

1996

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James E. Krier

University of Michigan Law School, jkrier@umich.edu

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Recommended Citation

Krier, James E. "Capture and Counteraction: Self- Help by Environmental Zealots (Allen Chair Symposium 1996: The Future of Environmental and Land-Use Regulation)." *U. Rich. L. Rev.* 30, no. 4 (1996): 1039-54.

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CAPTURE AND COUNTERACTION: SELF-HELP BY ENVIRONMENTAL ZEALOTS

James E. Krier*

I. THE MEANING OF SELF-HELP

Self-help is a largely neglected topic in American legal studies.¹ With the exception of a survey by a group of law students published a dozen years ago,² there appears to be little, if anything, in our legal literature that confronts the subject in a systematic way.³ This is so, at least, if one defines self-help as I do. To me, the term refers to any act of bypassing the formal legal system in order to get what one wants.

Lest this meaning seem obvious, notice that there are alternative definitions of self-help that view it more narrowly. One of these alternatives defines self-help to mean what it means in the large and familiar range of popular self-help books and articles that offer "how-to" guidance on matters ranging from the mundane to the metaphysical: how to do your own plumbing, how to be your own best friend, and so on. If we were to

* Earl Warren DeLano Professor, University of Michigan Law School. An earlier version of this essay was presented as the George E. Allen Lecture at the T.C. Williams School of Law, University of Richmond, during my week-long visit to the school as the George E. Allen Professor in March 1996. I am grateful to the Allen family, and to the students, staff, and faculty of the law school—Professor Michael Allan Wolf in particular—for hospitality and support. Research assistance was provided by a cluster of people during their time as students at the University of Michigan Law School. My thanks especially to Daniel Ginsberg, Eric Guidry, Stephen Ross, Kevin Toh, and Donald Wiest.

1. In contrast to the situation with respect to American law, there are a number of studies of self-help written in other languages and focused on other legal cultures. I have not consulted these for purposes of the present essay, but I intend to consider them in connection with the larger work of which this essay is a part.

2. See, Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845 (1984).

3. But see Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971). Posner's article, despite its rather limited substantive reach, approaches the question of self-help in a way that illuminates the general subject, as I shall try to show.

define self-help in this way, we would find a raft of legal literature offering instruction on the preparation of one's taxes, the making of one's will, the filing of one's lawsuit, the dissolution of one's marriage, and so on, by and for oneself.⁴ But this genre is concerned only with the relatively limited question of self-help that bypasses lawyers, whereas I am concerned with the very broad matter of self-help that bypasses the formal legal system entirely.

Another definition of self-help gets closer to the broad conception but still manages to fall short, and in a way that proves to be instructive. An example is found in the *Oxford English Dictionary*, which, under the term "self-help," has an entry that reads: "*Law*. Redress of one's wrongs by one's own action, without recourse to legal process."⁵ The shortcoming of this definition is its focus on the righting of wrongs. Self-help in its fullest and most significant sense entails substantially more than that, a point I can explain by reference to the rule of capture, which happens to be one of my central concerns in this essay.

II. SELF-HELP AND THE RULE OF CAPTURE

The rule of capture is quite clearly a self-help rule, yet it has nothing to do with redressing wrongs. Under the rule, which remains a significant feature of American law despite judicial and legislative modifications over the years,⁶ so-called fugitive or freely roaming natural resources are, while in their natural state, owned in common by members of the community at large. They remain common property until someone "captures" them by reducing them to individual possession and control, at which point they typically become that person's private property.

The rule of capture is of ancient origin. It probably originated in the context of wild animals—animals *ferae naturae* is the

4. See, e.g., FRANK G. HOUDEK, *LAW FOR THE LAYMAN: AN ANNOTATED BIBLIOGRAPHY OF SELF-HELP LAW BOOKS* (1991). Houdek's book is a loose-leaf volume, so obviously a lot of future entries are anticipated.

5. 14 *OXFORD ENGLISH DICTIONARY* 922 (2d ed. 1989).

