

Something Fishy:
Or Why I Make My Students Read *Fast-Fish and Loose-Fish*

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It is probably unique in the first year curriculum, but every year I make my civil procedure students read chapter 89 entitled *Fast-Fish and Loose-Fish* from Herman Melville's *Moby-Dick*.¹ And it is invariably a mystery to my students why I do so. They always wonder (even if they don't ask), "What has this got to do with the law?" "What am I supposed to take from this?" And, though every year I endeavor to explain it to them, I rather suspect that for many the lesson is one that takes some time to sink in – if indeed it is not entirely lost. For they are first-year students, and thus still laboring under all sorts of delusions about what the law is, what will we teach them and what they are expected to know.² Still, I always start the semester of civil procedure with this reading. I believe that no matter how mystifying it may be to the vast majority of them, there is virtually no better vehicle from which to launch a discussion of and to begin thinking about the knotty problem that is "The Law" than Melville's elegant and pithy meditation in this chapter on the law's limitations. It is particularly appropriate in the context of a "rules" course like Civil Procedure which most students invariably believe principally involves memorization of the rules, a standpoint from which it is often difficult for them to perceive the ambiguity of meaning and application that even some of the most apparently straightforward rules offer. Of course, the ability to see and then use this ambiguity is a central task that we set ourselves to teach them.

Now given that I have readily admitted at the outset that my election mystifies most of my students, one might well ask why I give it to them. Isn't it my duty to shed light, not further plunge them into darkness? (Well, if so, I say, spread the news because I venture to guess that this would come as a surprise to law students everywhere!) However, despite their general belief that law professors' job is to mystify not to clarify, I agree that I *do* want to shed light on the subject for my students. However, I also view it as my responsibility to challenge them, to push them to, and then past, what they previously thought were their intellectual limits. And this chapter, short though it is, offers many opportunities to do so. Thus, one answer to the question, "Why do I make them read this chapter?" is, "because it's good for them!" Besides, there is always the

* © 2002. Assistant Professor University of Tulsa College of Law. This is for TBD, who was the first person to appreciate my fondness for this reading. My great admiration and gratitude go to Cornell West for pointing me in this direction in the first place. Thanks also to Robert Weisberg, Kris Lackey, Alfred Konefsky, Gerald Torres, Barbara Bucholtz, and Russell Christopher who read or commented on some version of this and to the participants at Law, Culture & Humanities where it was first presented. But my deepest debt of gratitude is owed to the very first class to whom I presented this reading, my legal research and writing class at Stanford Law School. They were patient and mostly tolerant, and I think a few may have even enjoyed it.

¹ HERMAN MELVILLE, *MOBY DICK* (1851) Rinehart Ed. (1948).

² For a wonderful exposition of common misunderstandings with which law students enter law school and their common mistakes, as well as a delightfully lucid demystification of the law school process see R. MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE* (2000).

chance that one or two of them, or perhaps a whole crew, may dimly begin to grasp the concepts therein and be enriched thereby. At least that is my hope.

I do not think this hope is a vain one, judging from both the occasional comments from students and the richness of the material itself. After I've explained myself more fully in these pages, you, dear Reader, may also come to see my way of looking at it. After all, if clarity of purpose and intelligibility of the materials were the touchstones of "present-ability" of the readings we give to the students, we should end by giving them nothing at all! Or so it often seems in reading legal materials (particularly late twentieth century statutes).³ So I am not surprised when I'm reading exams and I come across yet another illustration that some central piece of information in the course has slipped by the student almost in its entirety although this cannot of course be solely attributed to the materials, or even to the student. I must share the blame, discouraging though it may be.).

Still, when I am reading exams and I come across some reference to how such and such agrees with "the rule of fast fish and loose fish" or why Melville would "hold" such and such, I feel no special remorse that I've burdened them with some reading that they obviously didn't understand, since such observations tend to join with many others of a similar ilk, drawn from the more traditional materials, in a veritable "school" of the malapropisms and misstatements with which exams are generally filled.⁴

At any rate, I find there are several pedagogical purposes to be served by this reading, purposes which I propose to lay before you so you can judge for yourself. Whether or not any of these "harpoons" find their marks in the students' minds is a matter of some luck as well as skill, (or so I tell myself). So I cannot promise that your results will be any better than mine. But it will enliven the process of this Sisyphean task we call law teaching.⁵ At least I have found it so.

