

As the famous fox case of Pierson v Post illustrates, rival hunters who have separately contributed to the capture of a wild animal may have different notions about which of them owns the prey. During the Stone Age, hunter-gatherers likely developed sophisticated norms to resolve these sorts of controversies. Each of the contributors to this symposium focuses on common law property rights in prey that North American judges articulated during the nineteenth century. Their articles analyse the rules of the game that applied in the Newfoundland sealery, North Pacific whaling grounds, and rural Long Island. In each setting, both hunters and judges tailored the applicable rules of capture to the characteristics of the hunted animal. When hunters' customs were opaque, as they commonly were, judges sought to crystallize definitive legal rules. The articles in the symposium strikingly illustrate the gulf between 'humanistic' and 'scientific' styles of legal analysis.

Keywords: rule of capture, wild animals, custom, *Pierson v Post*, sealery, whaling

The ghost of Herman Melville indisputably hovered, but a sentient Angela Fernandez actually presided over this symposium on the law governing the capture of wild animals. I congratulate Professor Fernandez for assembling the participants and spurring their contribution of these insightful and stimulating articles. At her invitation, I offer brief observations on what she, Robert Deal, and Bruce Ziff have given us.

1 *The thrill of the hunt*

During recent centuries, the relative economic importance of hunted game has fallen precipitously. Why, then, has there been a boomlet of scholarly interest in the nineteenth-century Anglo-American law of animal capture? I offer two thoughts. The first and more controversial is that interest in this seemingly obscure legal topic reflects the residual influence of challenges that were central in the lives of our remote ancestors. Members of the species *homo sapiens* became behaviourally modern on the order of 55,000–80,000 years ago. Prior to the invention of agriculture in the Fertile Crescent about 10,000 BCE, most people were allied with a few dozen others in a nomadic hunter-gatherer band. For Stone Age hunter-gathers, a decision on entitlements to the carcass of a

* Walter E Meyer Professor of Property and Urban Law, Yale Law School

slain animal could have life-or-death consequences. When teaching *Pierson v Post*, I suggest that our illiterate forebears would have had far better insights than we have into the appropriate resolution of the case.¹ The animal capture cases featured in the early weeks of a North American property course seem to have a special resonance. Might obscure processes of cultural transmission and even genetic inclinations be contributing to these reactions?

Fernandez's article refers to a less controversial reason for legal scholars' enchantment with disputes over the ownership of foxes, whales, and seals.² Both norm makers and lawmakers, when confronting a new problem of entitlements in resources, commonly resolve it by analogizing it to an older one. The North American judges who first had to define entitlements in deposits of oil and gas explicitly, and notoriously, compared the problem to the capture of a wild animal.³ Contemporary US legislators, when debating the relative merits of first-to-invent and first-to-file rules for the award of a patent, similarly might have thought to analogize that problem to the fox-hunt in *Pierson v Post*.⁴ In short, rules of capture may draw attention on account of their potential breadth of application.

II *The inherent complexity of a capture dispute*

Harvesting a wild animal entails several successive stages of work. Each of the core articles in the present issue depicts conflicts arising out of the same basic fact pattern. In this basic scenario, two (or possibly more)

- 1 Prehistoric hunter-gatherers generally lacked reliable means of preserving meat. Because a hunter who killed a large animal could not consume it all, a large kill would have presented an opportunity for the pursuit of distributive justice, a goal that seems not to have been salient to nineteenth-century hunters. Hunter-gatherers' norms might have, for example, entitled the close kinfolk of the slayer to have first pick of the prey's meat, but thereafter have required the hunter to share the carcass with others in the band. In this way, and others, a stateless band would have provided a primitive social safety net. A number of anthropologists and biologists have investigated food-sharing practices. See e.g. Michael Gurven, 'Reciprocal Altruism and Food Sharing Decisions among Hiwi and Ache Hunter-Gatherers' (2004) 56 *Behavioral Ecology & Sociobiology* 366; Jeffrey R Stevens, 'The Selfish Nature of Generosity: Harassment and Food Sharing in Primates' (2004) 271 *Proceedings: Biological Science* 451.
- 2 See Angela Fernandez, 'Fuzzy Rules & Clear Enough Standards: The Uses and Abuses of *Pierson v Post*' (2013) 63 *UTLJ* 97 at 102–3 [present issue] [Fernandez].
- 3 See e.g. *Westmoreland & Cambria Natural Gas Co v De Witt*, 18 A 724 at 725 (Pa 1889).
- 4 US patent law traditionally favoured the claimant who had been the first to invent, an approach designed to focus rewards on those who had performed productive labour. In 2013, the United States will join the rest of the world in favouring the claimant who first files a patent application, a system that is simpler to administer; see *Leahy-Smith America Invents Act*, Pub L No 112-29, § 3(c), 125 Stat 284 at 287 (2011).

