

## I

### Introduction

This book examines how American whalers resolved disputes at sea over the possession of whales. It also looks at the development of the law governing such disputes to understand how property law is created. Legal scholars and historians have tended to frame the issue of property law creation as an either/or question. Is it produced by legislators and judges, or does it develop from the practices and customs of involved individuals? To insist that property law must be the product of one or the other is to impose consistency and order on a process that is messy and often haphazard. Property law – like most things people produce collectively – emerges from a *mélange* of misunderstandings, mistakes, and contradictions. Law reflects both greed and a sincere desire to find fair solutions to difficult problems. It is never entirely one thing or the other. What follows is an examination of how Anglo-American whalers, lawyers, judges, and legal scholars created the laws governing property disputes over contested whales in the period from 1780 to 1880.

There was never a single property law of whaling or even a single set of rules operating at sea to settle arguments over the possession of a successfully hunted whale. Whalers operated at sea according to a number of general maxims that were often poorly understood even by experienced captains and crews. Negotiations and a sense of what constituted proper behavior – what one British captain termed “laws of honor” – were ultimately more important in resolving disputes over contested whales than any universally honored custom. What whalers valued most was a means of dispute resolution that within a framework of honorable behavior prevented violence and facilitated the killing of whales. When conflicts came before Anglo-American courts, lawyers and judges had different concerns. Recognizing that whaling vessels flew the flags of competing nations, jurists were worried that a simple argument between rival captains might develop into an international incident. Adopting industry customs respected by all whalers seemed to offer a neutral means of resolving

cases that did not honor the law of one nation over another. In their effort to discern whaling customs, courts often misunderstood how whalers actually settled disputes and found universal practices when, in fact, a flexible and ad hoc means of awarding whales existed at sea. The law of whaling that emerged from the reported Anglo-American cases must – in its clear statement of applicable customs and evocation of arguments dating back to Justinian about how one comes to possess and own wild animals – have seemed quite foreign to the men who made their living hunting whales. Whalers, in turn, largely ignored judicial pronouncements as to the customs of whaling and continued to operate in ways that made sense to them in their relentless quest to kill whales.<sup>1</sup>

The primary reason Anglo-American courts failed to understand how whalers settled disputes is that lawyers and judges were really never all that interested in or concerned about whaling practices. Although whaling was an important industry in the eighteenth and nineteenth centuries, it was always something of a legal backwater. The participants formed a discrete community engaging in an isolated and unique activity. Judges never worried that a ruling in a whaling case might upset established laws followed by other maritime industries. Courts in seeking settled whaling customs and universal adherence largely invented what they were looking for.

In addition, when the legal profession did think about whaling, members of the bench and bar failed to grasp that whales are extremely large and difficult to catch. Even in the late eighteenth and early nineteenth centuries when sperm whales and bowheads were plentiful, the finding and catching of a whale was time consuming and extremely dangerous. Weeks or months might pass in some seasons before a ship reduced a whale to oil. The catching of a single additional whale might be the difference between a successful season and financial loss. The whaling industry operated in almost all waters and time periods on a model of scarcity. Unlike bison hunting, logging, salmon fishing, or other extractive industries of the nineteenth century, whalers never had the luxury of passing up a whale with the confidence that other cetaceans could be easily located and killed. The happy discovery of a large number of whales swimming in company was no guarantee that even a single animal would be taken. Courts, when thinking about wild animal cases, imagined ducks, rabbits, mackerel, or even bees. The stakes in a dispute over a single animal worth potentially thousands of dollars bore little resemblance to a contest concerning a small animal that individually was of little value.

When the writers of Anglo-American legal treatises in the nineteenth century took up the task of explaining property rights in wild animals – or what the law calls *ferae naturae* – they never questioned whether the reported cases provided an accurate description of whaling practices. Their concern was in drawing

<sup>1</sup> C. Ian Jackson, ed., *The Arctic Whaling Journals of William Scoresby the Younger: Volume I, The Voyages of 1811, 1812 and 1813* (London: The Hakluyt Society, 2003), 119–20.