³ It is my impression, completed unsupported by any systematic survey, that statutory drafting got increasingly prolix as the last century progressed.

⁴ By this I mean *no* disrespect to my students at any of the institutions at which I've taught. The study of law is difficult for most students everywhere. I find it is a rare few for whom the peculiar ways of the legal mind come as naturally as breathing and who "get it" right away. Moreover, much of this material has to "marinate" awhile before it is appreciated.

⁵ It was ever thus. If you doubt me, take a look at Karl Llewellyn's opening remarks in *The Bramble Bush*.

We have no great illusions, my brethren and I, as to how much good it will do you to be told these things in advance. We have learned by bitter experience that you will not take the things we tell you very seriously. You conceive this, I take it, to be somewhat in the nature of the pep meeting to which you were exposed when you first entered college. You expect me to tell you that you should be earnest about your work, and get your back into it for dear old Siwash, and that he who lets work slide will stumble by the way. You sit back with cynical detachment, preparing in advance to let this anticipatory jawing slide comfortably off your neck and rump. Let him have his say. That is what he gets his pay for. But we, the sophisticated youth of this new century, we know that he means little of what he says, and what he does mean, as far as *he* is concerned, means nothing to us. The ungovernable hand of fate has put him in the chair; no help for that. The workings of society require us to let his mouthings fan our ears. Another of the conditions of admission to the bar.

We have, I say, no great illusions as to how much good this talking at you is to do. Still we must perform our duty as we see it.

A Preamble

Before I launch on a catalog of the manifest virtues of this small reading I shall say by way of background how I came to stumble upon it. For it was most certainly not that I possess any encyclopaedic knowledge of either literature, or Melville in particular, that lead me straightaway to conclude that this would be an illuminating reading for students of law. Far from it. My education in that regard has been rather spotty and characterized more by idiosyncratic taste and happenstance than by any systematic survey. No, it was, in a manner of speaking, an accident. It so happened that some years after graduating from law school I came around to the belief offered then by my professors and promptly ignored by me at the time, (in the time honored tradition of youth) that I might, after all, like law teaching. Since by the time I was brought round to this belief it had been some years since I was immersed in the more theoretical aspects of the study of law I was advised to return to school and pursue an advanced degree. This I did with some reluctance and foot-dragging and no small amount of grouching over the additional expense, (which just goes to show I haven't necessarily gained in wisdom as to my own best interests over the years).

So it was that I found myself in amongst a school of young strivers known as Harvard Law School. What exhilaration! What terror! Well, despite the many moments of self-doubt and self-examination (which I discovered I shared with most of my young colleagues), it was thrilling. Just the tonic to blow the cobwebs from the brains and banish morbid thoughts! A bracing intellectual breeze blows there at all times and if you are standing in it you can't help but be swept up. And I was. Gladly. And one particular breeze, hurricane more like, was the venerable Cornell West⁶ from whom I took a class, which he co-taught with Roberto Unger, called "American Democracy."

In this course West was wont to refer to Melville as the "greatest American author" and *Moby Dick* as a "masterpiece." I was surprised by this assessment.⁷ I am always suspicious of superlatives and lists and rankings -- particularly rankings. So I greeted this pronouncement with some skepticism. I had (to the extent I had thought of it at all) vaguely assigned *Moby Dick* to that collection of what I considered "boys' stories," -- *Call of the Wild*⁸ or *Last of the Mohicans*.⁹ These tales had never held much charm for me. Nevertheless, my admiration for West, and my agreement with so many of his other pronouncements led me to experiment and to test my prior judgment of *Moby Dick* by heaven forefend, reading it. Thus, in the midst of my studies, which were conducted with a great deal of thinking on the nature of law and undertaken with an eye to teaching it someday, I came to read *Moby Dick*.

KARL LLEWELLYN, THE BRAMBLE BUSH 1-2 (1930) (emphasis in original). For those teaching: Did you feel a jolt of recognition? Does this quote seem it could have been offered at this past fall's orientation? As I say, it was ever thus.

⁶ Sadly for the denizens of Harvard, this particular force has moved off its shores onto those of New Jersey.

⁷ Perhaps the more comprehensively educated would have been less surprised. But, as I explained above, such was not my lot.

⁸ **JACK LONDON, THE CALL OF THE WILD** (1903).

⁹ **JAMES FENIMORE COOPER, THE LAST OF THE MOHICANS** (1826).