6. See generally JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 20-62 (3d ed. 1991) (discussing various aspects of the rule of capture). Some of the ideas explored in the present essay were first suggested in the cited pages of the Dukeminier & Krier course book.

pretentious legal term—that were hunted for food and other domestic purposes: waterfowl and other wild birds valued for their flesh or plumage; rabbits, mink and deer; fish and whales. Whales provide a good example of the rule of capture in operation. A whale loose in the open ocean essentially belongs to everybody entitled to fish the waters—it is common property—whereas a whale fast to a whaling ship belongs, as private property, to the whaler that caught it.⁷ Capture might be literal (which is to say “actual”—the whale is harpooned and tied fast to the boat), or figurative (“constructive,” as lawyers put it—the whale has been mortally wounded by a harpoon from a pursuing whaler). The general point is apparent: When an animal *ferae naturae* is killed or caught, or as good as killed or caught, it belongs to the predator who did it in, so long as pursuit of the animal has not been abandoned.⁸

The rule of capture was extended early on from wild animals to other resources which, though they lack a life of their own, nevertheless roam about. An example is groundwater, found in pools and streams beneath vast stretches of surface land owned as relatively small individual plots by any number of people. Under the applicable rule (since modified to some degree in some jurisdictions), each owner of overlying land had the right to drill down through his land in order to extract (“capture”) the water. All of the landowners were in competition with each other.⁹ No one landowner had the right to exclude the others from taking water by digging wells that started on, and bottomed under, their own land. The water was common property until reduced to individual possession and control, at which point it, like a whale on a line, became private property.

7. “A Fast-Fish belongs to the party fast to it,” as one respected authority put the matter. “A Loose-Fish is fair game for anybody who can soonest catch it.” HERMAN MELVILLE, *MOBY-DICK* ch. 89 (Harrison Hayford & Hershel Parker eds., W.W. Norton & Co. 1967) (1851).

8. Under the rule of capture, an animal that subsequently escapes into the wild is usually once again *ferae naturae*, common property up for grabs. See, e.g., RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* 18 (Walter B. Raushenbush ed., 3d ed. 1975).

9. See *DUKEMINIER & KRIER*, *supra* note 6, at 40-41. Under the early common law rule, each owner of land over an aquifer was entitled to draw freely from the source. The rule “was in reality a rule of capture. . . .” *RESTATEMENT (SECOND) OF TORTS* ch. 41, commentary at 256 (1977).

Likening water beneath the surface of the earth to whales beneath the surface of the ocean would probably strike lay observers as a remarkably odd thing to do. But we can expect that most people, once introduced to the legal conception behind the analogy, would regard the leap from whales to water as perfectly natural and utterly logical. (Whether it was also wise is a separate question that I shall take up eventually.) And given the likening of water roaming free to wild animals roaming free, it is not surprising to learn that judges subsequently extended the notion to still other fugitive resources when mankind happened upon them and found them worth exploiting. So oil and gas, according to a judicial opinion from the late nineteenth century, "may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*."¹⁰ As with groundwater, an owner of land over a common pool of oil or gas could try to capture the resources—make them private property—by drilling wells down through his or her own land, but each landowner over the pool was in competition with all the others over the pool, who had the same rights to drill. The remedy of each as against others alleged to be taking amounts beyond their own shares was to "go and do likewise."¹¹ All were to help themselves.

III. THE NATURE OF SELF-HELP

The rule of capture demonstrates that self-help is not just about redressing wrongs. Under the rule, people are privileged to capture (or try to capture) fugitive resources not because anybody is "in the wrong," but rather because all have the right to engage in a competitive process whereby resources held in common are transformed into resources held as private property. This process was not, and is not, the only way the matter could be addressed. It could as well have been, for example, that the owners of land overlying common pool resources were required by the state to get some sort of permit in order to extract water or oil or gas, and the terms of the permit could have set the amount each was entitled to take. Indeed, roughly

10. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

11. *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801, 802 (Pa. 1907).

this sort of program eventually became the standard approach to the matter.¹²

The legal history of common-pool resources in the United States generally illustrates two points about self-help. First, bypassing the formal legal system in order to get what one wants might be privileged,¹³ but it might also be outlawed. Even during its heyday, for example, the rule of capture did not entitle one landowner to help himself to what another had already reduced to possession and control. If *A* captured oil and stored it in a tank, *B* was not privileged to go and siphon it off, even if *B* had been privileged to capture the oil before *A* in the first place.¹⁴ Second, acts of self-help that were once privileged might subsequently be made illicit, in light of changing circumstances. For example, the rule of capture was changed in various respects by the introduction of the permit systems mentioned above.