## Introduction

3

larger principles from these matters that would be applicable in other property cases. Whales, deer, and foxes were all – in the eyes of the law – pretty much the same. Even if these scholars suspected that whaling customs were not universally observed, it would have likely made little difference in their explication of the law. In common law jurisdictions, lawyers accept the statement of facts set forth in an opinion as proven. The ruling which follows is predicated on those facts. Facts in an opinion are thereafter stretched and manipulated by lawyers and judges to discover the point at which different facts necessitate a different ruling.

While the legal profession of the nineteenth century did much to obscure actual whaling customs, it has been the misreading of Herman Melville's discussion of whaling law in *Moby-Dick* that has enshrined the idea in the minds of most historians that whalemens avoided litigation and violence by a strict adherence to universally accepted norms. Melville proclaimed that without such universal laws, "vexatious and violent disputes" would frequently arise between ships claiming ownership of a whale. Melville reduced this unwritten property law of whaling to a pair of pithy maxims. "I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it." Yet, as one reads on and Melville's explanation of whaling laws becomes more convoluted, it becomes clear that these seemingly simple principles were – in practice – neither well understood nor universally followed at sea.<sup>2</sup>

Like most attempts at brevity and concision in the law, Melville's summation raised more questions than it answered. What, for example, constituted a fast-fish? How much control must a whaler have had over his prey before it was deemed fast? Melville's gloss provided some answers. A whale was fast when it was connected to an occupied boat by anything within the control of the crew. "[A] mast, an oar, a nine-inch cable, a telegraph wire, or a strand of cobweb, it is," Melville declared, "all the same." In Melville's telling, control of a whale's fate or even its movement was clearly not required. The fictive nature of control in obtaining the right to a whale was emphasized by Melville's further explanation that a whale was also "technically fast" when it carried the waif or "other recognized symbol of possession" of a ship that had the present ability and intention of taking the animal.<sup>3</sup>

Although Melville presented whaling norms as universal and unchanging, his description of these practices in *Moby-Dick* captured much of the confusion and ambiguity that governed confrontations at sea. Melville managed to seamlessly conflate two standards that would, if strictly applied, render contradictory results. Fast-fish, loose-fish, which Melville deemed the universal law, required that a physical connection between whale and boat or crew member must be maintained to defeat the claims of a rival vessel. Yet, he also introduced the norm of iron holds the whale which provided that a boat retained its claim

<sup>2</sup> Herman Melville, *Moby-Dick or, The Whale* (New York: Penguin Books, 2003), 432–3.

<sup>3</sup> Melville, *Moby-Dick*, 433. A waif is a flag that is attached to a pole that is affixed to a dead whale.

to a whale even in the absence of an attached line if a properly marked harpoon remained fast and the ship continued in pursuit with the ability – absent interference – to capture its prey. Melville indicated that a third standard – justice – was also sometimes invoked by the more honorable whalers to award whales to captains whose claims, while ethically compelling, were weak under the prevailing norms.<sup>4</sup>

How then did whalers use such vague guidelines to settle arguments at sea? A review of the available evidence concerning disputes at sea between whalers vying for the same quarry reveals that whaling customs were often vague and subject to interpretation and negotiation. While Anglo-American whalers – if asked to state the applicable custom – would have agreed that the first boat to affix a harpoon gained an advantage over its competitors, the precise application of this principle was far from clear. Whaling customs during the eighteenth and nineteenth centuries were, in fact, a jumble of often competing maxims tied together by what Melville saw as the desire of “the more upright and honorable whalers” to do justice. Yet, without resorting to violence, whalers managed to resolve disputes at sea because they were a close-knit community that shared both a commitment to harvesting the maximum amount of oil and bone and ideas as to what constituted fairness.<sup>5</sup>