I was immediately struck by the multiple layers of its meaning and the ways in which it can be read as allegorical encompassing several things at once -- the politics of the day, philosophy, the nature of man, and so forth. It was so much more than a simple tale of a whale and two men – one unhealthily transfixed by his obsession, the other, the detached narrator, who lives to tell the tale for our benefit. I was particularly struck by chapter eighty-nine, *Fast Fish and Loose Fish* and what appeared to be a meditation by Melville on the efficacy of laws (or rules) and law making and what it seemed to say about law. So you see, it was pure happenstance. And although I have since come to know that Melville actually said a lot about law and is used by teachers of the law to illuminate various aspects of it, particularly with *Bartleby the Scrivener* or *Billy Budd*,¹⁰ I remain loyal to my first love, *Moby Dick* and the chapter therein, *Fast Fish and Loose Fish* and, of course, think it unsurpassed for the purposes I offer it described herein.

Of Etymology and Understanding

One of the first challenges for my students in grasping the meaning of this reading is a seemingly trivial one at first glance; but upon closer inspection is revealed as a harbinger of a key skill to be learned – the enlargement of one’s vocabulary and the necessity, in this pursuit, *of looking things up!* Alas, it is true the students come to us with little refinement in the use of their principal tool – the language. So they greet this reading with the misconception that it has something to do with fish racing or racing fish, (although they might well think “racy fish” if they thought of yet another alternative for “fast” and “loose”).

So they first greet the word “fast” as referring to speed. Of course, for those familiar with the book or intuitively grasping from its pairing with the word “loose,” the word “fast” is used here in the sense of “firmly fixed or attached.”¹¹ Fast is a word that has a number of different meanings from “speed” to “fastened,” from “immoral” to “soundly” or “completely” (as in “fast asleep”), from the verb meaning “to refrain from food,” to the noun of the same source. However, the use of “fast” as in “fastened” “fixed” or “secure” seems to have largely fallen out of fashion. It is not an archaic usage by any means. But by the same token, it is not the *first* meaning that recommends itself to modern students. Thus, from the outset, students must struggle, even if just a bit, with the reading. They must, as Karl Llewellyn wrote, “labor through” it.¹² So that is the first use of the reading, to force students to struggle a little, to look things up. And as we all

¹⁰ One those that I’ve been privileged to read is the unpublished manuscript of Alfred S. Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law* (manuscript on file with the author). The first Melville piece discussed in this paper is *Benito Cereno* a work which may be rather less often used or discussed than the other two but which is equally thought provoking and is particularly relevant to discussions of race, culture and stereotypes.

¹¹ **OXFORD ENGLISH REFERENCE DICTIONARY** at 507 **fast**/ fa:st/ *adj. & adv. ... 7a* “firmly fixed or attached. **b.** secure; firmly established (*a fast friendship*).

¹² “Our class instruction is invaluable to you...only as you labor through the problems first yourself, as you prepare to see what goes on in the class...and only as you work through the problems afterwards yourself (or in a group).. ..”See Llewellyn, *supra* note 5 at 52. To Llewellyn the struggle was not a bad thing from a pedagogical perspective, although I think modern views put rather less emphasis on struggle and attempt to shift more of the heavy lifting away from the students.

know, the first year of law school is characterized by, among other things, a vast amount of looking up in the dictionary all sorts of words one previously thought one knew. “Fast” here is but another example.

Upon plunging into the reading, if the student thought that the word “fast” meant “speedy” she will quickly become disabused of this notion and perhaps confused. Although I did not think to tell them so right away since, when I read it, I read this chapter in the context of the full story, I now warn my students to use a dictionary and to look up the word “fast” and think about in what sense Melville is using the word.¹³ Those who do this are, I think, rewarded for their efforts with more immediate understanding. This is an important early lesson, albeit one that may seem trivial in comparison to the weightier ones which follow.

More Substantial Concerns

At this point we must stop to consider the reading itself before going further. What is it that Melville says in this chapter? For those who have not read the book, or read it but don’t clearly remember this chapter,¹⁴ let me summarize it for you. Although I hasten to add the best route to understanding is to go to the source and read the whole chapter for your self. Still, since you may not have a copy of *Moby Dick* ready to hand, let me try to give you the gist.

