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This Focus Feature on animals in the law and legal history has its origins in a workshop I organized at the Faculty of Law, University of Toronto in March 2012 called 'Foxes, Seals, Whales, and the Rule of Capture.' In the process of researching my book on the famous fox case, *Pierson v Post*, I learned about Bruce Ziff's work on a set of late-nineteenth-century Newfoundland sealing cases and Robert Deal's research on the nineteenth-century American whaling industry. Different things were being said about the different animals and the rule of capture, which *Pierson v Post* is often thought to have established. I wanted everyone to meet and to share directly with each other what we were working on. Chris Tomlins happily accepted my invitation to come to Toronto to provide a commentary on the three papers. I also invited Robert Ellickson to attend the event, as each of the authors presenting papers – Ziff, Deal, and myself – were all engaging with his work in one way or another. Deal especially was contesting Ellickson's claim about the unimportance of law in the whaling industry and arguing that, on the contrary, lawyers and judges were crucially important in the process of deciding which whale-hunting practices would become legal rules. In my piece, which traces the canonization of *Pierson v Post*, I include Ellickson in a group I call 'the new legal mandarins' who, I argue, have misunderstood the famous fox case. Ellickson could not make it to the event. However, he provides a reaction here to the points the three authors make in their papers. As he mentions, it is especially gratifying to get people who usually stay within a specialized disciplinary domain like legal history or law and economics to step out and speak to members of the opposite sect.

Tomlins's commentary is the first piece in the Focus Feature.¹ He weaves the three animal articles together wonderfully, as he has done in other projects where he has taken on this role.² Tomlins explains the

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1 Christopher Tomlins, 'Animals Accurs'd: *Ferae Naturae* and the Law of Property in Nineteenth Century North America' (2013) 63 UTLJ [present issue] [Tomlins, 'Animals Accurs'd'].

2 See e.g. Christopher Tomlins, 'Commentary: Effects of Scale: Toward a History of the Literature of Law' in Angela Fernandez & Markus D Dubber, eds, *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012) 220; Christopher Tomlins, 'Framing the Fragments – Police: Genealogies, Discourses, Locales, Principles' in Markus D Dubber & Mariana Valverde, eds, *The New Police Science: The Police Power in Domestic and International Governance* (Stanford, CA: Stanford University Press, 2008) 248.

background of Ellickson's book *Order without Law*³ and discusses the way in which each article refutes the claim that law is ultimately unimportant. Key here is a focus on the tricky role that custom plays in cases that involve hunting and animals. Tomlins explains why Melville cannot be trusted to give us a straightforward answer on what custom or practice was in the nineteenth-century whaling industry – Melville was engaged in what Tomlins calls 'deeply subversive, anti-foundational foolery' in a book like *Moby-Dick*, which it is a mistake to treat too seriously.⁴ Yet the lawyers and judges might also have been making things up, elevating one custom above others and making it law. Tomlins connects this point about custom to Deal's piece, explaining the way that it challenges Ellickson, and to Ziff, who is more sympathetic to Ellickson. The connection to my piece is to focus on the way that lawyers have customs too, including 'professional culture and custom of the law itself.'⁵ The story of what *Pierson v Post* became over the last two hundred years has a lot to tell us about what has happened to legal scholarship – effectively what we legal scholars have come to be impressed by and find important, compelling, persuasive.

After Tomlins's comment, comes Bruce Ziff's article, 'The Law of Capture, Newfoundland-Style.' In it, Ziff explains how the capture rule came to be seen as inadequate for seal hunting due to the fact that killing a seal and thereby 'capturing' it did not prevent the seal from escaping. Why? Seals were routinely killed and left in piles before being sculped (cleaned) and brought aboard a ship. Those later steps in the hunting process were time consuming and that time could be used to kill more seals, a possibility which seal hunters were apt to exploit as long as there were seals to kill. However, changing weather conditions and moving ice flows could easily separate the original hunters from their slaughtered seals. The seals, although dead, could effectively 'escape' back into the wild (escape from the hunters' perspective, not the seals'). Newfoundland courts made changes to the capture rule in order to allow a second ship, a rescuer, to be able to 'save' seals that would otherwise go to waste. They did this in a couple of ways: first, by allowing that second ship a salvage fee for saving what would have otherwise been lost; second, and more controversially, by actually giving ownership of the seals to the second ship – in circumstances where the original hunter had no hope of returning to collect the seals – under what Ziff calls a rule of 'deemed abandonment,' a rule that was touted by some as the customary rule.

3 Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

4 Tomlins, 'Animals Accurs'd,' supra note 1.

5 Ibid at 46.

Both of these alterations to the capture rule created incentives that would save waste, creating what Ziff calls ‘plausible regimes.’⁶ Ziff combines that economic bottom line with a historical explanation of why these cases arose when they did; namely, late in the three-hundred-year-old Newfoundland seal hunting industry. This explanation relates to changes in the type of ships used for seal hunting (steamers rather than sailing ships) and a (not unrelated) subsequent depletion in the seal stocks. One infers from Ziff’s piece that these changes made seals a more scarce resource than they had been previously, increasing the stakes in conflict situations and thereby making litigation attractive.

