

BOOK REVIEW

Erik M. Jensen*

TRUE TALES OF TRYING TIMES: LEGAL FABLES FOR TODAY. By Bob Rains. 2008. London: Wildy, Simmonds & Hill Publishing Ltd., & Carlisle: Willow Crossing Press LLC. 144 pp. \$19.95. Available at <http://truetalesoftrying-times.com/index.html>.

Bob Rains is a legendary professor at Penn State-Dickinson. I can attest to Rains's legendary status in Ohio, and, since nothing stays in Ohio anymore, I'm sure the legend has moved on to the Sun Belt. It might have been outsourced overseas as well.

Although I've never met the man, I've read Rains's work for years.¹ I'm fond of it, and I've fawned over it—especially the poems—in many different fora. More fawning is in order after the publication of *True Tales of Trying Times*.²

In this jewel of a book, Rains presents a collection of fifty-two fabulous “legal fables,” each describing real judicial decisions from the last four or five years—in that respect, not fables at all. Unlike the typical law review article, his book actually deals with *the law*. And Rains's poetic commentary accompanies all the fables. Like much of Rains's work, the book has both rhyme *and* reason.

You won't have heard of most of these cases; as Pennsylvania Supreme Court Justice J. Michael Eakin notes in his foreword, the facts don't lend themselves to “opinions that would become pillars of jurisprudence”³ like *Marbury v. Madison*,⁴ but you'll still enjoy making their acquaintance. Let's call them filigrees of jurisprudence.

The fables are always intriguing and often hilarious, and Rains makes them more pleasurable with his inventive wordplay. In particular, the puns range from the amusing to the gut-wrenchingly awful. (I intend “gut-wrenchingly awful” as high praise.)

I have my favorites among the fifty-two fables, and what follows is an idiosyncratic sampler. If you don't like my choices, I guarantee you can find

* Erik M. Jensen is the David L. Brennan Professor of Law, Case Western Reserve University, Cleveland, Ohio.

¹ Rains has been at Penn State-Dickinson since Noah's time, but he still seems to be in good shape. When people talk about heavy Rains in this context, the reference is to the forty-days-and-nights stuff, not to Bob. Nor is he a Rains of power. He's just a professor.

² BOB RAINS, TRUE TALES OF TRYING TIMES: LEGAL FABLES FOR TODAY (2007). In subsequent notes, I'll cite the book simply as RAINS and dispense with most *supras* and other folderol.

³ *Id.* at 12.

⁴ No, editors, a citation isn't necessary here. Does any reader of this journal not know what *Marbury* is? (If there is such an uninformed reader, let him Google it.)

others in *True Tales* that will generate a chuckle or bellylaugh and even, if you're so inclined, provide a legal issue or two to ponder.

Railing against injustice: An inebriated dodo apparently fell asleep on subway tracks, was hit by a train, and sued the transit system for negligence.⁵ (The argument went something like this: The driver shouldn't have been moving down the tracks when someone was sleeping there. How would you like it if Casey Jones ran the North Coast Limited through your bedroom?) Already in deep medical doo-doo, however, the dodo's case was derailed by the New York courts.

Milk from discontented cows: People for the Ethical Treatment of Animals (PETA) sued the California Milk Producers Advisory Board over the Board's "Happy Cows" campaign, raising the questions whether California dairy cows are really as laid back as the ads suggested, and whether the Board was therefore guilty of a moooving violation.⁶ Presumably, the level of bovine bliss is an empirical matter, but, because data were sparse, the court was unable to do the empirics. As Rains puts it, the cows "uttered not a word" about their level of contentment.⁷ Maybe things would have been different, and PETA wouldn't have been creamed, if the cows had memorialized their day-by-day discontents in writing. Unfortunately, these weren't diary cows.