In *Fast-Fish and Loose-Fish* Melville takes one of his many narrative detours in *Moby Dick* to explain an earlier reference to “waifs and waif-poles.”¹⁵ Waif poles were part of the apparatus for determining possession of whales hunted by whalers. First Melville explains the problem; *i.e.*, that many ships may be cruising and hunting in the same area and that one ship may actually harpoon and kill a whale but be unable to hold onto it for some reason. Or a whale may be wounded by one hunter who does not succeed in killing it and securing it, after which another hunter shoots at it and secures it, leading to disputes about who actually killed the whale and thus who is the rightful owner.¹⁶ And so forth and so on. “Thus the most vexatious and violent disputes would often arise between fishermen, were there not some written or unwritten, universal, undisputed law applicable to all cases.”¹⁷

Fortunately for “fisherman,” Melville says that such a “universal, undisputed law” indeed exists and is embodied in the following rules.

¹³ I hope that I am getting better too and that as I improve as a teacher my ability to convey to my students what I see in this reading improves as well.

¹⁴ And those two qualifications should capture virtually everyone since I suspect only a Melville scholar would have a clear enough recall of this chapter to allow her to make sense of what follows -- that or a photographic memory.

¹⁵ MELVILLE, *supra* note 1 at 391.

¹⁶ Property teachers will immediately see the parallels here between this problem and that arising in that famous Property case and perennial casebook favorite, *Pierson v. Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y.1805). For a wonderful exposition of the interpretive possibilities raised therein see **GETTING TO MAYBE** *supra* note 2 at 171-180.

¹⁷ *Id.* at 392.

- 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.¹⁸

Of course, this simple formula raises as more questions than it answers.

If we allow for a moment that everyone now knows that “the party fast to it” refers to the party “fastened” or attached in some way to the whale, it remains to be explained, fastened in *what* way? Herein begins the more meaty substance in the reading. It turns out that “what plays mischief with this masterly code is the admirable brevity of it, which necessitates a vast volume of commentaries to expound on it.”¹⁹ A better description of the inherent interpretive problem presented by law is hard to imagine.

One of the reasons we have laws, or so I tell my students, in adherence to the received wisdom and the conventional explanation, is an attempt to bring some order to what would (presumably) otherwise be chaos, a sort of survival of the fittest where disputes about “stuff” would all be resolved by resort to force.²⁰ Law offers an alternative to this brutal, Hobbsien sort of regime, or so the argument usually goes. But the promise of order is more illusory (albeit not *wholly* illusory) than it seems at first blush.²¹ This is in part because of the “play” in the words themselves. What do the words *mean*? What counts as “fast”? When is a fish “free”? What, indeed is a “fish.”²²

Interpretative Gambits

In the text that follows Melville alludes to what I attempt to show my students is an illustration of the move from the concrete, factually grounded “rule” to a formal rule, that is, one in which the facts which the words may have been intended to describe may not exist in fact, but where there is an understanding that the same purpose is fulfilled by treating the facts as if they represent a *form* of the facts meant to be represented by the original words.

What is a Fast-Fish? Alive or dead a fish is *technically* fast, when it is connected with an occupied ship or boat, by *any medium at all* controllable by the occupant or occupants,— a mast, an oar, a nine-inch cable, a telegraph wire, *or a strand of cobweb, it is all the same.*²³”

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Another way of stating this is: “[E]ven a very minimal legal regime, one that permitted outcomes extremely shocking to our moral sense, would impose more altruistic duty than a regime still closer to the state of nature.” Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976).

²¹ For a neat description of the seductive appeal but ultimately illusory promise of the apparently orderly “rule” see Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule Formalism*, 66 *U. CHI.L. REV.* 934 (1999).

²² This is a particularly appropriate question since we know that, technically, whales, the subject of these rules, are not “fish.”

²³ *Id.* at 392 (emphasis added).

Through the move from “line” to “cobweb” we see the evolution from what was, presumably, in the beginning an indication that the ship was *actually* connected to the whale in a manner that could be consider “fastened in fact,” into one in which “fast” was a term of art and could be satisfied by a *symbolic* “fastening.” A strand of cobweb is surely no more than a symbolic fastening. And indeed, it emerges that there *is* a form of symbolic fastening in fact - the aforementioned waif or waif-pole.

Likewise a fish is *technically* fast when it bears a waif, or any other recognized symbol of possession; so long as the party waifing it plainly evince their ability at any time to take it alongside, as well as their intention to do so.²⁴

Note that a waif is like a flag, tag or sticker. It serves the same purpose as a cattle rancher’s brand, that is, both to serve notice that someone lays claim to the animal and to offer some clue to the identity of the owner. The waif is the same thing. It is a flag on a pole.²⁵ And the move to “fastness” as a legal formality that is evidenced by the waif is one that mirrors many such moves that the students will encounter over the course of their first semester, from actual notice to constructive notice; from contract to constructive contract and so forth.

