



FABLES IN LAW, CHAPTER 2

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

We are pleased to present the second of three (and perhaps more) collections of Aesopian legal fables by Judge Hornby.

— *The Editors*



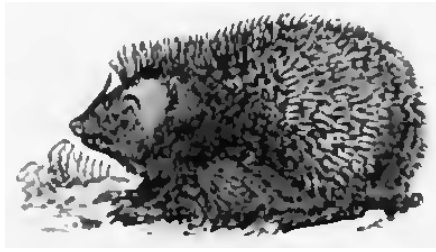
THE WOODCHUCK WHO GENERATED THE LONG SENTENCE

Snake was prosecuting a charge against two creatures for conspiring to bring red currants into the Pine Forest. Fox and Woodchuck were defending their respective clients. The evidence was

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very strong against both defendants. Fox realized that it was so, and persuaded her client to plead guilty and seek a lower sentence as a result of his admission. Woodchuck, on the other hand, persuaded his client that they should pull out all the stops. Woodchuck made every conceivable motion and took his client to trial. In light of all Woodchuck's efforts, his client came to believe that he had a shot at winning an acquittal, but in fact Snake secured a conviction. The resulting sentence was higher than Fox's client received. But Woodchuck thought that he had given his client the best defense possible.

Moral: Sometimes concession is in a client's best interest. A lengthy and complex defense, no matter how assiduously presented, may not be justified.



LENIENCY FOR THE HEDGEHOG

In another case, Snake prosecuted Hedgehog for his misbehavior in distributing a large quantity of the forbidden red currants and gooseberries to other creatures in the Pine Forest. Hedgehog was convicted. Snake asked Owl to punish Hedgehog severely, particularly given the large quantity found in his den.

Fox defended Hedgehog at sentencing. Fox urged Owl that Snake was overreaching by including in the quantity calculations a large amount of berries that remained *undistributed* in Hedgehog's den.

Owl said to Fox, "Since Hedgehog distributed the currants and gooseberries in the past, and his den contained a lot more of them than he would consume himself, isn't it reasonable to conclude that he intended them for distribution?" Fox thought this question over, and then replied, "Yes, I suppose that would be a reasonable inference."

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Fox then offered other arguments in support of leniency for Hedgehog. Owl listened much more favorably to these other arguments upon realizing that Fox would not press unreasoned positions.

Moral: Conceding a point sometimes lends greater weight to other arguments.



THE OWL'S INSTRUCTIONS

Fox and Snake had completed the evidence in their case before Owl. They met with Owl to discuss what instructions Owl should give to the creatures on the jury as they considered the evidence. Owl had prepared a draft of proposed instructions. Snake, who had not tried many cases, quibbled over each instruction, seeking minute changes in wording. Fox, an experienced trial lawyer, said on the other hand that the instructions were fine, and Fox proposed no changes. In their closing arguments, Snake argued the law, whereas Fox focused the creatures of the jury on the facts of the case, emphasizing those most favorable to her client. Fox prevailed.

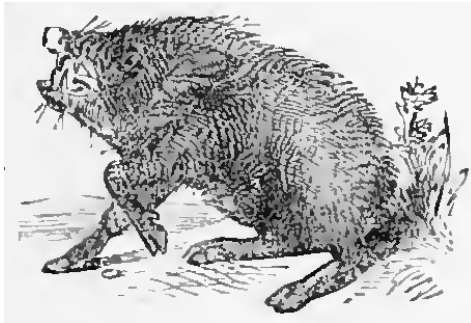
Moral: Experienced lawyers generally win their cases on the facts, rather than the law.



THE FIGHTING FOX

Snake and Fox were opposing counsel in a hotly contested civil case. They could agree on nothing. Owl held hearing after hearing trying to narrow and simplify the dispute, but Snake and Fox insisted on arguing each issue as if it were make-or-break. Finally, Snake agreed to concede on some unimportant issues, expecting Fox to do the same on others in response. But instead, Fox smelled blood and made even more strident demands. In every case with Fox thereafter, Snake refused to agree to any accommodation.

Moral: There is always someone who does not play fair, but the gambit does not work a second time with the same opponent.