The law of self-help is chiefly concerned with considering which acts of bypassing the formal legal system are to be privileged, which are not, and why. Notice that we could imagine a regime where no such acts are permitted, where all self-help is illegitimate, and where, in order to be entitled to do anything, one would have to enlist the aid and apparatus of the state, or at least get the state's explicit permission. Drawing a breath could be regulated, just as withdrawing oil is; exhaling could be subject to legislative control—and is, when the source is not somebody's lungs but somebody's factory.

The example of regulated respiration strikes us as silly, of course, but only because it would be silly, for any number of reasons, to regulate breathing. Nevertheless, however foolhardy it would be in practice, it is possible in principle. This is so for innumerable instances of legitimate self-initiative and privileged self-help, instances that we take for granted as part of a preordained natural order only because some kinds of self-help are

12. See, e.g., DUKEMINIER & KRIER, *supra* note 6, at 54.

13. Indeed, beyond being privileged it might be subsidized, as in the case of bounty hunting for money awards provided by the state.

14. For a time, at least, *B* was entitled to siphon off the oil captured by *A* if *A* stored it not in a tank, but rather by reinjecting it into a depleted pool under the land of *A* and *B*. See DUKEMINIER & KRIER, *supra* note 6, at 39.

so sensible and deeply normalized that we have no reason to imagine controlling them—even though, if we did have reason to imagine controlling them, we could.

Take the planting of crops for consumption by one's own household and livestock. Home gardening seems an innocent and very productive kind of self-help, utterly in accord with a healthy natural order. Yet it is also a kind of self-help that has hardly gone unbridled. Zoning and other laws govern horticulture in many areas, and some kinds of crops are controlled, or even prohibited altogether. Regarding prohibition, I have in mind not weed but wheat, the growing of which was regulated by the federal government during World War II. In *Wickard v. Filburn*,¹⁵ the Supreme Court upheld a legislative provision that extended a regulatory program "to production not intended in any part for commerce but wholly for consumption on the farm,"¹⁶ even though this necessarily resulted in "forcing some farmers into the market to buy what they could provide for themselves. . . ."¹⁷

If farmers had been permitted to provide for themselves, they would have done so whenever they regarded that as a less costly alternative than purchase in the market (or going without). And to say this is just to note a specific example of the general advantage of self-help to those who think they can take care of themselves.

In the legal context, for example, the benefit of bypassing lawyers is that one saves lawyers' fees (though at the cost of the chance that the lay person will perform less effectively than the law person). The advantage of bypassing not just lawyers, but the formal legal system altogether, is similar: The legal system is rather inert and expensive to move or change. If in a contest between me and another, I am entitled to bypass the legal system in a way that forces my opponent to resort to it, then the burden of inertia is in my favor, and this is a considerable benefit to me (although there is once again a cost to me as well, measured in terms of the possibility that working through the system would have proved to be the best way for

15. 317 U.S. 111 (1942).

16. *Id.* at 118.

17. *Id.* at 129.

me to get what I wanted). We can say with utter confidence that people who engage in any kind of self-help must regard their actions as beneficial on balance; otherwise they would not help themselves.

IV. INTERFERENCE WITH CAPTURE: TWO OLD CASES

Self-help privileges, therefore, are not part of an immutable natural order, they are instead mutable social constructions—the flipside of the formal legal system—and self-help always has costs and benefits. The private costs and benefits of self-help have just been suggested above. The social costs and benefits turn on what society gains by privileging certain acts of self-help, on the one hand, and what society loses by doing so, on the other. Just as private calculation will influence people's decisions about what actions to take for themselves, social calculation will (or should) influence the state's decisions about what actions people are privileged to take for themselves. For example, depending on circumstances, and changes in circumstances, the state might privilege some kinds of self-help at first, then later disallow them (and vice versa); it might allow certain self-help measures and, at the same time, privilege others that counter those allowed (as in "go and do likewise"); it might ban altogether certain kinds of self-help (outlawing "an eye for an eye").