It should be clear to any legally trained reader that the above is simply brimming over with factual questions that will need to be decided in any individual case. What of the whaler who *lacks* the ability “any time to take it alongside”? And how shall we measure the waif-pole owner’s “intention” to do so? Short of mind reading, some facts will have to serve as inferential bases from which to draw conclusions about those intentions. But it is no stretch to see that what seems like it might be a fairly straightforward “rule” has devolved into a less straightforward “standard” after all.²⁶ Alternatively, you could see these as simply more complicated rules; the complications arising not because really any standard has been set, such as a “*good faith* intention to make it fast”, but rather because the “fact” to be decided, “intention” is relatively more elusive of proof than a fact like the existence of a cable that attaches the whale to a ship.

A Frolic

Here, by happenstance again, I can take the class on a brief detour to explore an interesting collateral matter. (Or maybe it is not collateral, but rather foundational? I’m not sure.) And this is an issue about the efficacy and just general wonderfulness of a systems of laws as opposed to some alternative. As I say, the traditional justification offered for “the rule of law” is that it offers a pleasing and attractive alternative to “the

²⁴ *Id.* Of course after the first course of law any student should immediately grasp that it may be far from “plain” what will be recognized as “plainly evinc[ing]” – just to name one ambiguity.

²⁵ In one class I gave my students the assignment to find a picture of a waif or a waif pole such as was alluded to by Melville and bring it to class. I have attached one of the results to this article as an appendix.

²⁶ For more discussion of this metamorphosis see Kennedy’s *Form and Substance supra* at note 20 at 1700-02. Kennedy’s more complicated argument, that neither form has a determinate normative content is, of course, part of what I hope to convey to the students in the course of the entire semester. But it strikes me as rather too sophisticate to try right at the beginning with this reading, although it surely can be done. But to date I’ve always thought I had my hands full trying to get the first order moves set out.

law of the jungle.” Such justifications are often intoned with all the solemnity deemed appropriate to the gravity of the matter – that is avoiding the war of all against all. And, alas, often with all the self-congratulatory air that suggests that “this is the best of all possible worlds and it has been discovered by us,” that one suspects marked the apex of the British Empire.²⁷

Be that as it may, this is a traditional justification for the existence of law. However, it is one that has been challenged most brilliantly by Professor Robert Ellickson in his seminal work, *Order without Law*.²⁸ In this tidy tome, Ellickson suggests that in fact a vast number of the disputes that arise in the world are settled without resort to either law *or* violence and that therefore the choice is not an either/or dichotomy as it is so often presented. Rather, many, if not most, disputes in certain types of circumstances are resolved by virtue of the pressure of the social norms prevalent in the particular community. And Melville’s whaling laws seem to represent examples of just such norms rather than “laws” *per se*. Indeed, although Melville refers to these norms as “laws,” he clearly says, “the American fishermen *have been their own legislators and lawyers* in this matter.”²⁹ So this reading offers the opportunity to explore Ellickson’s insight and to ask whether “the rule of law” has all that much to recommend it over a system in which people can manage to settle their agreements both peacefully and cheaply, apparently by agreement, and without the need to resort to nasty things such as depositions and cross-examination.

It is thus perhaps no accident that Ellickson himself uses *Fast-Fish and Loose-Fish* as an illustration of just such norms. However, his use of the chapter offers several additional teaching tools that may not have been the ones Ellickson intended. First, Ellickson “corrects” Melville’s characterization of there only being two rules by breaking down the category of rules into three. However, when one reads these new rules carefully, it is not at all clear that Ellickson isn’t simply refusing to allow the definition of “fast” to be expanded *formally* by the use of a waif-pole and rather insists that this presents a “new rule,” the “iron holds the whale” rule. Thus, by juxtaposing the Melville reading with a section from Ellickson’s book on the same subject of the rules of whaling, we can explore the two proposed regimes of rules and see if they are really different *rules* or whether they aren’t different *descriptions* of what are essentially the *same* rules.³⁰

What is more surprising is that Ellickson seems to read Melville very literally in this section of *Order Without Law*. That is, he seems to take at face value the description Melville provides for whaling norms and appears to miss the sarcasm in the latter part of the chapter, a point I will address at greater length below, but which for now I can say calls into some question the apparently rosy picture of the operation of social norms that

²⁷ At this particular point in history, Prime Minister Blair’s flattering rhetorical flourishes notwithstanding, it would not do to be too smug or too quick to assume American moral superiority on the subject of empires.

