

## 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*.<sup>1</sup> 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?"<sup>2</sup> "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 we will teach them, and what they are expected to know.<sup>3</sup> 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 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, teaching them to see and then use this ambiguity is a central task that we set for ourselves.

Now, given that I have readily admitted at the outset that my selection 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,

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1. HERMAN MELVILLE, *MOBY DICK OR THE WHALE* (Rinehart 1948) (1851) [hereinafter *MOBY DICK*].

2. For a defense of using fiction outside of literature studies, see John R. Dorocak & S.E.C. Purvis, *Using Fiction in Courses: Why Not Admit It?*, 16 *LAW & LITERATURE* 65 (2004).

3. 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 RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE* (1999).

if so, 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 the law professor's 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 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 students, we should end by giving them nothing at all! Or so it often seems in reading legal materials (particularly late-twentieth-century statutes).<sup>4</sup> 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. Of course, this cannot 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. Such observations tend to join with many others of a similar ilk, drawn from the more traditional materials, in a veritable "school" of malapropisms and misstatements with which exams are generally filled.<sup>5</sup>

At any rate, I find there are several pedagogical purposes to be served by this reading, purposes which I set 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

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4. It is my impression, completely unsupported by any systematic survey, that statutory drafting became increasingly prolix as the last century progressed.

5. 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.

will enliven the process of this Sisyphean task we call law teaching.<sup>6</sup> At least I have found it so.

#### A PREAMBLE

Before launching into 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 possessed any encyclopaedic knowledge of literature, or of 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 by my professors, and promptly ignored by me at the time (in the time-honored tradition of youth), that I might, after all, like teaching law. Since, by this time, 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, 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).

I took the plunge and found myself in amongst a school of young strivers known as Harvard Law School. What exhilaration! What terror!

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6. 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 a cynical detachment, prepared 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 to 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.

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

Yet 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. One particular breeze, hurricane more like, was the venerable Cornell West,<sup>7</sup> from whom I took a class called "American Democracy," which he co-taught with Roberto Unger.

In this course, West was wont to refer to Melville as the "greatest American author" and *Moby Dick* as a "masterpiece." West's assessment surprised me.<sup>8</sup> 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"—*The Call of the Wild*<sup>9</sup> or *The Last of the Mohicans*.<sup>10</sup> 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, actually reading it. Thus, it was, 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 toward teaching it someday, that I came to read *Moby Dick*.

I was immediately struck by the multiple layers of its meaning and the ways in which it can be read allegorically, 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 89, *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. I have since come to know that Melville actually said a lot about law, particularly with *Bartleby the Scrivener*<sup>11</sup> and *Billy Budd*,<sup>12</sup> and he is used by many

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

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

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

10. JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS* (Philadelphia, H.C. Carey & I. Lea 1826).

11. HERMAN MELVILLE, *Bartleby the Scrivener*, in *THE PIAZZA TALES* 19 (1930).

12. HERMAN MELVILLE, *BILLY BUDD* (F. Barron Freeman ed., Harvard Univ. Press 1948).

teachers of the law to illuminate various aspects of it.<sup>13</sup> However, 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 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, the students come to us with little refinement in the use of their principal tool—the language. Thus, 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.”<sup>14</sup> Fast is a word that has a number of different meanings from “speedy” to “fastened,” from “promiscuous” to “sound” (as in “fast asleep”), from the verb meaning “to abstain from food,” to the noun of the same source.<sup>15</sup> 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.<sup>16</sup> So that is the first use of the reading, to force

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13. See, e.g., Alfred S. Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 *BUFF. L. REV.* (forthcoming 2004) The first Melville piece discussed in Konefsky’s paper is *Benito Cereno*, a work which may be less often used or discussed than *Bartleby the Scrivener* or *Billy Budd*, but which is equally thought provoking and particularly relevant to discussions of race, culture, and stereotypes. HERMAN MELVILLE, *Benito Cereno*, in *THE PIAZZA TALES* 66 (1930).

