boxes to check about the sentence. In particular circumstances, it also required

short written explanations about what an arbiter did. Challenged by the requirement of condensing a complex decision into boxes and short explanations, emotionally exhausted from a particular sentencing, and pressured to move on to the next dispute waiting on their docket, arbiters often assigned to administrative personnel the duty to complete the forms after sentencing. Even though arbiters had to sign the completed forms, the resulting documents did not really capture the details and nuances of what the arbiters had said in determining, explaining, and imposing the sentence. Nevertheless, the Commission used them as the basis for the empirical data it wanted, and to draw policy inferences.

Moral: It is tempting to focus on what can be counted or measured and to seek ways to force complex human interactions into formulas. But simplified data should be treated gingerly in analyzing complicated decisions.

How the Owl Was Handcuffed

The Forest Commission wrote its rules for punishment so as to cabin the arbiters' sentencing discretion. But Forest Glen law enforcement decisions continued to determine which crimes and which offenders were pursued, and prosecutors decided whether to bring charges against a creature and if so, what charges to bring. All those discretionary choices had a huge impact on whether there was a conviction and if so, what penalty an arbi-

ter like Owl must impose. But the discretionary choices the police and prosecutors made were far less visible to the Forest denizens than the decisions of the tribunals. Although arbiters like Owl recognized the disparate treatment that resulted from these law enforcement and prosecutorial choices, the Commission's rules restrained the arbiters' ability to adjust sentences to ameliorate them.

Moral: It is difficult to wring discretion out of a system; most efforts to reduce it simply move it around.[1]

WHY THE BEAVERS DID NOT TEACH THE GOPHERS

As the years passed, Professor Beaver and his colleagues mostly lost interest in writing treatises to organize the law in a way that would help judges and lawyers. The "in" type of academic behavior became empirical work, interdisciplinary research, and arcane legal philosophy. In fact, the law professors generally did not mention legal research skills and tech-

[1] I first heard this aphorism years ago from Professor Melvyn Zarr, University of Maine School of Law. I do not know whether he created it or heard it from a different source.

niques to law student Gophers in teaching them, and relied on teaching assistants and digital providers to do so. Gophers' resulting research skills were based largely upon digital caselaw searches; the instruction generally ignored or downplayed treatises and Restatements. After graduation, arbiters like Owl and the Vultures, and advocates like Frog and Fox, had to teach Gophers the efficacy and efficiency of using treatises and Restatements. Gophers who had become Squirrels or junior advocates were surprised at how helpful those resources were. They wondered why their law schools had not trained them in their use.

Moral: Law schools' disjunction between theory and practice creates an impediment that others engaged in actual practice must overcome.