²⁸ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991).

²⁹ MELVILLE, *supra* note 1 at 392 (emphasis added).

³⁰ As I say, it is not entirely clear to readers more than a century later, who are not schooled in the arcane arts of whaling, that these are two different proposals in fact, versus different *descriptions* of the same procedure. However, I am open to being shown they are in fact different.

Order Without Law may suggest to some readers. As we discuss both readings I ask the class to consider in Ellickson's examples the status of those who violate the norms about resorting to lawsuits. The answer is that for the most part they are "outsiders." And although in the context of ranchers and city dwellers it is not at all apparent that we should view the city dwellers as an oppressed minority, transpose the context to, for instance, the desegregation efforts against both formal and informal segregation and the question reorients itself. Then the outsiders resort to "the rule of law" seems less like a failure of neighborly cooperation and more like a protest, or use of an alternative force, against a "norm" which is not of their making.

For are not social norms created, however unconsciously perhaps, from those in the position to make and enforce them? And more troublingly where is the "court of appeal" from a social norm if not to that same personage or personages doing the dictating in the first place, however unwittingly?³¹ Is it possible that there are ranchers who would like to resort to the courts too but don't do so because that is not the "norm" of the community in which they live and they don't want to suffer the consequences of violating the norm? If so, the picture painted of an apparently tranquil community *may* be deceptive if there is no forum in which the disgruntled can make their disgruntlement felt.

All these are intriguing questions and some more observations may unfold a bit more as we proceed. However, at this point we must return to consider enforcement and the process by which an interpretation gains or loses ground or perhaps even more commonly, the interpretation *appears* unaltered but somehow an additional factor, heretofore unseen by the parties, makes its way into the case.

Enforcement: Catch as Catch Can

As Melville points out, these rules *sound* very nice, assuming we can sort all of their legal complexities out and figure out what "counts" as a "waif" or "fast" and such like. But they may not be enough.

"These are scientific commentaries; but the commentaries of the whalemens themselves sometimes consist in hard words and harder knocks –the Coke-upon-Littleton of the fist."³²

³¹ At this stage I should hasten to add that saying norms are socially constructed does not clearly assign responsibility to the "powerful" group alone for the creation of these norms. The less powerful also contribute insofar as they accede, police and internalize these norms. For a more thorough discussion of this phenomena see, e.g., Steve L. Winter, *The "Power" Thing*, 82 **V.A. L. REV.** 721 (1996). However, having conceded that contribution does not necessarily amount to an assessment of its equality of contribution and has nothing to say with respect to responsibility. For my purposes here (and it seems to me from Melville's perspective as well) the point is the phenomenological observation about the fact that he who appears to "win" disputes over "stuff" (be it people, things, land, etc.) often does so rhetorically and through the operation of law. This leads to the suspicion that physical power lurks in the background of assertedly neutral decision-making processes like law. That suspicion gains strength as interpretative "leaps" are made that cannot be defended deductively.

³² *Moby Dick* at 392.

Here Melville interjects what might be called a little legal realism and says, in effect, “Yes, these rules are all very nice in theory. But how do they work out on the ground as it were?” To which he responds, how it works out rather depends on the inherent fairness and goodness of the more powerful claimant who is in a position to enforce his claim by force, whether or not his claim has a basis in the facts and the rules as set out above.

True, among the more upright and honorable whalemens allowances are always made for the peculiar cases, where it would be an outrageous moral injustice for one party to claim possession of a whale previously chased or killed by another party. But others are by no means so scrupulous.³³

And by way of illustration of this problem he offers the case of a whale pursued by one ship whose crew had to let it go before being able to hold it “fast” because they had to abandon their ship and lines because of the danger posed by the floundering whale. Then these whalemens had to sit by and watch another ship come upon the injured whale and manage to kill and secure it right before their very eyes. When they complained to the captain of the second whaler he not only ignored their claim to first possession, but asserted that he could also keep their lines and boat that were attached to the whale as well!