The ability of whalers to resolve disputes on their own without violence and without recourse to lawyers and judges was a remarkable achievement made possible by the community’s tight social structure. Anglo-American whalers were almost always members of close-knit communities. The British whaling industry in the Greenland fishery of the late eighteenth and early nineteenth centuries was primarily based in a small number of ports on England’s northeast coast and in nearby Scottish towns. Captains and crews were often well acquainted with the men on other vessels. Even when British and American ships began competing during the last decades of the eighteenth century for whales in the southern hemisphere, a high percentage of captains and crews – regardless of the ship’s flag – hailed from Nantucket. In the American dominated nineteenth-century fisheries of the Pacific Ocean and, after 1848, the Western Arctic, virtually all of the ships called New Bedford, Sag Harbor, or one of a handful of Southern New England towns home. Identifying all of the bonds of marriage and consanguinity between American ship owners, captains, officers, and crews would be a daunting task. The tightness of this community was increased by the tendency of American whalers by the 1820s to spend significant periods each winter in Honolulu and other Hawaiian ports. There the men worshipped, socialized, and replicated – to a limited degree – New England society.<sup>6</sup>

<sup>4</sup> Melville, *Moby-Dick*, 432–5.      <sup>5</sup> Melville, *Moby-Dick*, 433–5, 443.

<sup>6</sup> Gordon Jackson, *The British Whaling Trade* (Hamden, CT: Archon Books, 1978); Eric Jay Dolin, *Leviathan: The History of Whaling in America* (New York: W. W. Norton & Co., 2007), 212–5; and Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991), 192–5.

## Introduction

5

Legal theorists and economic historians have generally accepted Melville's notion of universally observed whaling customs and elided his confusing and contradictory discussion of those practices. Like the writers of legal treatises in the nineteenth century, recent scholars have used the handful of reported whaling cases as a vehicle for making larger points about the development of property law. Actual whaling practices have received very limited scrutiny and whalemens have been largely cast as wealth or welfare maximizing automatons at the service of the so-called norms scholars who see property law as largely the bottom-up creation of communities of users.<sup>7</sup>

To understand the internecine struggles between the norms school and the legal centralists who view property law as the work of legislatures and other legal elites, the work of the economist Ronald Coase is central. Coase, a sort of latter day Hobbesian and a leading legal centralist, believed – as did most of his contemporaries – that property law was imposed from above by courts and legislators. While Coase did not, as we shall see, believe that it ultimately much mattered what the law dictated, he certainly never envisioned participants creating the governing rules. In 1960, Coase published an article setting forth an extremely influential model of how people with competing interests in property and natural resources settle disputes. Coase illustrated what has come to be known as the Coase Theorem with a hypothetical dispute involving a rancher whose cattle destroys the crops of the neighboring farmer.<sup>8</sup>

If the law in this fictional jurisdiction holds the rancher liable for damage inflicted by his cattle to the farmer's crops, Coase envisioned several outcomes. The rancher could install a fence and add as many animals to the herd as is practicable. However, the rancher, realizing that the cost of the fence is greater than the harm inflicted on the farmer, may decide that it makes more economic sense to pay the farmer for the damage to the crops. This would be acceptable to the rancher so long as the income generated by a particular animal exceeds the value of the damaged crop. Likewise, the farmer would be satisfied if the money received from the rancher is greater than the loss inflicted by the wayward ungulates. In a situation where the rancher and farmer are both satisfied, the rancher will feel free to add animals to his herd, confident that his profits will rise. The end result will be more cattle, a diminished crop yield, and an improvement in the bottom line for both neighbors. If, however, the fence does not make economic sense and the value of the crop damage caused by a single animal exceeds the profit generated by that creature, the rancher will not add to his herd.<sup>9</sup>

<sup>7</sup> Ellickson, *Order without Law*, 191–206; and Henry E. Smith, "Community and Custom in Property," *Theoretical Inquiries in Law* 10, no. 1 (January 2009): 6.

<sup>8</sup> Ronald Coase, "The Problem of Social Cost," *Journal of Law & Economics* 3 (October 1960), 1–44.

<sup>9</sup> Coase, "The Problem of Social Cost," 1–8. The crop yield will be diminished because of the damage or by way of an agreement between the neighbors that the farmer will leave the field vacant. Another possibility is that the farmer will choose to grow a crop that cattle do not harm.