unallied participants have made sequential contributions to a successful capture. One hunter, whom I'll refer to as 'First,' has successfully completed some early stages of the capture – starting the animal, tiring it out, and perhaps wounding or trapping it. A competing hunter, 'Second,' then arrives on the scene and finishes the job by killing or permanently confining the prey and perhaps also harvesting its flesh or pelt. First promptly claims ownership, but Second contests that claim.

Even when analysed simply through a utilitarian lens – a perspective that eliminates many potentially pertinent normative considerations – the resolution of this basic scenario is inherently difficult. That's partly why *Pierson v Post* succeeds as a teaching vehicle. Suppose, plausibly, that hunters would honour the Lockean norm that a wild animal should belong to the person who has successfully laboured to remove it from the state of nature.⁵ This Lockean norm would privilege the claims of both First and Second over the claims of an onlooker (such as Fernandez's Duck, whose claim was based merely on a sighting), but would hardly resolve the First/Second dispute itself. Three ways of resolving the First/Second dispute are plausibly consistent with Lockean values: (1) splitting entitlements in the prey in proportion to the value of the work performed (or, more crudely, half-and-half); (2) awarding ownership of the prey entirely to First on the ground that First had done enough, a defensible result if First likely would have finished the job even in the absence of Second's intervention; and (3) awarding the prey entirely to Second, perhaps on the ground that First had actually never finished the job and that, absent Second's efforts, the prey likely would have escaped back into the wild.

Even when appraised solely from a utilitarian perspective, none of these three normative approaches is obviously best. Splitting ownership invites quarrels over the fractions of the work contributed and, perhaps, the number of contributors. Alternatively, the application of a more mechanical rule that would award the prey to only one claimant, for example to First provided that First had obtained 'certain control,' would promise to simplify fact-finding and arguably prevent quarrels among hunters. But, from a Lockean perspective, that resolution might short-change the losing claimant, such as Post, who might have done the bulk of the work.

III *The individual articles*

Bruce Ziff's discovery of the Newfoundland cases introduces another biological suborder, seals, into the scholarly conversation. The first of

⁵ John Locke, *Two Treatises of Government*, ed by Peter Laslett (Cambridge, UK: Cambridge University Press, 1988) at 288–9 [Locke].

the cases that he has uncovered was handed down in 1859, three centuries after commercial seal-hunting had commenced on the ice floes off Newfoundland.⁶ Ziff's account reveals that the hunting of harp seals involved two special complications for makers of capture rules. A hunter in First's crew, when walking on ice floes, could readily kill any seal within reach. But, to prevent the deterioration of a pelt, it was desirable for a hunter promptly to sculp a seal (i.e., detach its pelt from its carcass). In addition, even a sculped pelt was in serious jeopardy of being lost until it had been transported to a ship. In the sealing industry, the special complications of capture rules arose out of the temptations of First's crew, when it had just come upon a large herd of harp seals, to engage in additional killing as opposed to sculping the seals already slain and transporting their pelts off the floes.

As Ziff lucidly describes, sealers followed the custom of collecting their dead prey into a 'pan' on the ice. Panning had several advantages. The ice was constantly shifting, at times in a manner that would interfere with transport of pelts to a ship. Panning also enabled hunters to turn more rapidly to the killing of additional live quarry. But the practice of creating a temporary pan increased the risk that the pelts would never, in fact, be harvested. Partly on account of capricious weather or shifts in the ice floes, First's crew might fail to find a pan that it had formerly amassed, and, if it did fail, the valuable pelts might ultimately sink into the sea. And, even if First's crew did eventually regain access to a pan, if its members hadn't bothered to sculp, the pelts might then be worthless.