The first group of whalers brought suit against the second for recovery, not only of the ship and lines, but for the value of the whale that was the cause of their loss. In reporting on the argument of defendant’s counsel in the case, Melville also offers an example of reasoning in a common law system, that is, of reasoning by analogy from a past case to a present case. This is, of course, one of the principal skills we hope to instill in our students and thus it is of particular interest how that reasoning proceeds, bearing in mind the “Coke-upon-Littleton of the fist” that lurks in the background. In the actual encounter the whaler of superior strength was able to enforce his claim, even though a more “honorable” whaler might have allowed as the claimants ought, in all fairness, to be allowed to share in the spoils and permitted them to do so. These defendants did not. And so the plaintiffs brought the case to court. Here then, the student might expect, is where the law of the jungle, that “Coke upon-Littleton of the fist” will be supplanted by the rule of law and “allowances” be made. (Again, the parallel can be drawn to desegregation and the role of law in providing a forum for less powerful, only this time one can ask if there is even the slightest reason to believe that the plaintiffs in this case can begin to claim the moral weight and desert of the former. Perhaps. Perhaps not.)

But where in “the law” is the law about these “allowances” mentioned by Melville? Nowhere to be seen -- unless of course one views the poles and lines as waifs. But then plaintiffs clearly lacked the ability to hold the whale fast. Thus, a mere reading of the “text” of the rules as set forth by Melville would seem to favor the defendant. So does the court in the case.

³³ *Id.*

In arguing his case for why the defendants should keep the whale an analogy is drawn by the defendants' lawyer, a Mr. Erskine, who claimed that the whale was like the wife in a then notorious criminal conversation case.³⁴ In that case he argued;

[T]hough the gentleman [the husband] had originally harpooned the lady, and had once held her fast, and only by reason of the great stress of her plunging viciousness, had at last abandoned her; yet abandon her he did, so that she became a loose fish; and therefore when a subsequent gentleman re-harpooned her the lady then became that subsequent gentleman's property along with whatever harpoon might have been found sticking in her.³⁵

So too in this case, argued Mr. Erskine, was the property "loose" for the taking of any newcomer such as his clients. The court was convinced. The upshot was that the hapless whalers, who had lost not only their whale but their ship as well, could not convince the court that they were entitled to the whale. Still, all was not lost. The court held that *the ship*, which the plaintiffs abandoned only to save their lives, should be returned to them. On what principle or rule is left unstated. Perhaps on the grounds of those "allowances" whatever they may be? But it ruled that the "whale, harpoon, and line, they belonged to the defendants; the whale, because it was a Loose-Fish at the time of the final capture; and the harpoons and line because when the fish made off with them it (the fish) acquired a property in those articles; and hence anybody who afterwards took the fish had a right to them."³⁶

Could ever a decision better illustrate the absurd lacuna of the law? The *whale* acquired a property interest? Only lawyers, worn down and overwhelmed by the sheer number of such bizarre fictions, can entertain such ideas. But do perhaps the absurdities serve as a sideshow to distract from the main event? Can it be mere coincidence that it was the more powerful defendants' whose capture was thus secured by virtue of this absurd legal device?³⁷ The remainder of the chapter suggests that Melville at any rate thinks not.

³⁴ Criminal conversation, a largely (and blessedly) defunct cause of action, is described in Black's Law Dictionary as follows:

Defilement of the marriage bed, sexual intercourse of an outsider with husband or wife, or breaking down of the covenant of fidelity. Tort action based on adultery, considered in its aspect of a civil injury to the husband or wife entitling him or her to damages; the tort of debauching or seducing of a wife or husband. Often abbreviated to *crim. conv.* [as indeed it was in *Moby-Dick*] Statutes in several states prohibit actions for criminal conversation. See **Alienation of affections; Heart-balm statutes.**

BLACKS LAW DICTIONARY (5th Ed. 1979) at 366.

Of course the gender-neutral language in this definition glosses over the fact that, because of the doctrine of *coverture*, wives could not employ this cause of action because their personhood was subsumed into the husband's. A wife had had no right to sue. It was not too many decades after the abolishment of the doctrine of *coverture* that criminal conversation as a cause of action lost its charm. Thus, the window of opportunity for a woman to sue for the alienation of her husband's affections must have been rather brief. Here again is an opportunity to observe a curious parallelism between the interests of those mostly in charge of the law and the laws contents.

³⁵ *Id.* at 393.

³⁶ *Id.* at 393-94.

³⁷ See *supra* note 34.