14. OXFORD ENGLISH REFERENCE DICTIONARY 507 (Judy Pearsall & Bill Trumble eds., 2d ed., rev. 2002).

15. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 826 (1986). Among the myriad definitions, some refer specifically to whaling. See *id.* (“fast . . . 6 . . . d (1) of a harpoon : stuck securely in a whale (2) of a whale : secured by a harpoon; esp : harpooned securely by a certain crew and consequently the rightful possession of that crew regardless of subsequent claims (3) of a whaleboat : secured to a whale by harpoon . . .”).

16. Llewellyn, *supra* note 6, at 52. “Our class instruction is invaluable to you. But . . . only as you labor through the problems first yourself, as you prepare yourself to see what goes on in the class. And . . . only as you work through the problems *afterward* yourself (or in a group) . . .” *Id.* To Llewellyn, the struggle was not a bad thing from a pedagogical perspective, although I think modern

students to struggle a little, to look things up. And as we all 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” 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, initially, 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. 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

Before going further, we must stop to consider the reading itself. 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,<sup>17</sup> let me summarize it for you. Although I hasten to add that the best route to understanding is to go to the source and read the whole chapter for yourself. Still, since you may not have a copy of *Moby Dick* at 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.”<sup>18</sup> 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 fail 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.<sup>19</sup> And so forth and so on. “Thus the most

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views put rather less emphasis on struggle and attempt to shift more of the heavy lifting away from the students.

17. These 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.

18. *MOBY DICK*, *supra* note 1, at 391.

19. 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 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805). For a wonderful exposition of the interpretive possibilities raised therein, see FISCHL & PAUL, *supra* note 3, at 171–180.

vexatious and violent disputes would often arise between the fishermen, were there not some written or unwritten, universal, undisputed law applicable to all cases.”<sup>20</sup>

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

- 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.<sup>21</sup>

Of course, this simple formula raises 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 of the reading. It turns out that “what plays the mischief with this masterly code is the admirable brevity of it, which necessitates a vast volume of commentaries to expound it.”<sup>22</sup> 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 to 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.<sup>23</sup> Law offers an alternative to this brutal, Hobbesian 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.<sup>24</sup> 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”?<sup>25</sup>

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20. *MOBY DICK*, *supra* note 1, at 392.

21. *Id.*

22. *Id.*

23. 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, 1720–1721 (1976).

24. 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).

25. This is a particularly appropriate question since whales, the subject of these rules, are technically not fish.

## 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 apparent factual content of the wording of the rule, which the words may have been intended to describe, need not actually exist, but where there is an understanding that the rule’s purpose is fulfilled by treating other facts as if they represent a *form* of the facts meant to be represented by the original words. This is hard to describe. It is better illustrated by Melville’s definition of a “fast-fish.”

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.*<sup>26</sup>

Through the move from “mast” 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 considered “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 with which this chapter began.

Likewise a fish is *technically* fast when it bears a waif, or any other recognised 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 so to do.<sup>27</sup>

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 as to the identity of the claimant. The waif is the same sort of device. It is a flag on a pole.<sup>28</sup> And the move to “fastness” as a legal formality that is evidenced by the

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26. *MOBY DICK*, *supra* note 1, at 392 (emphasis added).

27. *Id.* (emphasis added). Of course, any first year law student should immediately grasp that it may be far from “plain” what will be recognized as “plainly evinc[ing]”, just to name one ambiguity.

28. In one class, I gave my students the assignment to find a picture of a waif or a waif-pole. I have included one of the results of this assignment as Appendix II.



waif mirrors many such moves that students will encounter over the course of their first semester, from actual notice to constructive notice, from written contract to constructive contract, and so forth.

It should be clear to any legally trained reader that the passage above is simply brimming over with factual questions that 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 a fairly straightforward “rule” has devolved into a less-straightforward “standard” after all.<sup>29</sup> Alternatively, you could see these as simply more complicated rules; the complications arising not because 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: the efficacy and just general wonderfulness of a system of laws, as opposed to some alternative.<sup>30</sup> As I say, the traditional justification offered for “the rule of law” is that it offers a pleasing and attractive alternative to “the 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).<sup>31</sup>

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*.<sup>32</sup> In this tidy tome, Ellickson suggests that in fact a vast number of the disputes

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29. For more discussion of this metamorphosis, see Kennedy, *supra* note 23, at 1700–01. 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. However, it strikes me as rather too sophisticated to try right at the beginning with this reading, although it surely can be done, but I’ve always thought I had my hands full trying to get the first-order moves set out.