To reduce both types of waste, sealers developed norms, undoubtedly untidy ones, that incentivized the crew of a Second to harvest a pan that was no longer within First's ready reach.⁷ These rules entitled a harvesting Second, at minimum, to a salvage payment (i.e., a partial reward) from First. And the Newfoundland courts, perhaps affirming sealers' customs, at times held that when the probability that First would ever regain the pan was sufficiently low, First's rights were to be deemed abandoned. When this latter rule applied, Second won full ownership of the seals in any pan that it harvested. Ziff, who generally seems to share my own largely utilitarian outlook, explains that these rules reduced waste by incentivizing First's crew to devote more labour to hauling pelts to safety, and less to additional killing.⁸ And to encourage prompt sculping, the

6 Bruce Ziff, 'The Law of Capture, Newfoundland-Style' (2013) 63 UTLJ 53 at 56–63 [present issue].

7 This is my interpretation of Ziff's statement, *ibid* at 70, that, when a salvage attempt had not been 'necessary,' Second was not entitled to any payment.

8 *Ibid* at 68–70.

Newfoundland courts eventually ruled in favour of a Second who had gathered up dead seals that a First had failed to sculp.⁹

The prevalence of the Newfoundland practice of awarding Second a salvage payment is intriguing. Although neither of the judges' opinions in *Pierson v Post* mentions the possibility of divided ownership, this approach, which appeals to Fernandez,¹⁰ crops up in a few animal-capture contexts.¹¹ Splitting has a number of virtues. A split commonly is the outcome most consistent with Lockean ethics. In addition, a known custom of splitting can incentivize unallied actors to make partial contributions essential to the ultimate success of a hunt. If splitting is unusual in animal-capture cases, why did the custom of salvage awards emerge in the Newfoundland sealery? The physical isolation of that hunting ground may have made the social networks of hunters tight enough to sustain the complexity of norms requiring individuated calculation of salvage payments. The technical complications of seal-hunting may also have spurred adoption of a split-ownership norm. As we shall soon see, whalers construed a First's loss of contact with a dead whale as evidence of lack of fresh pursuit and therefore a basis for forfeiture of entitlement. But sealers, in light of the large size of some seal herds and the shifting nature of the ice, might have been more willing to forgive a First whose crew had opted to kill more prey instead of sculping slain seals and transporting pelts. In sum, both hunters and courts seem to have fine-tuned the applicable capture rules to suit the conditions of the Newfoundland sealery.

For many observers, in one respect the hunting of seals is especially distressing. During the nineteenth century, Newfoundland seal-hunters typically killed harp seals, many of them no more than a few weeks old, by walking up to them across the ice and clubbing them to death. While an adult fox or whale has some capacity to flee, a seal pup is defenceless. Chris Tomlins concludes his article with a plea for compassion for the animals targeted in the hunting cases.¹² He should be reassured that, in the twenty-first century, a law professor teaching *Pierson v Post* is likely to raise the potential relevance of animal rights and the loss of endangered

⁹ *Ibid* at 62–3.

¹⁰ Fernandez, *supra* note 2 at 98.

¹¹ See e.g., *Ghen v Rich* (1881) 8 Fed 159 (D Mass), awarding the whale to the hunter who had killed it with a bomb-lance but entitling the party who had found the dead whale on a beach to a 'reasonable salvage'; Robert C Deal, 'The Judicial Invention of Property Norms: Ellickson's Whalemens Revisited' (2013) 63 UTLJ 73 at 95 [present issue] [Deal, 'Judicial Invention'], citing a custom of whalers in the Galapagos fishery to split ownership between First and Second.

¹² Christopher Tomlins, 'Animals Accurs'd: *Ferae Naturae* and the Law of Property in Nineteenth Century North America' (2013) 63 UTLJ 35 at 50–2 [present issue].

species, two considerations that were not on the radar screens of the appellate judges who decided that case. In a context such as the Newfoundland sealery, Tomlins's plea is especially poignant.