It is in terms of social construction, based on social costs and benefits, that I shall examine the self-help rule of capture and the competition it sets up between two or more parties with conflicting interests in the same resource. I am particularly interested in the kinds of self-help *interference* with capture that might or might not be privileged.

A. *Interference with Capture*

Interference with capture can take essentially two forms. In the first form, earnest *A* is trying to get some common property resource when opportunistic *B* comes along and grabs the resource before *A* has reduced it to possession and control. So, for example, a hunter might kill and take a deer that another hunter was pursuing and was about to shoot at close range.

The second form of interference is a modest but significant variation on the first. Here altruistic *B* interferes with *A* not by capturing the resource, but instead by intervening in a way intended to frustrate capture by *A* or anyone else. Examples of particular interest in this essay are provided by zealous environmental groups whose members engage in various practices designed to counter the efforts of hunters attempting to kill or capture prey. Some of the practices are (usually) uncontentious, as where environmental activists buy hunting licenses from a limited stock established by the state and then do not use them;¹⁸ or where the groups persuade private landowners to post their land ("No Hunting!").¹⁹ But a host of other tactics have provoked considerable controversy, to the point that many have been outlawed by legislative action in the form of so-called hunter harassment laws.²⁰ Typically these laws aim at various on-site activities by the anti-hunters, such as getting in between hunters and their prey, making loud noises or scattering repellents to scare away wildlife, spreading garlic cloves to throw hunting dogs off the scent, scuba diving in wetsuits to remove fish from hooks, blocking access to hunting grounds, and so on.²¹

Over eighty percent of the states have enacted hunter harassment laws, some of which have been upheld by the courts, and others of which have been invalidated for vagueness, or for interference with the First Amendment right to freedom of speech.²² I want to consider hunter harassment from another angle, looking at the matter not in terms of the Constitution, but instead in light of two very old common-law cases.

18. See, e.g., INGRID NEWKIRK, *SAVE THE ANIMALS: 101 EASY THINGS YOU CAN DO* 96 (1991); Luke A. Dommer, *The Anatomy of Hunt Sabotage*, *ANIMALS' VOICE MAG.*, Aug. 1990, at 70.

19. See, e.g., RON BAKER, *THE AMERICAN HUNTING MYTH* 58 (1985).

20. On hunter harassment and hunter harassment laws, see generally John A. Grafton, *Hunter Harassment Statutes: Do They Shoot Holes Into the First Amendment?*, 96 *W. VA. L. REV.* 191 (1993); Aileen M. Ugalde, *The Right to Arm Bears: Activists' Protests Against Hunting*, 45 *U. MIAMI L. REV.* 1109 (1991); Michael Satchell, *The American Hunter Under Fire*, *U.S. NEWS & WORLD REP.*, Feb. 5, 1990, at 30.

21. See generally Stephen F. Ross, Memorandum on Hunter Harassment (1996) (unpublished manuscript, on file with the author).

22. See generally *id.*

B. *Two Old Cases*

Most students of property law have probably been introduced to the two cases I have in mind, or at least to the first one—*Pierson v. Post*.²³ Post, who was out hunting on a piece of open land in the state of New York, had scared up a fox and was chasing after it with his hounds when Pierson, well aware that Post was in hot pursuit, killed the animal and took it for himself. Post sued, and lost on the ground that mere pursuit of an animal *ferae naturae* establishes no rights in the hunter; the animal belongs to the first person who traps, kills, or mortally wounds it.²⁴ In short, the rule of capture was the applicable rule of law, a point that the majority determined primarily by consulting—and on occasion quoting in Latin—works of jurisprudence that dated back as far as the thirteenth century.

The dissenting judge in *Pierson* took a seemingly more modern and constructive approach to the dispute, which he said “should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited. . . .”²⁵ The judge observed that the chief point of a fox hunt was to rid the land of the fox, whose “depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit.”²⁶ But who would bother hunting foxes in the first place if “a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?”²⁷ The way to get rid of foxes was to get rid of the rule of capture. A hunter should prevail if “he be within reach, or have a reasonable prospect . . . of taking, what he has thus discovered [with] an intention of converting to his own use.”²⁸

23. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). This case has been a standard item in American property law casebooks for many years.

