“Coke-Upon-Littleton of the Fist”: Law, Custom, and Complications

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Robert Deal, **The Law of the Whale Hunt: Dispute Resolution, Property Law, and American Whalers, 1780-1880** (2016).

Robert Deal is a historian at Marshall University. His book is a nuanced account of the nineteenth-century British and American whaling industry and how it was misunderstood by contemporary lawyers and judges and continues to be misunderstood by present-day legal scholars.

Herman Melville famously wrote in *Moby-Dick* that whalemen settled their disputes using “hard words and harder knocks – the Coke-Upon-Littleton of the fist” (*Moby-Dick*, Chapter 89). As Deal shows, however, little violence actually sprung up when the crews of two (or more) ships pursued a whale but only one took it.

Deal’s explanation is that captains had incentives to engage in negotiations in a gentlemanly manner. Ownership of a whale (or shares in its blubber, sperm, or bone) was a question for the captains to negotiate and, if they could not agree, the owners of the ships could decide to pursue arbitration or, in extremely rare cases, litigation. Litigation was unpopular because it was slow and expensive. These usual problems were exacerbated in an industry where witnesses would quickly be unavailable and onto their next voyage, Deal explains. Captains spoke often about personal ethics and “laws of honor.” Good relations between captains were imperative to survival on whaling voyages because one captain might well need to turn to another for assistance if his ship ran into trouble in ice or the high winds and waves of storms at sea.

Cooperation was also important not just to the survival but also the success of a voyage. Captains were expected to help, or at least not deliberately mislead, one another about issues like weather conditions and where whales were located. When times were good and there were plenty of whales, this fact alone would greatly reduce an incentive for captains to engage in protracted and highly confrontational dispute over any particular whale. In most cases it was better to quickly agree to go halves, or some other proportion that seemed fair in the circumstances given the efforts each had invested, and move on to chasing other whales. When the catch was not going as well, as whale stocks became depleted and whalers had to go deeper into the ocean to pursue them and in more unfamiliar waters, one whale might make the difference between a voyage that was economically viable and one that was not. Deal points out that some of the litigated cases arose during lean times. The problem is that “[m]any – indeed the vast majority – of bad seasons did not send whalemen to the courtroom.” (P. 143.) And the dispute in one of the cases that Deal discusses at length, *Taber v. Jenny*, happened in 1852, a year that “may well have been the most successful season in the history of the Okhotsk fishery.” (P. 139.)

So what kept whaling disputes out of the courts? Deal insists it was *not* (contra Melville and legal scholars such as Robert Ellickson) because industry participants had a very firm and settled sense of what the rules or customs were for settling disputes. Deal argues that captains used a jumble of different competing ideas, rules, norms, and customs, including personal ethics, to decide how to negotiate situations of conflict. He concludes that captains must have wanted it that way, “prefer[ing] to operate on the basis of vague standards rather than clear rules.” (P. 162.) And while we are often told by law and economics scholars that flexibility will lead to conflict and more litigation, on the contrary, in this case at least: the “muddy standards” of the whalemen “were remarkably successful at avoiding [both] violent disputes and litigation.” (P. 163.) Hence, *Coke-Upon-Littleton*, i.e. legal rules, were only a very small part of what was in operation.

It is certainly true that lawyers and judges tried to generate firm rules from the handful of whaling cases that did appear before them. However, when they did so, they were not apt to follow custom or care very much about what whalemen actually did. And so when they issued rules like “fast-fish, loose-fish” (the whale was yours as long and for only as long as you remained attached to it), as the British courts did in whaling cases coming from the Greenland fishery, they deliberately ignored the rival custom that was certainly alive in that industry of “iron-holds-the-whale” (the whale went to the first ship to affix an iron with its mark on it regardless of whether it remained attached). Or they did worse, misunderstanding or misapplying custom, as American courts did dealing with disputes that arose in the Sea of Okhotsk (as in the Massachusetts United States District Court cases *Swift v. Gifford* (1872) and *Taber v. Jenny* (1856), as Deal explains).

Deal’s principal argument in the book is that whalemen “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.” (P. 2.) And “Anglo-American courts failed to understand how whalemen settled disputes [because] lawyers and judges were never all that interested in or concerned about whaling practices.” (*Id.*) Hence, there was a fundamental disconnect between the two worlds, impossible to see in the few litigated cases, which give the impression that whalemen operated according to settled customs that the judges turned into (or refused to turn into) rules. However, the reality was much more complicated. The customs were much less settled, the judges did not seem to understand them or preferred to ignore them, and the rules the judges made were probably of little consequence to the whalemen.

What happened to whales under the pressure of this relentlessly extractive industry is a tragedy, although Deal argues it was not technically a “tragedy of the commons.” Why? Because it is unclear, at least before 1850, that it was understood to be possible to hunt whales to extinction. Hence, whalers were not taking from the commons *knowing* that it was hurting the collective resource but doing so anyway in order to further their own economic short-term interest. They could not then have been *knowingly* engaged in a race to the bottom, Deal argues, because the ocean was (conveniently) thought to be boundless, its bounties limitless, the whale mythical and hence indestructible. When it became increasingly difficult to find whales, they were thought to be retreating further and further away, (romantically) hiding like the great White Whale from Ahab, rather than disappearing. This might seem laughable and implausible to us sitting now where we do with our current ecological consciousness.

Deal explains at the end of the book how petroleum developed as an alternate fuel for lighting and machine oil lubrication, a move that, fortunately for them, saved the whales. This is an arresting historical irony given our current crisis and the very well-grounded fears we have about who or what technological innovation will save us from our relentlessly extractive pursuit of oil and gas given the turn towards tremendously environmentally destructive processes such as fracking.

This book is an excellent read. Given its exploration of the great gulf between law-on-the-ground and law-in-the-courts, it has the potential to become a classic law and society study. It is particularly useful for legal historians interested in the way that history complicates our understanding of economic self-interest. The whalemen were primarily motivated by economic self-interest, there is no question. Yet the tight-knit nature of their group and their hazardous physical surroundings made ethical conduct (at least towards one another if not the whales) essential. That conduct required a certain kind of flexibility that we fail to understand if we continue to insist, as judges and lawyers of the day did, on reducing the norms they followed to a legal rule or custom.

This was a point that Herman Melville probably well appreciated when he surely intentionally mashed together the law of “fast-fish, loose-fish” and the custom of “iron-holds-the-whale” in his famous Chapter 89 in *Moby-Dick.* He might well have been trying to make the point that Deal demonstrates through his historical research – namely, that this was not an industry governed by pure law or custom; it was both of these plus more, a mishmash of different norms and priorities. The ways that all of these forces interrelated were loosely grasped even by participants themselves. Hence, the *order* that famously prevailed in the industry (emphasized in Ellickson’s *Order Without Law*) was neither a consequence of law, Melville’s *Coke-Upon-Littleton*, nor a product of well-settled understandings. It was more fluid and complicated than either of these.

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