Great Principles

A common man looking at this decision of the very learned judge, might possibly object to it. But ploughed up to the primary rock of the matter, ...these two laws touching Fast-Fish and Loose-Fish, I say, will, on reflection, be found the fundamentals of all human jurisprudence; for notwithstanding its complicated tracery of sculpture, the Temple of the Law, like the Temple of the Philistines, has but two props to stand on.³⁸

These two props he goes on to maintain are the two with which he began: which I paraphrase as “He who has got it gets to keep it. Stuff that doesn’t have anyone claiming who had the power to enforce that claim is free to be scooped up.” He might as well have said it was one rule: Might makes Right. *That* seems to be the principle that Fast Fish and Loose-Fish illustrates - that for all its “complicated tracery” the law is often found to be the servant of the powerful. And indeed Melville proceeds to describe the various areas in which this principle might be observed to play itself out.

What was America in 1492 but a Loose-Fish, in which Columbus struck the Spanish standard by way of waiving it for his royal master and mistress? What was Poland to the Czar? What Greece to the Turk? What India to England? What at last will Mexico be to the United States? All Loose-Fish.³⁹

Indeed. And here is the lesson that I think perhaps most need impressing upon these young minds: the plasticity with which the law can be molded to accommodate the desires of those in a position to make those desires felt, thus lending an appearance of detachment and dispassion from their baser exercises of what would otherwise be raw power. Given that large portions of what we teach, and virtually all of the rhetoric of the law, seems designed to obscure or deny this point, or perhaps more charitably, to search for a methodology which can be employed without the distorting effects of power, it is never too soon to call students attention to these striking parallels.

Conclusion

It pays to keep this, these “fundamentals of all human jurisprudence,” in mind lest one be unduly swept away by fine sounding language Melville seems to say. In fact, in these days of preemptory strikes, “regime”-making and unmaking, perhaps this is a lesson that has been rather neglected in general and is in need of some sprucing up. Of course it hardly seems that education or experience could really turn or stem the flood of such ambitions. History bears witness to that. Why should the present age offer any surcease? And what makes us think that we shall have the equipment with which to extricate ourselves from this mess? Or so Melville hints at the end, suggesting that he might have been a pre-post-modernist. And while it may be discouraging for my students

³⁸ *Id.* at 394.

³⁹ *Id.*

to question the possibility of neutrality or their ability to achieve it, it appears to me that a little humility might not be a bad thing.

What are the Rights of Man and the Liberties of the World but Loose Fish? What all men's minds and opinions but Loose-Fish? What is the principle of religious belief in them but a Loose-Fish? What to the ostentatious smuggling verbalists are the thought of thinkers but Loose-Fish? What is the great globe itself but a Loose-Fish? And what are you, reader, but a Loose-Fish and a Fast-Fish too?⁴⁰

⁴⁰ *Id.*

Appendix I: *Storm Warnings*

This reading does not come without some costs other than those already explored. There are aspects of the reading that are troubling or potentially troublesome in a law school class in 2003. The first is the discussion of the case Melville uses to illustrate the problems in adjudicating these disputes where counsel for one of the parties analogizes the party who lost control of the whale in question as like a husband who had abandoned his wife to another man

Similar, but more subtle issues arise in the example of the lender charging a “ruinous discount” (that is, interest rate) who he names “Mordecai.”⁴¹ This can be fairly read as an anti-Semitic allusion. I don’t think there is any getting around that. The dilemma then is how to handle these aspects of the reading. Should it not be used at all? Without launching into a general defense of the value of using materials which, by virtue of their , age reflect attitudes which are unacceptable now but which were unexceptional then, it is obvious that I’ve rejected that option. Still, if others feel these aspects of the chapter disqualify it from use, I can sympathize and I’m not sure I can say that is the wrong conclusion. Clearly I don’t agree that all value is lost. But if one decides to use the material, it is unclear how to best address these aspects of it. Pointing them out seems to underscore their importance. Worse, it may cause some students to make an association where they previously had not seen one. (Although, query, is that worse or better?) On the other hand, not to comment seems equally suspect, as if these aspects were trivial. I tend to play it by ear and wait for reactions to it, to try to gauge the temperament and atmosphere in the class before concluding that a comment is necessary. I have no idea though whether this is the best decision on the matter or the most defensible. But it is the one that seems like the best I can do at this point. And perhaps there is no better reason for that than that I want to continue to use this reading.

⁴¹ *Id.* at 394.