Robert Deal and I are card-carrying members of the small band of scholars intensely interested in the history of US whaling law. During the past decade, Deal has made a number of painstaking and innovative contributions to this small literature, and in this symposium, he adds another. He has uncovered, and carefully dissected, the rich trial records in *Heppingstone* and *Swift*, two of the dozen published US whaling decisions.

I am largely persuaded by Deal's assertion, which is generally supported by Ziff's and Fernandez's accounts, that attorneys and judges played key roles in the crystallization of a purported hunters' custom out of a welter of varying social practices.¹³ As Deal knows, I myself once stated that whalers' norms of capture were 'not tidy.'¹⁴ Both attorneys and judges sought to depict hunters' customs as being more settled than they actually were. In some instances, attorneys likely coached witnesses in advance of their testimony. As Deal convincingly demonstrates, the trial and appellate judges who decided whaling cases were eager to proclaim the existence of a settled custom even when the admitted evidence had, in fact, been unruly.

But Deal's agnosticism about the nature of whalers' norms is overblown. Early in his article, he announces the overarching proposition that whalers resolved ownership disputes, not by applying mechanical rules, but rather according to 'general maxims' that incorporated standards of 'honourable behavior.'¹⁵ I agree with Deal that whalers did honour an inchoate general principle of ownership rights. But I would articulate that principle concretely, as Deal himself did in one of his prior articles: it was the principle of Lockean entitlement; namely, that a contributor of valuable labour merits reward.¹⁶

¹³ Deal, 'Judicial Invention,' supra note 11 at 74–5.

¹⁴ See Robert C Ellickson, 'A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry' (1989) 5 *JL Econ & Org* 83 at 88 [Ellickson, 'Hypothesis']; 'Whaling norms were not tidy, certainly less tidy than Melville asserted in *Moby-Dick*'; compare Deal, *ibid* at 95–6.

¹⁵ Deal, 'Judicial Invention,' supra note 11 at 74; see also *ibid* at 93, stressing influence of 'principles of fairness.'

¹⁶ See Robert C Deal, 'Fast-Fish, Loose-Fish: How Whalers, Lawyers, and Judges Created the British Property Law of Whaling' (2010) 37 *Ecology LQ* 199 at 236 [Deal, 'Fast-Fish'], citing John Locke, *Two Treatises of Government* (1764) at 219, the same passage of Locke's that is cited supra note 5; see also Deal, 'Judicial Invention,' supra note 11 at 93, recounting whalers' testimony that had a Lockean cast.

Despite his declared agnosticism about customs, Deal affirms elsewhere in his article that whalers in the Pacific fishery had developed at least two mechanical rules to help settle disputes over ownership: (1) that the act of first affixing an iron to a live whale was a prerequisite to the success of First's claim, and (2) that Second owned a whale that First had harpooned if Second's crew had completed stripping the whale's blubber ('cutting in') prior to First's reappearance.¹⁷ These two propositions were rules, not standards, and the whalers themselves, not attorneys and courts, had invented them.

Why would whalers have supplemented their Lockean principle with various mechanical rules? In my view, they realized that there was no obviously best way to resolve a dispute between two unallied hunters who had sequentially contributed to a successful capture. The two mechanical rules mentioned had the advantage of relative clarity, and, in most applications, generated results that were consistent with Lockean ethics. But what if application of a mechanical rule would produce a result that would offend Lockean principles, as it sometimes would? In that event, the whalers commonly were stumped and, during the waning years of their industry, willing to turn to litigation.

Consider the facts of *Heppingstone*, colourfully described by Deal.¹⁸ In that instance, the crew of First had affixed irons to a bowhead whale. The next morning, the crew of Second found the bowhead swimming alone, lowered boats, learned (but doubted the veracity) of First's basis for its claim, and proceeded to kill the bowhead. To John Heppingstone, the captain of Second, these facts supported 'going halves,' a resolution generally consistent with Lockean principles and one that the Hawaiian courts ultimately rendered. The captain of First, by contrast, insisted on application of the mechanical rule that 'the first iron holds the whale' as long the affixer of that iron remains in fresh pursuit. The freshness of First's pursuit was ambiguous in this instance because, as the trial judge later opined, it was unclear whether First would ever have retaken the bowhead. In *Heppingstone*, many of the witnesses who were asked to testify about whalers' customs offered a muddled account. Few of them were capable of articulating a formula that would reconcile their Lockeanism with the mechanical rule that the first iron holds a whale.¹⁹

¹⁷ Deal, 'Judicial Invention,' supra note 11 at 82, 92. But see also infra note 21.