24. *See id.* at 179.

25. *Id.* at 180 (Livingston, J., dissenting) (emphasis deleted).

26. *Id.*

27. *Id.* at 181.

28. *Id.* at 182 (emphasis deleted).

The majority, as we have seen, disagreed, figuring that while the rule of capture did tolerate the admittedly rude behavior of a person like Pierson, it had the offsetting advantage of easy application (it is simpler to determine capture than to determine a reasonable prospect of capture).²⁹ What the majority did not address is the impact of the rule of capture on the destiny of foxes. That issue we can take up later for ourselves.

The second case I want to consider, *Keeble v. Hickeringill*,³⁰ was decided a century before *Pierson*, and by an English, not an American, court. Actually, the decision in *Keeble* was cited by the majority opinion in *Pierson*, though not by name and not as precedent; it was regarded as "clearly distinguishable."³¹

Keeble, like *Pierson*, involved interference with capture, but in the second of its two forms, where the interloper acts not to finish the business at hand but rather to frustrate it. Keeble owned some land on which he had built a pond (called a decoy) to attract ducks that he would then catch with nets. Hickeringill, an eccentric parson who lived nearby, was unhappy about his neighbor's activities. He discharged guns to scare the fowl away from Keeble's decoy, and Keeble sued for damages. Chief Justice Holt, one of the great English judges, wrote an opinion in Keeble's favor. The whole of the opinion is very brief, and the little bit quoted here is its gist:

To learn the trade of seducing . . . ducks to come . . . in order to be taken is not prohibited either by the law of the land or the moral law; but it is as useful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, . . . this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. . . .

[W]here a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. But if a man doth him damage

29. See *id.* at 179.

30. 11 East 574, 103 Eng. Rep. 1127 (K.B. 1707).

31. See 3 Cai. R. at 179 (identifying the case only by one of its citations, and finding it distinguishable).

by using the same employment; as if Mr. Hickerlingill had set up another decoy on his own ground near the plaintiffs, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff.³²

Holt's concern, expressed at the end of his opinion, was to support a process "whereby the markets of the nation may be furnished. . . ."³³

V. TWO READINGS OF TWO OLD CASES

There are two ways to read *Pierson* and *Keeble*, two ways to get at what they have to say about modern day conflicts between avid hunters and zealous environmentalists. One reading, which I think is fairly superficial, quite obviously supports the position of those opposed to hunter harassment. But the other reading, which plumbs a little deeper, opens up the possibility of the opposite conclusion. Consider the two interpretations in turn.

Pierson, stating a view that reflects what is generally still the law in the United States, allows anti-hunting activists some privileges, but at a price the activists cannot afford to pay. They are only entitled to interfere with hunters in the way that *Pierson* was allowed to interfere with Post. They can go and do likewise, trying to kill or capture the hunters' prey before the hunters do. But killing, obviously, is out of the question for the zealous environmentalists. So is catching (say by nets), because the activists' objective for wildlife is conservation, not confinement. Caging the animals is ruled out by principle, and would be ruled out by cost in any event, no matter how much cheaper it would be than another infeasible alternative—buying up land for huge game preserves.

What the activists need is the privilege to scare wildlife away from hunters, or hunters away from wildlife, but such measures seem to be denied them by *Keeble*, and *Keeble*, like *Pierson*, is the law (indeed, it is the very law since codified in hunter ha-

32. 11 East at 575-76, 103 Eng. Rep. at 1128.

33. 11 East at 578, 103 Eng. Rep. at 1129.

rassment legislation). The two cases establish a catch-as-catch-can regime. Interference with capture is allowed, but only when it is a kind of interference that promotes capture in the end. So *Pierson* was allowed to snatch the prey away from *Post* at the last moment, but would not have been privileged to foil the fox hunt altogether. Similarly, *Hickeringill* was not allowed to scare the ducks on *Keeble's* pond away, but was privileged to attract them to his own decoy. The cases are of a piece.

