THE ACQUISITION OF PROPERTY RIGHTS IN ANIMALS: A BRIEF COMMENT ON OLIAR AND STERN: *RIGHT ON TIME: FIRST POSSESSION IN PROPERTY AND INTELLECTUAL PROPERTY*

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In their impressive article, *Right on Time: First Possession in Property and Intellectual Property*,[1] Professors Dotan Oliar and James Y. Stern work diligently to develop a comprehensive theory that explains the acquisition of property rights in the full range of resources starting with land and animals, and then moving inexorably to deal with the three most important forms of intellectual property—patents, copyrights, and intellectual property. Historically, the rules governing the acquisition of various forms of tangible property came first, dating back to Gaius and Justinian, both of whom, in dealing with land, chattels, and animals, recognized ownership in the first party to take possession of a *res nullius*, a thing owned by no one, by operation of natural law—that is, through a set of rules that was universal across time and space, and independent of any state enactment. These early sources did not offer any functional explanation of the sort examined by Oliar and Stern, who think that the right answer rests on this trade-off: Award rights too early and "risk that they will go to someone who will fail to complete the proverbial chase, leaving the resource underused."[2] Go too late, and there will be too many competitors seeking a resource that can be obtained by only one.[3]

First Possession. The first possession rule is more difficult to apply to animals than to land or chattels, because animals quite literally present a moving target. In dealing with this issue, three times are relevant: hot pursuit, wounding, and capturing. Justinian does not discuss hot pursuit, but holds that wounding is sufficient for first possession—actual capture of the animal is not required "because many accidents may happen to prevent your capturing it."[4] That conclusion was put to the test in the famous decision in *Pierson v. Post*.[5]

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[1] Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U. L. REV. 395 (2019).

[2] *Id.* at 407-08.

[3] *Id.* at 408-09.

[4] J. INST. 2.1.13.

[5] 3 Cai. 175, 175 (N.Y. Sup. Ct. 1805).

That case centered on a clash between the rule of jurists as represented by Justinian and a local customary rule that awarded the fox to the party in hot pursuit. Picking some rule is critical in order to determine which person owns the fox because this allows decisions about whether to keep, kill, or sell it to be made by a single person, rather than two hunters who are likely to have a sharp difference of opinion.

On this view, the question of which rule to use to determine possession is decidedly *a second-order question*. The basic point is that, in the vast majority of cases, the hunter who begins the chase will have a clear field to complete the capture, so the disputes of the sort that occurred in *Pierson* will be relatively rare. This simple point matters because it shows that Oliar and Stern are mistaken in thinking that the tragedy of the commons—overhunting and overfishing of common resources—should influence the choice among these three variations of the first possession rule.[6] How can these variations matter to the larger social problem if ninety-nine percent or more of actual captures will come out the same way regardless of which rule is used? The correct conclusion—especially when it comes to fish, whales, and game—which are not, as was said in *Pierson*, "*hostem humani generis*" (the enemy of mankind)[7]—is to find some alternative approach to handle the common pool problem directly, namely by imposing direct catch or bag limits, either by treaty or regulation, that reduce the total number of catches to sustainable levels. The timing details at issue in these cases cannot begin to address this inquiry.

Accordingly the office of the first possession rule is *only* to resolve disputes between rival claimants to the wild animal in ways that minimize the conflicts between them, so as to capture the allocated number of animals in the most efficient matter possible. Two *independent* legal regimes, operating side by side, each addressing a different problem, is the only way to handle this question. Looking, therefore, at two rival claimants, it should be clear that Justinian gives an unsatisfactory answer. The test of a good rule is not whether it gives the right answer all the time, but whether it works better than any of the alternatives, and there are just too few times that the wounding party cannot capture the animal unless someone intervenes. Indeed, this point was raised in an instructive way in *Pierson*, where the hot pursuit rule was added into the mix. On this point, the ultimate result is important because of what it reveals about the different methodologies vividly presented in Judge Tomkins's majority opinion and Judge Livingston's dissent. The majority appealed, in good jurisprudential fashion, to a rigid principle of law, ostensibly derived from higher-order principles. The dissent relied on a rule of custom, a bottoms-up approach derived from the common practice in the hunting communities on Long Island before the dispute occurred. The advantage of the formalist approach is its uniformity. But its disadvantages loom far greater. If

[6] Oliar & Stern, *supra* note 1, at 409-11.

[7] *Pierson*, 3 Cai. at 180.

it turns out that different rules are needed for the capture of different types of animals, the single rule dictated by some grand legal principle becomes a regrettable constraint on reaching the proper solutions. To be sure, shifting rules can create serious problems where the boundary lines between the two classes are not clear. But there is no epistemological doubt in setting the line between foxes and whales. At various points, Oliar and Stern do acknowledge that custom is indeed a source of wisdom,[8] but they do not link that point back to some larger theory.