¹⁸ Ibid 76–85.

¹⁹ Although the whalers themselves never spoke in this vein, I have hypothesized that they sought to develop an informal set of rules and standards that would minimize the sum of the transaction costs and deadweight losses that they would incur; see Ellickson, 'Hypothesis,' supra note 14 at 87.

Contrary to what Deal implies, the whalers' mechanical norms led to determinative outcomes in most contexts. Suppose, in *Heppingstone*, that Second, before First rearrived on the scene, not only had killed the bowhead but had also completed the lengthy and laborious process of cutting in. Deal asserts there is no indication of how whalers' would assess entitlements in such an instance.²⁰ Whalers' norms, he states, would definitely have favoured Second only if Second had completed the job of cutting in a harpooned whale that Second had initially found *dead*.²¹ But it is inconceivable that whalers would have conferred lesser entitlements on a Second who had not only completed cutting in, but also, as in *Heppingstone*, previously accomplished the difficult task of killing a fleeing whale. Whalers' mechanical norms would clearly have favoured Second in such an instance, and no First would have been foolish enough to contest that outcome in court.²²

Angela Fernandez starts her article smashingly, with a memorable turn on Duck and Goose. She proceeds to present highlights of her exceptionally deep and illuminating investigation into the litigation, and aftermath, of *Pierson v Post*, particularly that decision's evolving influence on legal culture.

Many Anglo-American legal scholars, emulating the likes of Blackstone and Holmes, attempt to synthesize patterns from a broad swathe of primary legal sources, such as judicial opinions. By contrast, Fernandez, at least in this context, opts for depth. She criticizes the many authors of property casebooks who have failed to offer detailed background information on *Pierson v Post*.²³ A methodological pluralist sees value in the work of both synthesizers and particularizers. Fernandez's conception of how the famous fox case should be taught is intriguing. But might not it be just one of many viable pedagogical options?

In the final section of this article, I assert that, within the legal academy, a gulf separates scholars with a humanities orientation from those with a more scientific bent. In the final third of her article, Fernandez reveals the firmness of her allegiance to the humanities. She is

²⁰ Deal, 'Judicial Invention,' supra note 11 at 81–92.

²¹ If First had not merely left a harpoon in a dead whale but also had anchored and waived the carcass, Second's completion of the cutting-in process early the next day would not necessarily have been normatively decisive; see *Bartlett v Budd*, 2 Fed Cas 966 (D Mass 1868).

²² In a fishery where iron holds the whale was the general approach, whalers' norms provided that a First who had affixed an iron was deemed to have lost the exclusive right to capture when either First ceased to be in fresh pursuit or Second had completed cutting in, whichever occurred first. See Ellickson, 'Hypothesis,' supra note 14 at 90; but *c.f.* Deal, 'Judicial Invention,' supra note 11 at 92.

²³ Fernandez, supra note 2 at 111–6.

incredulous that some scientifically inclined scholars have used the facts of *Pierson v Post* as a springboard for economic modelling and exercises in artificial intelligence.²⁴ And she puts forth a central thesis: that law-and-economics scholars have had an unwarranted attachment to resolving conflicts through the application of rules, as opposed to standards.²⁵

I interpret the law-and-economics literature differently. In general, scholars in this subdiscipline are inclined to apply cost-benefit analysis to assess the merits of alternative property arrangements – an approach Fernandez likely would reject.²⁶ In some contexts, cost-benefit analysis does favour the use of rules, but, for two basic reasons, in other contexts, it would favour the use of standards. James Krier’s reference to the ‘vice of inflexibility’ of rules alludes to both these potential disadvantages.²⁷ First, the cost-benefit analysis of a rule demands attention not only to its effects on the transaction costs of dispute resolution but also to the precision of the *ex ante* incentives that it provides. If two or more ships were to be in the vicinity of a whale, a rule that awarded rights in the whale to the ship bearing the tallest mast would be relatively clear, but, if actually applied, would under-incentivize the harpooning of whales and also encourage wasteful investments in masts.²⁸ In some contexts, a standard such as that of Lockean desert would provide more precise *ex ante* incentives than any rule would, given the inevitable crudeness of rules. Second, Carol Rose has shown that in some contexts a supposedly crystalline rule is likely to entail greater transaction costs than a vague standard would.²⁹ Consider the whalers’ fast-fish rule, which protected First’s exclusive right to capture only as long as the whale was linked by a line to one of First’s boats. Suppose that, while First was towing a dead whale, an isolated ocean swell parted First’s tow rope and an