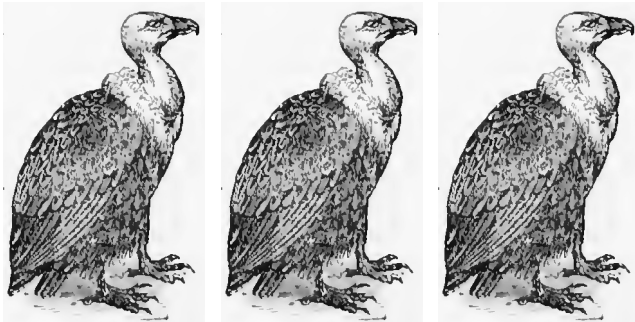
HOW THE OWL GORED THE BOAR

Owl had two sentencings to conduct that Monday. Both involved serious breaches of the Pine Forest rules, where Wild Boar and Wolverine had each viciously and without reason attacked

another creature. There was a large attendance, with denizens of the Forest wanting to see justice rendered. Wild Boar's case came first. Owl ripped into him verbally, refused to entertain any mitigating circumstances, disparaged Wild Boar's character and ridiculed his excuses. The audience was entertained and gratified. For Wolverine, who came next, Owl had lost some of her negative energy. As a result, Owl was more even-tempered, listened to Wolverine's arguments and treated him with more dignity. The audience was more bored.

As it developed, Owl imposed the same sentence on each creature, but Wild Boar went away muttering, and continued to threaten Owl for years thereafter even while confined. Wolverine, on the other hand, accepted his sentence quietly.

Moral: Dignified treatment of a miscreant can aid acceptance of the punishment.



THE THREE VULTURES' DELAYING DEMANDS

Owl was overwhelmed with cases to decide. When she was a younger arbiter, she tried to rule immediately after hearing argument, and the denizens of the Forest went away with a decision. Even though one party naturally was unhappy with the outcome, everyone could get on with their lives. But as Owl's caseload grew and became more complicated, and as the appellate tribunal, the Three Vultures, increasingly demanded that Owl provide a detailed

explanation of each stage of her decision-making, Owl became more and more insecure about ruling immediately. Instead she took her cases under advisement and labored long and hard to generate noteworthy written decisions that the Three Vultures would find difficult to reverse. (They still did reverse!) As a result, weeks and even months passed before Owl issued her decisions, the parties could not proceed to order their affairs, and they certainly could not appeal the legality of a ruling that had not yet been made. So they suffered endless uncertainty and had to continue to pay their advocates to remain always at the ready.

Moral: Justice delayed is justice denied. Sometimes it is also justice made expensive.



THE FOREST COMMISSION

The Forest creatures appointed a commission to promulgate and revise Forest rules on the proper punishment for particular infractions. The commissioners took their job very seriously and gathered mountains of data on statistical correlations between factors like the nature of the offender's crime and past criminal behavior, on the one hand, and the likelihood that there would be future recidivism, on the other hand. They also gathered data on the costs of confinement and on what punishments Owl and her colleagues imposed and the reasons they gave. They talked about victims' rights,

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how to protect, how to deter deviant behavior, the need for just punishment and respect for the law, and punishments consistent from creature to creature. Their debates involved statistics, probability, morality and political demands.

Wolf was convicted of violently assaulting Sheep and came into Owl's courtroom to be punished. In determining Wolf's punishment, Owl was obliged to follow the commission's pronouncements, as interpreted by the Three Vultures. But Wolf's mate and Wolf's cubs pleaded desperately for mercy notwithstanding the commission's pronouncements, pointing out that they would be destitute if Wolf could not hunt for them and that they would have to ask the Forest denizens for assistance. The family of Sheep, whom Wolf had attacked, pleaded for harsh punishment, recounting Sheep's veterinary bills and the devastating emotional impact of the attack on Sheep's young lambs. The Magpies, reporting for the Forest Glen Gazette, focused their interest on these emotional pleas. Snake and Fox, respectively advocates for the prosecution and the defense, had to deal with the pronouncements of the commission and the Three Vultures, but they too appealed to the emotional side of the case in arguing to Owl the appropriate punishment. Owl faced an agonizing decision, knowing that the penalty she imposed would not satisfy Sheep and his family or repair their harm; that however much Wolf deserved his punishment, there would be unavoidable collateral damage to his mate and cubs; but that without harsh punishment Wolf and others like him might attack another creature.

Moral: Sentencing policy is abstract and idealistic; sentencing in practice is personal and painful.

To be continued . . .