The piercing of impropriety: It seems like everyone has metal protruding from one body part or another these days. From *True Tales*, we learn, for one thing, that a tongue stud (that's an attachment, not a person) can foul up a breathalyzer test with happy results for one wild and crazy Guy.⁸

The metalworking cases keep coming: If an old-fashioned employer prohibits facial jewelry (other than earrings) during working hours, is the policy an ironclad no-iron-cladding rule or is an employee whose face resembles R2D2's exempt from the policy because she's a member of the Church of Body Modification (CBM)?⁹ CBM's noble goal is to help its members "grow as individuals through body modification" and its teachings, and therefore CBM urges everyone to wear facial jewelry 24/7¹⁰—a real golden rule. Regardless of those teachings, said a federal court to the pierced (the piercee?), you've got to grin and not bare the metal.¹¹

Also on the piercings front—yes, another one!¹²—yet another court concluded that the law can treat male and female breasts differently in the piercing

⁵ See RAINS, at 30-31 (citing *Lassalle v. N.Y. City Transit Auth.*, 783 N.Y.S.2d 402 (N.Y. App. Div. 2004)). I like to think Lassalle had a female friend to whom he might have said, once he decided to file suit, "I'm going to sic Transit, Gloria."

⁶ See *id.* at 54 (citing *People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd.*, 22 Cal. Rptr. 3d 900 (Cal. Ct. App. 2005)). For the purposes of this review, I'm giving you the condensed version, but this isn't a case that you want to skim.

⁷ This reminds me of the old story about the cross-eyed milkmaid, who suffered from udder confusion.

⁸ See *id.* at 21 (citing *Guy v. State*, 805 N.E.2d 835 (Ind. Ct. App. 2004)).

⁹ See *id.* at 84-85 (citing *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)).

¹⁰ See *id.* at 84-85. The church has about one thousand members, all facing toward magnetic North. It would be larger, but baptism in molten metal decreases membership.

¹¹ See *id.* Covering it up, or, as a business lawyer might put it, veiling the corporeal piercings, would have worked too.

¹² Piercing behinds is a less litigated issue.

context.¹³ (I'm inclined to do that in nearly all contexts.) The moral drawn by Rains:

Justice, so it's said, is blind;
But surely even blind folks find
Differences in people's peccs
Associated with their sex.¹⁴

As a result, a tattoo *artiste* offering free nipple piercings (ouch!) to customers who agreed to undergo the procedure in the store window violated the law when she publicly gave her awl to female customers, but not when she similarly hammered males.

Lady Justice dropping her robes: If body piercing isn't titillating enough for your taste—it isn't for mine—Rains includes a couple of nude-dancing disputes.¹⁵ You'll have to read the details about those cases yourself, however. This is a family law review.¹⁶

The thrilling days of yesteryear: Those of us over sixty know that Tonto addressed the Lone Ranger as *kemosabe*. If a boss calls a Native American employee (and no one else) *kemosabe*, is it an actionable racial slur?¹⁷ Of course not, concluded a Nova Scotia court. How can *kemosabe* be a slur if Tonto said it means “trusty friend,” and LR and Tonto both used the term in an apparently positive way? The plaintiff couldn't present a sliver of evidence, much less a smoking gun or silver bullet, to show that *kemosabe* is discriminatory.¹⁸

The greening of America: If you think golf is exercise, and, your physical condition isn't up to par, do you want to *walk* when playing a round on a public course? Silly you. If the course rules require you to drive after your drive, just shut up and get into your putt-putt.¹⁹ There's no constitutional protection: neither the eagle nor the birdie protection clause speaks to the right to walk on a golf course.

A legal branch: Suppose a Cornell student protests something, as Cornell students are wont to do, by sitting in a campus tree on a windy day. Moreover, suppose she resists security personnel, who, barking up the tree, try to convince her to turn over a new leaf. A New York court concluded that the behavior may have been sophomoric, but the student hadn't engaged in criminal tres-

¹³ See RAINS, at 90-91 (citing *City of Albuquerque v. Sachs*, 92 P.3d 24 (N.M. Ct. App. 2004)).

¹⁴ *Id.* at 91.