Coase then asked what would happen if the law were changed and the rancher was no longer responsible for damage caused by his cattle. The farmer will build a fence if the cost does not exceed the value of the damaged crops. The same result is thus reached as in the system where the rancher is liable. So long as crop damage is greater than the cost of the fence, the fence will get built and the rancher will add to his herd as he sees fit. The only difference between the two legal systems is the party who absorbs the cost of the fence. Assuming that the farmer does not build a fence, he will pay the rancher to reduce his herd by an amount that is less than the amount of damage done by that particular animal. The rancher will be happy not to raise the animal if the payment from the farmer is greater than the value of the cow. If, however, the value of one animal is greater than the value of the crops it damages, the rancher will not accept the payment and add to his herd as he chooses. Again, as in the scenario where the rancher is liable, when the value of the cattle is greater than the crop damage the herd will increase.<sup>10</sup>

The Coase Theorem thus demonstrates that the end result of crop and meat to market is identical regardless of upon whom liability for wayward cattle is imposed and upon whom the cost is placed. The importance of Coase's findings was immediate to both lawyers and economists. Liability laws had nothing to do with the amount and type of product reaching the market. The parties would reach the same results regardless of whom the law declared responsible. This was an obvious blow to the notion that liability laws had a major impact upon society at large. The only people with any interest in the matter were the rancher and the farmer. Urban consumers were not affected one way or the other. While Coase overturned the prevailing notion that the content of a law imposing liability necessarily affected production, he hewed to the orthodox view that law is imposed from above.<sup>11</sup>

The Coase Theorem is based upon two very large assumptions. The first is that people always behave in a rational way that is based solely upon economic self-interest. The second assumption is that there are no transaction costs in the negotiations between the rancher and the farmer. Transaction costs are the expenses that parties incur reaching a resolution to their dispute. Typical transaction costs for any dispute arise in preparing for and conducting negotiations and, when resolution proves difficult, litigation. Coase was well aware that human behavior is not simply the product of an accountant's calculations. He also recognized that transaction costs can be significant in shaping how property disputes are settled. Instead, Coase sought to challenge prevailing ideas and suggest that assignment of liability has a limited role in determining the type and amount of goods produced. Market forces, Coase postulated, govern production regardless of how the legal system assigns liability. While

<sup>10</sup> Coase, "The Problem of Social Cost," 1–8.

<sup>11</sup> Coase, "The Problem of Social Cost," 1–8; and Ellickson, *Order without Law*, 2–4.

## Introduction

7

Coase believed that laws should be crafted so as to reduce transaction costs, he argued that government intervention was neither as important nor as effective in shaping the economy as previously thought.<sup>12</sup>

Given the prominence of the Coase Theorem, it was perhaps inevitable that someone would conduct a study of how farmers and ranchers actually manage rampaging cattle. Robert Ellickson explained that as an expert in land-use law he had employed the Coase Theorem to explain how individuals bargain in a way that is to their mutual advantage. Born of a desire to venture beyond the walls of the law library, Ellickson went in search of and discovered in Shasta County, California, Coase's hypothetical ranchers and farmers in the flesh. Located near the Oregon border at the northern terminus of California's Central Valley, Shasta County is the home to farmers and ranchers living together in close proximity. In addition, land in the rural portions of Shasta County is designated as either of open and closed range. In open range, as defined in Shasta County, a rancher is not liable for damage inflicted by his herd unless the rancher intentionally engineers his livestock's trespass onto a neighbor's property or the animals breach a fence that is deemed legally sufficient. In all other circumstances, a rancher is without liability even if the trespass is the result of his negligence. A closed range, conversely, holds a rancher strictly liable for any damage caused by his herd. All of the pieces of the Coase Theorem were in place for an examination Ellickson likened to the anthropological inquiry of Clifford Geertz.<sup>13</sup>

Ellickson discovered that the farmers and ranchers of Shasta County do not behave in the manner suggested by the Coase Theorem. While the ranchers and farmers do cooperate in resolving problems arising from wayward cattle, they do so with a decidedly incomplete understanding of the substantive law or, even in some instances, whether the dispute took place on land designated open or closed range. The careful bargaining based on an understanding of legal rights and obligations that Coase imagined, simply did not take place. Instead, the residents of Shasta County operated pursuant to an unwritten code of behavior best characterized as neighborliness. A farmer, for example, is likely to suffer occasional invasions by cattle without complaint, mentally calculating any damage as a debt to be repaid by the rancher in some other situation. Neighbors in rural Shasta County deal repeatedly with one another and find ways to even up their accounts. The rancher, Ellickson found, might bear a greater burden of cost or work on a community water project. Deviants who do not abide by the community norms are punished primarily by self-help measures taken by the aggrieved. Gossip is generally an effective way of coercing the recalcitrant into compliance. In a community where families have lived for many generations and a good reputation for neighborliness is valued, spreading word of an unbalanced account is generally sufficient to secure that parity is

<sup>12</sup> Coase, "The Problem of Social Cost," 2–3.