30. Or maybe it is not collateral, but rather foundational? I’m not sure.

31. At this particular point in history it would not do to be too smug or too quick to assume American moral superiority on the subject of empires.

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

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.<sup>33</sup> 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.<sup>34</sup> Melville's whaling laws seem to represent examples of just such norms, rather than "laws" *per se*.<sup>35</sup> 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."<sup>36</sup> 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 settle their differences both peacefully and cheaply, apparently by agreement, and without the need to resort to nasty things such as depositions and cross-examinations.

It is thus perhaps no accident that Ellickson himself uses *Fast-Fish and Loose-Fish* as an illustration of such norms.<sup>37</sup> However, Ellickson's 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.<sup>38</sup> 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.<sup>39</sup>

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. Ellickson

33. *See id.* at 137–47 (critiquing the legal-centralist tradition).

34. *See id.* at 141–43 (discussing studies indicating that "people [often] look primarily to norms, not to law, to determine substantive entitlements").

35. *See id.* at 192 ("Anglo-American whaling norms seem to have emerged spontaneously over time, not from decrees handed down by either organizational or governmental authorities.").

36. *MOBY DICK*, *supra* note 1, at 392 (emphasis added).

37. *ELICKSON*, *supra* note 32, at 191–206.

38. *Id.* at 197. "Whaling norms were not tidy, and were certainly less tidy than Melville asserted in *Moby-Dick*. Whalers developed three basic norms, each of which was adapted to its particular context." *Id.*

39. 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.

also 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 will say calls into question the apparently rosy picture of the operation of social norms that *Order Without Law* may suggest to some readers.<sup>40</sup> 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.<sup>41</sup> The answer is that for the most part they are "outsiders."<sup>42</sup> 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.<sup>43</sup>

For are not social norms created, however unconsciously perhaps, by those in the position to make and enforce them? And, more troublingly, to whom does one petition as 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?<sup>44</sup> Is it possible that there are ranchers who would

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40. Ellickson himself stresses that, "because the norms that help a group's insiders may be detrimental to outsiders to the group, the hypothesis plainly does not support a blanket normative conclusion that the rule of law should give way to a rule of norms." Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J.L. & HUMAN. 333, 335 (2003). Both this article and the one that it responds to provide more elaborations of these problems and many others. See Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School"*, 15 YALE J.L. & HUMAN. 295 (2003).

41. See ELLICKSON, *supra* note 32, at 52–64 (categorizing methods by which neighbors in Shasta County, California resolve livestock-trespass disputes).

42. See *id.* at 64 (summarizing the prevailing attitude that neighbors who resorted to lawsuits are "'bad apples,' 'odd ducks,' or otherwise . . . not aware of the natural working order").

43. This is an example, I think, of the sort of critical reframing that Professors Susan Sturm Lani Guinier urge in their outstanding and stimulating article, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515 (2003).

We emphasize the importance of developing a "critical perspective," meaning we focus students' attention on the assumptions and values that underlie conventional approaches to controversial issues. We treat race (and other socially constructed but politically, socially, and economically meaningful categories of difference) as significant not only to the self-identified members of a particular group but also as a lens for identifying more general patterns of institutional dysfunction or unfairness. We use a brainstorming framework to invite students to think outside the box.

*Id.* at 530–31. It should be clear that this is what I am attempting to do as well, albeit with far less in the way of imaginative structures and techniques than Professors Sturm and Guinier.

44. 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

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 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."<sup>45</sup>

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 might respond, "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." In his own words, Melville continues:

True, among the more upright and honorable whalemens allowances are always made for 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.<sup>46</sup>

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thorough discussion of this phenomena, see, e.g., Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721 (1996). However, having conceded that contribution does not necessarily amount to an assessment of the equality of contribution and has nothing to say with respect to responsibility, for my purposes (and it seems to me from Melville's perspective as well) the point is the phenomenological observation of 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. This suspicion gains strength as interpretative "leaps" are made that cannot be defended deductively.