¹⁵ See *id.* at 96, 100 (citing *Galardi v. Steele-Inman*, 597 S.E.2d 571 (Ga. Ct. App. 2004); *City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005)).

¹⁶ No, not a journal specializing in family law, but a . . . Oh, you know what I mean!

¹⁷ See RAINS, at 86-88 (citing *Nova Scotia (Human Rights Comm'n) v. Play It Again Sports Ltd.*, CA 217567, [2004] 227 N.S.R.2d 292 (N.S.C.A. 2004) (Can.), available at <http://gov.ns.ca/humanrights/pubs/decisions/2004Moore.pdf>).

¹⁸ Ah, but maybe a little deeper digging was required here. Tonto said *kemosabe* means “trusty friend,” but who's to say he wasn't pulling LR's leg? Maybe *kemosabe* really means “dingbat,” or “a*****.” Cf. the LR-Tonto joke with the punch line, “What you mean ‘we,’ white man?” (If you don't get the reference, ask your grandfather.)

¹⁹ See RAINS, at 94 (citing *Zurla v. City of Daytona Beach*, 876 So. 2d 34 (Fla. Dist. Ct. App.)).

pass.²⁰ This exercise of free speech didn't interfere with teaching and research, and besides, although the court didn't say this explicitly, what are you going to do for excitement in Ithaca, New York, other than climb a tree?

Brushing up on the law: Describing a case involving two inmates who sued their jailers after being denied toothpaste for three weeks, Rains uses language that will make you happily gnash your teeth. On the merits, the jailer effectively argued that halitosis is better than no breath at all, but the Seventh Circuit affirmed the order denying the jailer's summary judgment motion.²¹ According to Rains, the court's opinion was nearly perfect. It was an "[i]ncisive opinion filled with wisdom, [concluding that] such a deprivation is not a proper way to take a bite out of crime."²² Like the inmates, the opinion was without floss.

Weapon of mass consumption: If you use a flip-flop (you know, one of those thingies worn by folks who think we want to see their feet)²³ to whack somebody in the face, have you used a "prohibited weapon," as defined in the District of Columbia Code?²⁴ In a case (and face) of first and second impressions, the D.C. Court of Appeals said "No," providing an opinion full of footnotes.

Enough. You get the idea. All great fun.

True Tales for Trying Times is a terrific read, and that by itself ought to commend it to your attention.²⁵ Rains presents no unified theory of the sort common in law reviews,²⁶ but there are serious lessons to be learned from the book's pages. For one thing, Rains confirms that some people are idiots. (I suppose we already had an inkling of that, but it's nice to have empirical support for our suppositions.)

More generally, and more important, we learn what a grand and engaging teacher Bob Rains must be. As I read Rains's synopses, I was intrigued enough that I wanted to know more about many of the fables, and I read several of the full opinions. Is there any higher praise for a teacher than to say that he makes us want to learn more about his subject, maybe even to sit at his feet?²⁷ (Just in case you have any doubt, the answer to that rhetorical question is "No, there isn't.")

Reviewers have to be critical; it's part of the job description. Before I conclude, I need to find something to criticize in *True Tales for Trying Times*. There's a comma missing in a citation.²⁸ That should do it. Mission accomplished.

²⁰ See *id.* at 102, 104 (citing *People v. Millhollen*, 786 N.Y.S.2d 703 (Ithaca City Ct. 2004)).

²¹ See *id.* at 120 (citing *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005)).

²² See *id.* at 120. At least he resisted telling us the molar of the story.

²³ And their toe piercings. See *supra* notes 8-14 and accompanying text.

²⁴ See *id.* at 124-25 (citing *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005)).

²⁵ The pictures are top-drawer, too, done by one E. A. Jacobsen, who's a which (a partnership), not a who.

²⁶ *Praise the Lord!*

²⁷ Assuming he's not wearing flip-flops and he has no protruding metal studs. See *supra* notes 8-14, 23-24 and accompanying text.

²⁸ See RAINS, at 143 (citation for page 84). Uh-oh. There goes Penn State's ranking in *U.S. News*.