<sup>13</sup> Ellickson, *Order without Law*, 1–9.



regained. Self-help may, on rare occasions, escalate to the point where a wayward animal is harmed in such a way that a clear message is sent to the offending rancher. It is only in the most egregious situations or those involving outsiders such as passing motorists that county officials are notified or litigation is commenced.<sup>14</sup>

While Coase correctly predicted that farmers and ranchers would manage to resolve potential disputes to their mutual benefit without recourse to governmental institutions, he failed, in Ellickson's estimation, to grasp the central insight to be gained from his Theorem. Government is not the sole provider of the rules which maintain order and permit society to operate efficiently. Neighbors, business associates, and all manner of people in everyday situations navigate their relationships according to principles and guidelines that supplement and, in some cases, even contradict state laws and regulations. Coase was unable to see the error in adopting the related fallacies of viewing the state as the source of all law – legal centralism – and the Hobbesian concept that government is the sole guarantor of social order. Ellickson further declared that people do behave rationally, but what constitutes the basis for rational action must be expanded beyond a narrow economic focus imposed by Coase.<sup>15</sup>

Building on the insight that Shasta County farmers and ranchers developed their own norms in large part because they perceived recourse to formal legal institutions to be extremely expensive and contrary to their ideal of neighborliness, Ellickson proposed that close-knit communities resolve disputes in ways that minimize transaction costs and maximize the welfare of the group. Ellickson, in *Order without Law* and an earlier law review article, offered as an example of this phenomenon the nineteenth-century American whaling industry. Whaling in the nineteenth century was, despite the disparate nationalities of participants and the global expanse of its fisheries, conducted by a close-knit community. As Ellickson explains, whalers met constantly at sea exchanging information. In addition, their “home and layover ports were few, intimate, and socially interlinked.” Whaling was also an intensely competitive business and disputes over which of several pursuing ships was entitled to a slain whale were inevitable. Absent some rules governing these situations, violence at sea would ensue. The rules that ultimately emerged were the product of customs that evolved among the community of whalers. In order for these norms to be effective – in Ellickson's estimation – the involved parties had to understand exactly what sort of behavior was expected. English and American courts, recognizing the virtue of these participant-created norms, invariably deferred in Ellickson's estimation to what they perceived to be the custom of the industry in deciding the handful of whale capture disputes that resulted in litigation. Ellickson's story of nineteenth-century whaling has, in effect, a happy ending.

<sup>14</sup> Ellickson, *Order without Law*, 1–10.

<sup>15</sup> Ellickson, *Order without Law*, 4–6.



## Introduction

9

Whalemen maximized their welfare and provided the valuable lesson to society that allowing individuals to shape the laws by which they are governed brings more goods to market at a lower cost than when rules are imposed by outsiders.<sup>16</sup>

Ending his tale in the nineteenth century, Ellickson is able to elide the issue of resource depletion. Legal scholar R. Brent Walton has vigorously challenged Ellickson's theory of whaling's welfare maximization by pointing out that whale stocks were reduced throughout the nineteenth century by the very efficiency that made New Bedford an economic powerhouse by the 1830s. Walton's point is that the whaling industry committed suicide in exchange for short-term maximization of welfare and wealth. Ellickson offers two responses that illustrate his minimal concern with the connection between norms and resource depletion. Conceding that the overfishing of certain types of whales which led to longer voyages and ever more distant fisheries was not welfare maximizing, Ellickson observes "that norms that enrich one group's members may impoverish, to a greater extent, those outside the group." Norms, Ellickson also reflects, are ill equipped to either master the type of sophisticated understanding of cetacean habitats and breeding or to implement the world-wide network of monitoring required to forestall depletion of whale stocks. "For a technically difficult and administratively complicated task such as this," Ellickson concedes, "a hierarchical organization, such as a formal trade association or a legal system, would likely outperform the diffuse social forces that make norms."<sup>17</sup>