²⁴ *Ibid* at 123–4.

²⁵ *Ibid* at 97 119–25.

²⁶ Most law-and-economics scholars also assert that, in the contemporary era, issues of distributive justice are better addressed through broad taxation and welfare policies than through the manipulation of narrow doctrines of private law, such as the law of animal capture. But *c.f.* *supra* note 1, speculating that Stone Age hunter-gatherers, to provide social insurance, required the sharing of large game.

²⁷ See James E Krier, ‘Facts, Information, and the Newly Discovered Record in *Pierson v Post*’ (2009) 27 LHR 189 at 193 [Krier]. Fernandez, *supra* note 2, notes that Krier has endorsed Judge Tompkins’s opinion in *Pierson v Post*; see Krier, *ibid* at 191, n 8. But Krier does not endorse the superiority of rules across the board. See *ibid* at 193, discussing trade-offs in any choice between a rule and a standard.

²⁸ I have referred to these possibilities as risks of deadweight losses. See Ellickson, ‘Hypothesis,’ *supra* note 14 at 87. And I have hypothesized that norm makers in practice are attentive to both deadweight losses and transaction costs. See *supra* note 19.

²⁹ Carol M Rose, ‘Crystals and Mud in Property Law’ (1988) 40 Stan Law Rev 577.

opportunistic Second immediately pounced.³⁰ In this instance, a strict application of the fast-fish rule would confer rights on Second. In practice, however, First probably would regard Second's claim to be inconsistent with Lockean ethics and heatedly contest that claim. If so, the purported transaction cost advantages of the 'clear' fast-fish rule, in this application, would have turned out to have been chimerical.

In sum, most law-and-economics scholars believe that a choice between a rule and a standard entails a variety of trade-offs. These scholars are not consistently devoted to either of these styles of law making. Fernandez, who seems to give little weight to the information costs inherent in alternative property systems, is rather consistently anti-rule and pro-standard.³¹ Perhaps she is unhappy with lawyer-economists because they don't share her across-the-board aversion to rules.

IV *A caution against legal centralism*

Most law professors are legal centralists – that is, observers disposed to imagine that law is significant in every sphere of life. The authors of each of the primary articles in this symposium chose to scrutinize judicial decisions in one or more capture cases. This implies that they think that these decisions, in some respects at least, are worthy of attention. While examination of these decisions may, indeed, improve understanding of legal culture and the overarching structure of legal property rights, it is not obvious that *any* of the decisions discussed would have had discernible effects on the subsequent behaviour of hunters. Since *Pierson v Post*, there have been, to my knowledge, no reported cases on the ownership of foxes. It is notable that both the US whaling industry and the Newfoundland sealing industry existed for centuries before the publication of the first judicial opinion addressing the ownership of prey. Plainly, whalers and sealers, to resolve their ownership disputes, commonly applied informal customs enforced through other methods, including perhaps negative gossip, forceful self-help, mediation, and arbitration. Prior to publication of the whaling and sealing decisions, mediators or arbitrators that the competing hunters had employed conceivably might have consulted the venerable legal authorities on animal capture issues. But I think it more likely that these intermediaries, like the judges in the

³⁰ This hypothetical is a variation on one posed by whaler William Scoresby, Jr; see Deal, 'Fast-Fish,' supra note 16 at 207.

³¹ See Fernandez, supra note 2 at 121–2, endorsing Judge Livingston's dissenting opinion in *Pierson v Post*.

cases the authors discuss, would instead have been more interested in discerning and applying the customs of the hunters themselves.