Interestingly enough, however, they are of a piece on a deeper reading as well, but the deeper reading carries a very different message. While *Pierson* and *Keeble* are both about promoting capture, they are also, and more fundamentally, both about advancing social welfare. In neither case, after all, did the judges wish to promote capture just for its own sake; in both, they wanted to do so in order to make society better off, given conditions at the time.

VI. PRODUCTIVE INTERFERENCE AS HEALTHY COMPETITION

To me it is plain that the judges in *Pierson v. Post* and *Keeble v. Hickeringill* were constructing a self-help regime, and not in some mindless or formalistic (or inconsistent) fashion but rather very sensibly. Confronted with parties who were interfering with each other in various ways, they aimed at resolutions that produced net benefits for society, given the conditions then present.³⁴ In the time of those cases, the social benefits of consuming chickens and ducks outweighed, or at least were surely thought to outweigh, the benefits of conserving abundant wildlife. So while some kinds of interference with capture were privileged and other kinds prohibited, the constant aim was to make society better off by facilitating consumption. *Hickeringill* couldn't interfere with *Keeble* in a way that meant fewer ducks, but *Pierson* could interfere with *Post* in a way that meant fewer foxes (and more chickens); *Hickeringill* would have been allowed to catch any ducks he could lure from *Keeble's* pond to

34. See Posner, *supra* note 3, at 223 (suggesting that the chief purpose of self-help privileges and prohibitions should be "to channel people's conduct, and in such a way that the value of interfering activities is maximized.")

his own, but Pierson would not have been allowed to trip Post so that the fox could get away.

In a state of abundance—whether abundant wildlife, ground-water, oil, gas, or any other fugitive resource—the balance of costs and benefits makes exploitation sensible,³⁵ and the rule of capture as fashioned by the courts promoted exactly that. The dissenting judge in *Pierson* was incorrect. The dissent, remember, expressed the view that the majority's rule of capture would discourage hunting.³⁶ The logic of the judge's argument is apparent:

- * *P1* hunts because he likes the thrill of killing foxes.
- * *P2* also hunts, for the same reason.
- * If either hunter can at the last instant lose a good-as-dead fox to the opportunistic other hunter, no hunters will bother hunting.
- * Conclusion: a chickenless world overrun with foxes.

There are several problems with this reasoning. The first might be called a Yogi Berra-type problem (Berra is alleged to have said that nobody ate at a certain restaurant, because it was too crowded): If a prospective hunter can observe that no hunters are hunting, won't he enter the empty field? The second problem with the dissent's reasoning relates to this, and gets to the real substance of the matter. One might think that no hunter will enter the empty field because each knows that other opportunistic hunters would then follow him and take advantage of his labors. Perhaps, but the first entrant would still have a lead-time advantage; he might be able to chase up and kill a fox before anybody else arrives. Given this, hunters generally would have incentives to concentrate on making quicker kills, for example by using long-range rifles, or faster horses, or both. In consequence, more foxes would be killed—by somebody or other.

35. See, e.g., TERRY L. ANDERSON & DONAL R. LEAL, *FREE MARKET ENVIRONMENTALISM* 40-45 (1991) (discussing the costs of exploitation versus conservation of timber in the nineteenth century and suggesting that practices viewed as wasteful today were productive in their time).

36. See *supra* note 27 and accompanying text.

Theory and fact alike suggest that the problems with the dissenter's reasoning in *Pierson* are not fanciful but real. The rule of capture favored by the majority has been shown in any number of instances to result in relatively rapid depletion rather than long-term conservation, because it induces people who seek to exploit common property resources to gear up, to get more, and to get it faster.³⁷ Put another way, it promotes interference by each in the activities of others. When the interference is inconsistent with social welfare, we say it is illegal. But when it is productive, we call it competition.

A last little bit from *Keeble* makes my point about constructive interference (competition) ever so clear:

One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.³⁸

VII. RETHINKING CAPTURE AND COUNTERACTION

Times are not what they used to be. Fugitive resources that were once in rich supply have grown scarce, thanks in part to the rule of capture. Changes in the relative benefits of exploitation and conservation have prompted any number of familiar measures enacted to economize on dwindling stocks by conserving rather than consuming. Fossil fuel mining is regulated, as is extraction of groundwater; threatened species are protected; habitat is set aside; hunting and fishing are licensed and controlled. So should hunter harassment be allowed?

