



# FABLES IN LAW, CHAPTER 13

LEGAL LESSONS FROM  
FIELD, FOREST, AND GLEN

*D. Brock Hornby*

## THE ARITHMETIC OF JUSTICE IN THE GLEN

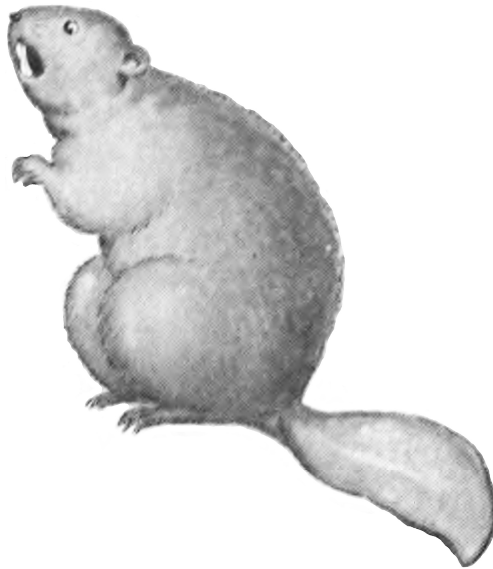
Related to the goal of cabining arbitral discretion, one of the primary reasons that the Forest Commission promulgated its Forest rules on proper punishment was to reduce unwarranted disparity among how similarly situated creatures convicted of crime were treated. The Commission therefore listed a large number of characteristics that arbiters must consider in determining the punishment, such as previous convictions and sentences, and gave numerical weights to each, so that there would be equal treatment. Owl and her colleagues found it valuable to know what the standard punishment ranges were for various characteristics that the Commission promulgated, but Owl and arbiters like her also knew that the Commission's formulas actually masked deep disparities, based upon varying arrest policies among the Forest Glen and other jurisdictions like Barnyard, different charging and sentencing practices from jurisdiction to jurisdiction,

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prosecutorial discretion on whether and what crimes to charge, prosecutorial decisions on what evidence to present to the arbiter, and inevitable variations in animal behavior and circumstances. These variations led the arbiters sometimes to deviate from the Commission's arithmetic in particular cases. Yet when they did so, prosecutors, the journalist Magpies, and others were quick to charge that the arbiters were again ignoring the mandate of equal treatment and reverting to arbitrary disparities among defendants.

*Moral: Numbers are seductive; the system of justice has many components, such that equality imposed at one level alone is an illusory equality.*



## WHY THE BEAVERS WOULDN'T TEACH THE GOPHERS MATH

Owl complained frequently to Professor Beaver and his colleagues that in federal criminal law they needed to teach Gopher law students more about sentencing. Most law professors who taught criminal law, however, preferred to focus on constitutional issues involving arrests, searches, wiretaps, and confessions. Those were the issues on which the professors had been trained, and they found them more interesting. Owl tried to

## Fables in Law, Chapter 13

explain to the law faculty that such issues were no longer the backbone of criminal practice because law enforcement had mostly learned to comply with Fourth and Fifth Amendment requirements. Instead, Owl explained, modern federal criminal advocates focused their attention on sentencing and how to get their clients the lowest possible punishment, a process that often started even before a grand jury returned an indictment and required negotiating with the prosecutor over what would be charged and how. In response to the professors' assertion that sentencing guidelines and law were boring, Owl pointed out that sentencing law involved traditional legal materials that law schools taught: The Guidelines were like a code, such as the Uniform Commercial Code or the Internal Revenue Code; they had a "legislative history" in the process by which the Sentencing Commission revised the Guidelines from time to time; there was abundant Vulture caselaw interpreting the Guidelines; and some constitutional issues in sentencing even reached the highest tribunal. Owl gained some converts but, for the most part, Beaver and his colleagues were unpersuaded.

*Moral: It can be difficult for law faculty to shift ground on how to teach a subject.*

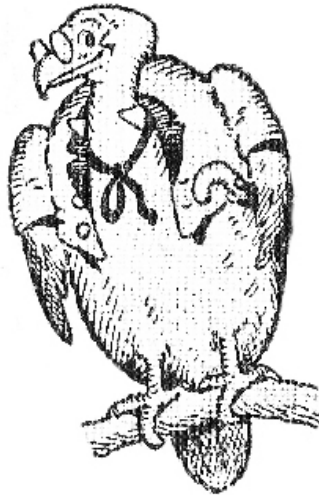


### THE TRIALS OF BIRD ADULATION

As Owl aged, her law clerk Squirrels commissioned a portrait of her for the Forest Glen tribunal. It was a good likeness, and the tribunal held a ceremony to hang it, inviting advocates, other arbiters, tribunal personnel, Owl's family and her many law clerk Squirrels to attend. There was an abundance of laudatory speeches. A few years later when Owl actually retired, the Forest Glen held another ceremony to honor her, with the same categories of guests being invited to hear a new succession of laudatory speeches. When Owl's successor, Eagle, was appointed, the tribunal held an

investiture ceremony to honor Eagle, again inviting other arbiters, advocates, tribunal personnel and Eagle's family, and featuring a series of speeches about Eagle. One of the Vultures remarked to Owl, Eagle, and her colleagues: "The Forest Glen Tribunal has become so adept at these events, and they are so satisfying!" Tribunal personnel who were not arbiters were mostly bemused by the proceedings. The advocates, on the other hand, complained to each other, with the common refrain: "I am so tired of attending these ceremonies and hearing over and over again the adulation of the arbiters."

*Moral: Public ceremonies of veneration get old very quickly except for those being venerated.*



## THE PREDICTABLE PATTERN OF VULTURINE CRITIQUE

The Vulture who had previously been an academic decided that she should gain judicial trial experience by presiding at trials in the Forest Glen. Owl was very grateful for the assistance. Vulture had more assistants than Owl and did not have the volume of cases awaiting trial or defendants awaiting sentencing that Owl had. As a result, Vulture gave a lot of attention to the cases where she presided and did a good job on them. However, Vulture criticized Owl and other arbiters for using so-called Pattern in-

## *Fables in Law, Chapter 13*

structions in charging juries on the law. Vulture also criticized the instructions that the advocates offered for use in her trials. But Vulture had enough time to do all her own research and generate her own instructions, which were excellent because Vulture was brilliant and a quick study. Owl, on the other hand, did not have time to search through all the appellate cases and parse their often ambiguous legal requirements when it came time to charge a jury. She was grateful, therefore, for the suggested Pattern instructions that others had prepared from a careful analysis of the cases and that were updated as the Vultures handed down new decisions that affected the law. Owl did not take the Pattern instructions as holy writ, but adjusted them to fit the facts of the case before her, and the advocates did the same. Owl thought that Vulture's criticism of her for doing so was uninformed.

*Moral: Pattern instructions are not the end, but the beginning of crafting a proper set of instructions for a jury. Not every judge needs them, but they should not be denigrated for those who find them helpful in managing a busy court calendar.*

what are the states' Solicitor General offices? They are not (yet) an Eleventh Justice. But neither are they just another litigant before the U.S. Supreme Court. They collectively occupy a middle ground.