I subscribe to the subversive view that those of us enmeshed in legal culture tend to exaggerate the role of law in many social contexts.³² For three reasons, even a relatively celebrated decision such as *Pierson v Post* might have had limited effect on the subsequent behaviour of fox hunters in rural New York. First, in all likelihood, few would-be fox hunters would have learned anything, even indirectly, about the ruling or its implications. I am curious whether Fernandez's research into the aftermath of *Pierson v Post* turned up any evidence about the publicity the decision received, particularly in rural communities. Second, even highly educated professionals, after getting word of a legal innovation, may oversimplify or otherwise distort the message that lawmakers had intended to convey.³³ Third, and most important, particularly when stakes are small and the parties involved are enmeshed in a closely knit social group, people are likely to resolve disputes beyond the shadow of the law.³⁴ For example, fox hunters with an accurate understanding of *Pierson v Post* might nevertheless have chosen, if their personal ethics or social norms so dictated, to resolve a fox dispute contrary to the rule of 'certain control' that Judge Tompkins set out in his majority opinion. Informal norms and formal laws seldom exist in isolation, and each commonly has some influence on the other.³⁵ Legal centralists tend to believe that legal rules are likely to displace incompatible norms. Evidence from the field suggests that, especially among the closely knit, informal norms are just as likely to do the displacing.

v *The gulf between humanists and scientists*

Fernandez mentions a statement I once made about a gulf separating law-and-economics and law-and-society scholars.³⁶ Another gulf is even wider. A half-century ago, the novelist and physicist CP Snow asserted the existence, at universities, of two cultures, personified by the literary intellectual and the physical scientist, whose members use distinctly

³² See generally Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991) [Ellickson, *Order*].

³³ See e.g. Daniel J Givelber, William J Bowers, & Carolyn L Blitch, 'Tarasoff: Myth and Reality: An Empirical Study of the Law in Action' [1984] *Wis L Rev* 443 at 461–2, reporting that one in four psychiatrists misconstrued a famous judicial holding on a psychiatrist's duty to report to authorities a patient's threat to harm a third party.

³⁴ This is a central theme of Ellickson, *Order*, supra note 32.

³⁵ See *ibid* at 132.

³⁶ Fernandez, supra note 2 at 124.

different methods and view the world from divergent perspectives.³⁷ Let's call the members of these two cultural camps *humanists* and *scientists*. Law rightly is an object of interest to members of both groups, and Angela Fernandez commendably has arranged for affiliates of both to participate in this symposium.

In the gamut of legal scholars, I situate myself toward the pole of science,³⁸ where Bruce Ziff might locate himself as well. Angela Fernandez plainly is humanities-oriented, as are Robert Deal and Chris Tomlins, who each have a PhD in history. Scholars with a humanities orientation tend to delight at finding evidence of variations in social practices and in explaining the contingency of outcomes. The nature of my work on norms, by contrast, has been what some humanists would call 'reductionist.' I have proffered the sweeping hypothesis that members of a close-knit group, in any setting, tend to develop norms that maximize their own welfare, regardless of the consequences to those outside the group.³⁹ Humanists are likely to be dumbfounded that a scholar would attempt to be so universalizing. Out of politeness, perhaps, neither Deal, Fernandez, nor Tomlins has chosen to mount a direct challenge to this broad proposition.

In the abstract, members of both the scientific and humanistic camps within the legal academy are likely to favour attempts to bridge the gulf. Alas, in practice most on both sides of the divide quickly lose patience with the alien genre. Upon encountering a concept such as the 'fluidity of texts' in a scholarly article, the brain of a law-and-economics scholar is apt to shut down. Conversely, so is the brain of a humanities scholar upon the first appearance of 'Coase theorem.' The gulf that CP Snow identified persists. If we openly acknowledge that the abyss is there, perhaps we will be better able to esteem the rare scholar who can bridge the divide and traverse briskly back and forth.

³⁷ CP Snow, *The Two Cultures: And a Second Look*, 2d ed (Cambridge, UK: Cambridge University Press, 1965).

³⁸ Hard scientists and rigorous economists, of course, likely would scoff at this.

³⁹ See Ellickson, 'Hypothesis,' supra note 14, and Ellickson, *Order*, supra note 32 at 167–83.