In considering this question, I limit my inquiry to the kinds of activist interference that take place on public lands and waters, that involve common property resources, and that entail

37. See, e.g., Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 UCLA L. REV. 855 (1971).

38. 11 East at 576, 105 Eng. Rep. at 1128.

no threat to life and limb. I presume that the activists, but for the disturbance they cause, have as much right as anyone else to be on lands and waters open to the community in general. I presume that they "own" wildlife in the same sense as (in common with) the hunters. And I presume that the activists have no more right than anyone else to cause physical harm to person or property.³⁹

Given all of this, and in light of the continuing relevance of the principles deeply embedded in our two old cases, I have to wonder why anti-hunting activists should not be permitted to interfere with hunters, subject to the terms and conditions I have mentioned. If I am correct in thinking that many natural resources once abundant are now in short supply, and if I am right in my reading of *Pierson* and *Keeble*, then those two cases are venerable precedents in direct support of my position. The sort of social calculus they suggest is a constant, but the costs and benefits have changed. What used to add up one way now adds up another.

Legislators in the United States should rethink hunter harassment legislation. The international community should be more tolerant of the activities of groups, like Greenpeace and the Sea Shepherd Conservation Society, that patrol the ocean commons for the sake of protecting whales and baby seals.⁴⁰ Judges should be sensitive to the larger social welfare as they construe hunter harassment legislation or as they decide cases in the absence of such legislation. A standard canon of statutory interpretation holds that statutes in derogation of the common law are to be strictly construed,⁴¹ and *Pierson* and *Keeble*

39. They would thus have the rights to do harm that anyone else has, and it follows from this that there might be circumstances where they would be privileged to threaten harm. I do not pursue this observation here. See generally Posner, *supra* note 3.

40. On the tactics and legal problems of such groups, see PAUL WATSON, *OCEAN WARRIOR: MY BATTLE TO END THE ILLEGAL SLAUGHTER ON THE HIGH SEAS* (1994); PAUL WATSON, *EARTHFORCE! AN EARTH WARRIOR'S GUIDE TO STRATEGY* (1993); Donna E. Correll, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 *RUTGERS L.J.* 773 (1993).

Some of the activities discussed in the foregoing sources entail very aggressive acts that violate the restrictions I would put on self-help by environmental activists. I am interested for now only in acts that pose no unreasonable threat to person or property.

41. See JAMES WILLARD HURST, *DEALING WITH STATUTES* 62-63 (1982).

stand for common law principles that, when rightly understood, endorse not unrestricted capture but constructive competition.

I am not concerned that legitimating hunter harassment is beyond the courts' competence or authority. Much of the law of self-help in the United States has been constructed by judges, who have felt free to grant and deny privileges as circumstances demanded. The law of landlord and tenant provides a perfect example. There was a time when landlords were allowed in many respects to help themselves—say by evicting tenants without resort to the legal system, or by denying tenants decent housing conditions—but eventually the old rules were changed, and almost always by the courts in the first instance (legislatures usually followed suit a little later, codifying the new rules handed down by the judges).⁴² Today, for instance, landlords may not engage in self-help eviction, and most tenants are entitled to habitable premises and are privileged to enforce the entitlement on their own by withholding rental payments.⁴³

I am also not concerned that by privileging such self-help activities as hunter harassment we run the danger of creating a kind of “noise,” whereby activists who suddenly find themselves entitled to do one thing (such as yell at a hunt) will get confused and think that the new privilege allows them as well to do some other thing (like hitting a hunter over the head). As we saw earlier, all sorts of self-help activities are privileged in the United States, yet our system of social controls has not fallen apart in consequence. We needn't worry that altering the rule of capture will undermine the rule of law.

To privilege hunter harassment is not to promote violence, and testy situations can as well be controlled in any event by restrictions governing hunters and activists alike. Confrontations are two-sided affairs, and self-restraint by one side is as much an issue as is self-help by the other.

42. See, e.g., *DUKEMINIER & KRIER*, *supra* note 6, at 489-97 (self-help eviction by landlords), 533-37 (tenants' rights to habitable dwellings and rent withholding).

43. See, e.g., *id.*