Robert Deal’s article, ‘The Judicial Invention of Property Norms,’ challenges Robert Ellickson’s view that courts felt bound to adopt the norms whalers developed. Deal argues that those norms were not clear or as widely accepted as lawyers and judges involved in the reported cases pretended they were. ‘In seeking to settle the cases at bar, judges drafted opinions that suggested a level of agreement among whalers as to prevailing norms that never existed at sea.’⁷ This places the act of creation, as it were, with the lawyers and the judges rather than the whalers, who were, Deal claims, often acting out of ‘inchoate notions of what constituted honourable behaviour.’⁸ The idea then that the law was simply following custom was, in fact, overly simplistic. Yet that simple view is what was canonized in the treatise literature. Deal uses an in-depth examination of two whaling cases – *Heppington v Mammen* and *Swift v Gifford* – to demonstrate the contested nature of custom among the whalers and the limited understanding lawyers and judges had of the customs they simplified.

My article, ‘Fuzzy Rules and Clear Enough Standards: The Uses and Abuses of *Pierson v Post*,’ traces the scholarly career of the *Pierson* case, starting with James Kent’s *Commentaries on American Law* and Oliver Wendell Holmes, Jr.’s famous lecture on possession in *The Common Law* and extending it into the twentieth-century treatment by legal scholars and its law-school casebook treatment. The argument is that the case has been used to demonstrate the superiority of a clear rule, the capture rule, over an arguably ‘fuzzy’ standard, the hot pursuit rule. However, I show that the standard had a lot more going for it than contemporary scholars admit, and while those scholars concede that rules are not always superior to standards, there seems to have been a general bias in

6 Bruce Ziff, ‘The Law of Capture, Newfoundland-Style’ (2013) 63 UTLJ [present issue].

7 Robert Deal, ‘The Judicial Invention of Property Norms: Ellickson’s Whalers Revisited’ (2013) 63 UTLJ [present issue] [Deal].

8 Ibid at 74.

that direction. I am not saying that standards are always better, although as Ellickson notes in his response perhaps I am unhappy with lawyer-economists who seem rather automatically to prefer a rule over a standard.⁹ Nor am I saying that an in-depth approach is necessarily the best way to teach *Pierson v Post*.¹⁰ The point is rather to understand and to perhaps be troubled by the tendency, which seems to have become a dominant one, to reduce *Pierson* down to a lesson about the superiority of rules and standards, when rules are not necessarily generally superior, as Ellickson agrees, and when the standard was, at least in this case, arguably better. In other words, it is not the case that there is only one way to teach or think about *Pierson v Post*; however, it is important to notice that the case has overwhelmingly been approached in a reductionist way and that is an important comment on the tilt of American legal scholarship in the twentieth century.

Robert Ellickson provides here a gracious and lucid response to many of the issues raised in the three animal articles. He offers a very clear heuristic for thinking about the general structure of the animal-hunting cases that allows us to appreciate what he calls 'the inherent complexity of a capture dispute.'¹¹ He then treats the individual articles separately, summarizing and mostly agreeing with Ziff. While conceding that Deal is correct to argue that lawyers and judges played key roles in crystallizing which custom would be elevated out of a wide variety of practices, he thinks that there is a logic, specifically a Lockean logic, to the inchoate ideas of what proper or honourable behaviour amounts to in the messy on-the-ground situations.¹² Ellickson characterizes me as a 'particularizer' (rather than a 'synthesizer') and places me, along with Robert Deal and Chris Tomlins, in the 'law and humanities' camp, labelling this type of a scholar a 'humanist' as opposed to a 'scientist,' where he places himself and Bruce Ziff.¹³ He sees the humanist as someone who would object to the reductionism of more sweeping scientific accounts, including his own thesis in *Order without Law* about the non-centrality of law in social life. My own thought is that it is difficult to make general claims about a matter like this – sometimes law is important, sometimes it is not. I think it mostly depends on what exactly we are talking about. I suppose that is exactly what a particularizer would say. Variation and contingency is, of course, what history so often throws up and what a

9 Robert C Ellickson, 'The Entitlements of Unallied Hunters after a Sequential Capture' (2013) 63 UTLJ [present issue] [Ellickson, 'Entitlements'].

10 Ibid at 133.

11 Ibid at 127.

12 Ibid at 131.

13 Ibid at 133, 136–7.

reductionist account will seek to eliminate or at least minimize. However, there is a general point here that the three papers make; namely, that lawyers, judges, and legal scholars have been important to the focus on and specific ways of elaborating the capture rule. That insight is difficult to escape.

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