Ellickson's inability to provide a compelling response to Walton's challenge is a reflection of the degree to which he has essentialized whalemen into welfare-maximizing machines. They are welfare maximizing, Ellickson's circular logic suggests, because that is what they do. Whalemen certainly killed a large number of whales, but it is not really possible to state with any authority whether their practices maximized profits or were, for that matter, particularly efficient. When confronted with the inability or disinterest of whalemen in preserving whale stocks, Ellickson is left to concede that perhaps their ability to maximize their welfare was limited to short periods of time and small groups. While Ellickson offers a more nuanced approach to what motivates human action than Coase, his vision of whalemen as effective maximizers of their welfare forces him into the position that his protagonists agreed upon and followed the most efficient course of action in dividing disputed whales. This, in turn, prevents Ellickson from seeing the uncertainty and flexible negotiations that actually attended property conflicts at sea or in port. The reality of general

<sup>16</sup> Ellickson, *Order without Law*, 191–206, 193; and Robert C. Ellickson, "A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry," *Journal of Law, Economics, and Organization* 5 (Spring 1989): 83, 85. *Fennings v. Lord Grenville*, 1 Taunt. 241 (1808).

<sup>17</sup> Ellickson, *Order without Law*, 205, 206. R. Brent Walton, "Ellickson's Paradox: It's Suicide to Maximize Welfare," *New York University Environmental Law Journal* 7 (1999): 153.

principles subject to much dispute and confusion as to proper behavior is at odds with Ellickson's vision of universally accepted norms well suited to the type of whale hunted in a particular fishery.<sup>18</sup>

Attention to the issues of stock depletion raised by Walton in critique of Ellickson does not guarantee an understanding of whaling practices that is any less static and essentialized. Models of resource depletion offered by scientists and environmental historians have been no less prone to reducing human motivation to a single imperative driving all of their actions and decisions. Dubbed “the tragedy of the commons,” Garrett Hardin's iconic description of the inevitable destruction of commonly owned and competitively hunted resources was driven by his belief that humans are motivated exclusively by the desire to maximize their individual profit. Hardin's dark vision captured the imagination of scientists, historians, and legal theorists, spawning a cottage industry of scholarly work dissecting and largely accepting the idea that – unless checked – resources not owned by individuals or subject to strict regulation are doomed to destruction.<sup>19</sup>

When Garrett Hardin delivered his 1968 presidential address to the Pacific Division of the American Association for the Advancement of Science, he identified his subject as the “population problem.” Hardin argued that the finite resources of the world can support only a limited number of people. Invoking the specter of Malthus, Hardin warned that only zero population growth would prevent an otherwise inevitable disaster of hunger and desperation. Hardin assumed that his audience at Utah State University and the readers of *Science* – in which a reworked version of the speech was published as “The Tragedy of the Commons” – shared his belief in a coming population crisis. His main purpose was to convince the scientific community and the educated public that there was no technological solution to the problem. There was, in other words, no technique or invention that would permit the earth to sustain more than a particular population. Neither farming the sea nor any other scheme or invention practical in the foreseeable future would stop the coming disaster caused by unchecked population growth. Instead, the freedom to reproduce at will must be replaced by a system of controls that effectively curbs the human tendency to self-destruction.<sup>20</sup>

Recognizing that the existing laissez-faire approach to reproduction enjoyed a cultural legitimacy inherited from the economic theory of Adam Smith, Hardin vigorously attacked the idea that individuals acting in their own self-interest would make decisions that would prevent overpopulation. The illustration Hardin employed to dispute the notion that unrestrained individuals and markets can be counted on to act in a way that benefits society came to overshadow in intellectual and academic discourse the looming population

<sup>18</sup> Ellickson, *Order without Law*, 192–206.

<sup>19</sup> Garrett Hardin, “The Tragedy of the Commons,” *Science* 162 (December 13, 1968): 1243–8.

<sup>20</sup> Hardin, “The Tragedy of the Commons,” 1243.