Foxes. Start with foxes. Here there are two enormous advantages to the customary rule.[9] The first is that it avoids the risk of major collisions as two hunters come ever closer to each other in the effort to nab the fox. Either, or both, could get seriously injured, giving the fox a chance to get away. Forcing one rider to stay aside until the other has his run avoids these problems. And if that first rider fails, the second can then chase the animal with relative impunity and a higher chance of success. The second issue has to do with the appropriation of one actor's labor the other. Under the capture rule, the strategic rider will hang back, let a rival do all the work, and then, at the last moment, swoop in on his fresh horse for the capture. There is always a mismatch to let *A* gain from the labor of *B*. That option, too, is foreclosed by the first possession rule. Here, therefore, the choice to use the earlier time of hot pursuit is made simply to avoid the conflict. There is no reason to move back to any earlier time given the two risks that were addressed. The overall analysis has nothing to do with getting the resource into the hands of the party who values it most. That is done afterwards in a competitive market in which the two rival hunters are not the only participants, so that there is no holdout or monopoly with which to contend.

Whales. The situation differs for whales, which come in many different species and are far harder for a single party to bring down alone. In dealing with this issue, Oliar and Stern rightly refer to the work of Professor Robert Ellickson, who notes that different customary norms have emerged in this context.[10] But in their description they refer only to those customs that result in a single party getting control over the whale, including a custom that followed the hot pursuitand wounding rule, where "custom granted an exclusive claim to the first to lance a whale and mark its body with a harpoon, regardless of whether the harpoon remained connected to the whaler's vessel, so long as the whaler remained in active pursuit."[11] But the problem is often more complex than this because it often requires the labor of two or more independent parties

[8] *See, e.g.*, Oliar & Stern, *supra* note 1, at 406 (describing whaling custom as wise approach to possession).

[9] For discussion, see Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1236 (1979).

[10] Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 88-94 (1989).

[11] Oliar & Stern, *supra* note 1, at 406 (citing Ellickson, *supra* note 10, at 90-92).

to capture the whale, and any legal rule that gave all the compensation to a single party would necessarily block the activities of a second party whose cooperation was necessary to bring the capture to its successful conclusion.[12] Here are two illustrations.

The first involves a report offered by Oliver Wendell Holmes in *The Common Law*. The report noted that, from Greenland to the Galapagos, a variety of customs had emerged for the capture of whales, which sorted out the contributions between a first striker and a subsequent taker, some of which involved sharing rules and some of which did not.[13] We cannot say for sure whether these rules are efficient or not, but in those cases where there are no external effects on third parties—a condition satisfied here, if the common pool problem is handled independently—there should certainly be some tendency in that direction.[14]

The second involves the famous 1881 case *Ghen v. Rich*,[15] where a finback whale, killed with a bomb lance designed with just this outcome in mind, sank to the bottom of the ocean, only to float to the shore some days afterward. In *Ghen*, the finder of the whale sold the whale, rather than notifying the whaler of his find per the local custom. The whaler then sought to claim the entire value of the oil that the buyer had extracted from the whale and sold. Clearly, the finder's practice, if validated, would have wrecked the whaling industry, for why should anyone engage in the cost of hunting the whale if its value could be expropriated by another? Moreover, in this situation, there was no way for the finder and the whaling ship to contract in advance for the payment of some fee, given that neither party knew who the other party might be. It is for situations like this that the customs emerged of awarding the finder a small fee, large enough to cover the expenses of reporting to the whaling ship the location of the whale and watching over it until the rightful claimant could collect it. Here the question is not a timing issue as such. It is a coordination game that works only because all parties to the venture receive a benefit that, from the ex ante perspective, exceeds their cost of participating in the venture. Note too that by encouraging efficient capture, this rule hastened the need for some common pool limitation on the rights of capture.

Conclusion. The question is what inferences can be drawn from this brief account. I think that there are two points worth making. The first is that physical assets, by nature, have a greater variation in appropriate property

[12] For a general discussion, see Richard A. Epstein, *From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, 100 IOWA L. REV. 1744, 1751-52 (2015).

[13] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 191-92 (Harv. Univ. Press 2009) (1881). For one notable case on this issue, see *Swift v. Gifford*, 23 F. Cas. 558 (D. Mass. 1872) (No. 13,696).

[14] *See generally* Richard A. Epstein, *The Path to* The T.J. Hooper*: Of Custom and Due Care*, 21 J. LEGAL STUD. 1 (1992).

[15] 8 F. 159, 159 (D. Mass. 1881).

rights because of the great heterogeneity of the circumstances in which these rights are created. The point applies not only to the rules on acquisition for animals but also to the structure of rights for other resources. The structure of water rights is the most important. Water rights are generally thought to be in some sense common rights, with all sorts of correlative duties and few absolute temporal priorities. The variation in water systems between riparian, reasonable use, and prior appropriation all matter, and the choices in question are largely unintelligible without some appreciation of the differences between a gentle English river, the larger rivers in the eastern half of the United States, and the raging rivers of the West. Thus, it is important to explain the differences and the similarities, and the tools for that task have to be many and varied.[16] Ironically, intellectual property presents less of a reason to have different forms of acquisition, at least within each of the broad classes of patents, copyrights, and trademarks, where the relevant differences are between classes and not within classes. Oliar and Stern have much to say on the intellectual property dimensions; however, such issues are beyond the scope of this short comment.

[16] For some of the variations, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, *in* PROPERTY IN LAND AND OTHER RESOURCES 317 (Daniel H. Cole & Elinor Ostrom eds., 2012).