

JUDGES OF JURISPRUDENCE: A POETIC TRILOGY

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I CLASSICAL COMMON LAW

A judge sits to give judgment,
Propped up by the greats of Coke and Hale and Blackstone,
And yet he needs none of them, except that they are part of experience.

Always a he...
He is of fine intellectual prowess and 'peculiarly English' breeding
And yet he need not be wise.

For the judge is merely an oracle, a mouthpiece.
He declares, he does not make or assess law – he reasons, yes,
And yet he does not think.

It is an artificial reason,
A private, privileged reason that only the experienced can gain,
And yet it is not logical, nor personal, nor an opinion.

It is an unwritten, illiterate law.
His knowledge may not even be based on reading
But comes from a long line of tradition,
Where the mere repetition of the rule deems it acceptable.
A law only crystallises when it is repeated by the next judge
And yet he cannot get the law wrong, for if it be law at all, it is correct.

The judge looks to his memory
His knowledge of law comes but from his immersion in it,
A practical training not unlike a legal cult
Which brainwashes him, and moulds him
Until he sleepwalks law...
And yet he speaks as if he has experienced all of it.

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He is not in control of his own judgment,
 The strings are pulled by tradition.
 Tradition is both his Maker and his Bible.
 The judge is just one more in the lineage of doll-judges that all look the same.
 He is faceless.
 And yet he is all powerful.

He looks back and forward,
 To ensure his judgment conforms with the past, but does not upset the future.
 On a continuum through time.
 The law runs through him like a piece of string straight through his navel,
 An umbilical cord with the double connection to the judge before and after
 And yet the line ends only in time immemorial.

He is the classical common law icon
 His declaratory judgment is the key to the law
 And yet he is the quintessential law student.

II POSITIVISM

Decades passed, Parliament reigns
 No monarch, but still 'sovereign will' remains
 Judgment rides in the back seat
 Legislature takes the wheel
 We meet our poor judge, whose cheeks are tear stained.

The judge's opinion is irrelevant, just like the common law,
 But at least those judges were key players before
 Now she can only be bored
 With application of (some of) the 'Laws properly so called'
 And she cannot even declare the law.

Now the observable facts of the statute take primary importance
 Other facts are seen through the eyeglass of evidence
 A little green book
 At which the judge looks
 Contains rules which appear to her as nonsense.

Still she applies one set of objective facts to the other before her
 And churns out the answer like a computer
 But she knows from the start
 Deep in her heart,
 That evil lives in her answer.

The tortured judge is not the authority
 Law was posited by a body much less 'indivisible' than she

For she cannot assess law's value,
 But can merely apply it
 She can only be the judge of validity.

The 'legal pedigree' of the law is the only condition
 Law's source derives validity from the rule of recognition
 Or if you prefer from legal norm...
 To legal norm...to grundnorm
 Or from command of sovereign will, backed up with a sanction.

While this agent of bureaucracy remains a conduit of sorts,
 It is not for 'tradition' but for a law that contorts
 The truth, with which she
 Need not concern herself.
 Always the 'is' of the law but never the 'ought'.

She cries for a man whose heart she just broke in two
 But she thinks to herself 'what else could I do?
 The law was legitimate,
 The answer I gave correct,
 I used formal logic. So why do I feel so blue?'

The clerk leaves the court to call out the next name
 The churning out of answers begins once again
 But soon her internal churning will stop
 She will come to give answers without crying a lot
 And not feel, but just play, the facts game.

She never studied Hart, Austin, Betham or Kelsen,
 But their 'pure theories' are her daily reality, her torment
 This 'Positive law' binds her,
 Not necessarily fair, but clever
 Without her ever knowing it, she is the rat in their experiment.

III REALISM

Reality bites.
 It does not matter if I speak sophistry
 My words do not count.
 Only my actions, my behaviour have any meaning, and even then
 It's only in the context of my actions affecting others.
 I am the third judge,
 But I may as well be a robot.
 I need not speak at all.
 I am a soliloquist.
 My words are more invisible than the faceless common law judge,

But my actions are crucial.
My words are more irrelevant than the positivist judge who merely applies the law,
But my presence is crucial.
I am the newest judge, I feel sorry for the others,
But I think that I am possibly even sadder.
I have no voice.

I am surprised you can hear me now.
I am confused, disappointed, bewildered.
My decision no more than an action.
It is as though my reasoning is just a joke.
It falls on deaf ears.
They are not interested in the books that I write,
The general principles I espouse, or
Heaven forbid, any abstract rule I might apply.
These fundamentals mean nothing.
The only meaning of judgment is law in action.
They think I'm some sort of social instrument —
I think I am just doing my job.

Anything outside this court, this institution, is not real to them.
Hence I am vital.
But then again I am not.
I speak but you cannot hear me.
I am a judge who, like the wise monkey, sees and can be seen
But cannot speak.
The upshot of it all is that
My decision may not even be a judgment!
It may not even be law!
They say that each decision I make,
That I slave over, is but a single instance,
Not a law. It *may* become a law once another judge confirms it
(And here we have come the full circle back to common law).
But what does the next judge know if he can't even listen to my reason?
They say that only at point of impact on people can you determine what is law.
Even then, it may only be a decision with consequences,
No more than an act.
How can I ever fit into a system, if my judgments don't?

I cannot move without them jumping on me
I cannot blink without them questioning it
Why can't they listen to me?
They continually criticise without even understanding why I do what I do.
Do you know how hard it is to be an actor without a voice?
A violin without strings?

They sit in my court room with their notebooks
Their 'empirical reason'
They collect data from me, like a laboratory
They look at my skills, my techniques,
But do not listen to my reasoning.
They think that if they look at my craft that
They can discern some sort of system to what I do,
To legitimise it,
Just like experience was a source of legitimacy
To the common law judge.
Have they no commonsense?
Don't I know myself and what I think better than they do?

They look at the consequences of my actions
Without understanding the basis.
How can they criticise me on the effects alone?
They think that 'induction' is a legitimate tool
But scientific methods analyse law like oil mixes into water
I should know.
They think they are so intelligent, so objective,
But even they have a predetermined bias...
They cannot even listen.
Listening is the first tool of an intelligent human being.

I speak of the Realists,
They bite me.