45. *MOBY DICK*, *supra* note 1, at 392.

46. *Id.*

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 the danger posed by the floundering whale forced them to abandon their ship and lines.<sup>47</sup> These whalers then had to sit by as another ship came upon the injured whale and watch as its crew managed to kill and secure it right “before [their] very eyes.”<sup>48</sup> When they complained to the captain of the second whaler he not only ignored their claim to first possession, but asserted that he could keep their lines and boat that were attached to the whale as well!<sup>49</sup>

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.<sup>50</sup> In reporting on the argument of defendants’ 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 conceded that the claimants ought, in all fairness, to be permitted to share in the spoils. However, 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, one can draw the parallel to desegregation and the role of law in providing a forum for the 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 first whalers’ poles and lines as “waifs” which signaled their possession. But even 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 defendants. And so does the court in the case.<sup>51</sup>

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47. *Id.* at 392–93.

48. *Id.* at 393.

49. *Id.*

50. *Id.*

51. *Id.* at 393–94.

In arguing his case for why the defendants should keep the whale, the defendants' lawyer, a Mr. Erskine, made an analogy. He likened the whale to the wife in a then-notorious, and recently argued, criminal conversation case in which a husband sued another man who he accused of illegal intimacy with his wife.<sup>52</sup> There, Mr. Erskine argued for the defendant that the husband had no claim because

though the gentleman [the husband] had originally harpooned the lady, and had once had 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.<sup>53</sup>

So, too, in this case, argued Mr. Erskine, was the property, the whale, "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.<sup>54</sup> Perhaps on the grounds of those "allowances," whatever they may be. But it ruled that the

whale, harpoons, and line, they belonged to the defendants; the whale, because it was a Loose-Fish at the time of the final

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52. *Id.* at 393. Criminal conversation, a largely 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 a 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. con.* [as indeed it was in *Moby Dick*]. Statutes in several states prohibit actions for criminal conversation. See Alienation of affections; Heart-balm statutes.

BLACK'S LAW DICTIONARY 336 (5th ed. 1979). Of course, the gender-neutral language in this definition glosses over the fact that, because of the doctrine of coverture, a wife could not employ this cause of action because her personhood was subsumed into her husband's. A wife 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 its contents.

53. *MOBY DICK*, *supra* note 1, at 393.

54. *Id.*

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.<sup>55</sup>

Could ever a decision better illustrate the absurd lacunas of the law? The *whale* acquired a property interest? Only lawyers, worn down and overwhelmed by the sheer number of bizarre fictions with which the law is rife, can entertain such ideas. But do the absurdities perhaps 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?<sup>56</sup> The remainder of the chapter suggests that Melville, at any rate, thinks not.

#### 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.<sup>57</sup>

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 asserting 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 Melville proceeds to describe the various areas in which this principle might have played 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.<sup>58</sup>

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55. *Id.* at 393–94.

56. *See supra* text accompanying notes 52–53.

57. *MOBY DICK*, *supra* note 1, at 394.

58. *Id.* at 395.

Indeed. And here is the lesson that I think perhaps most needs 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, seem 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, Melville seems to say, lest one be unduly swept away by fine sounding language. In fact, in these days of preemptory strikes and "regime"-making and unmaking, perhaps this lesson has been rather neglected 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 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 thoughts 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?<sup>59</sup>

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59. *Id.*



## APPENDIX I: STORM WARNINGS

This reading does not come without some costs other than those already explored. Certain aspects of the reading are troubling or potentially troublesome in a modern law-school class. First, Melville illustrates the problems with adjudicating these disputes with a case in which counsel for one party analogizes the other party, who lost control of a whale, to a husband who has abandoned his wife to another man. Similar, but more subtle, issues arise in an example of a lender, who he names as “Mordecai,” charging a “ruinous discount” (that is, interest rate).<sup>60</sup> This can be fairly read as an anti-Semitic allusion. I don’t think there is any getting around that.

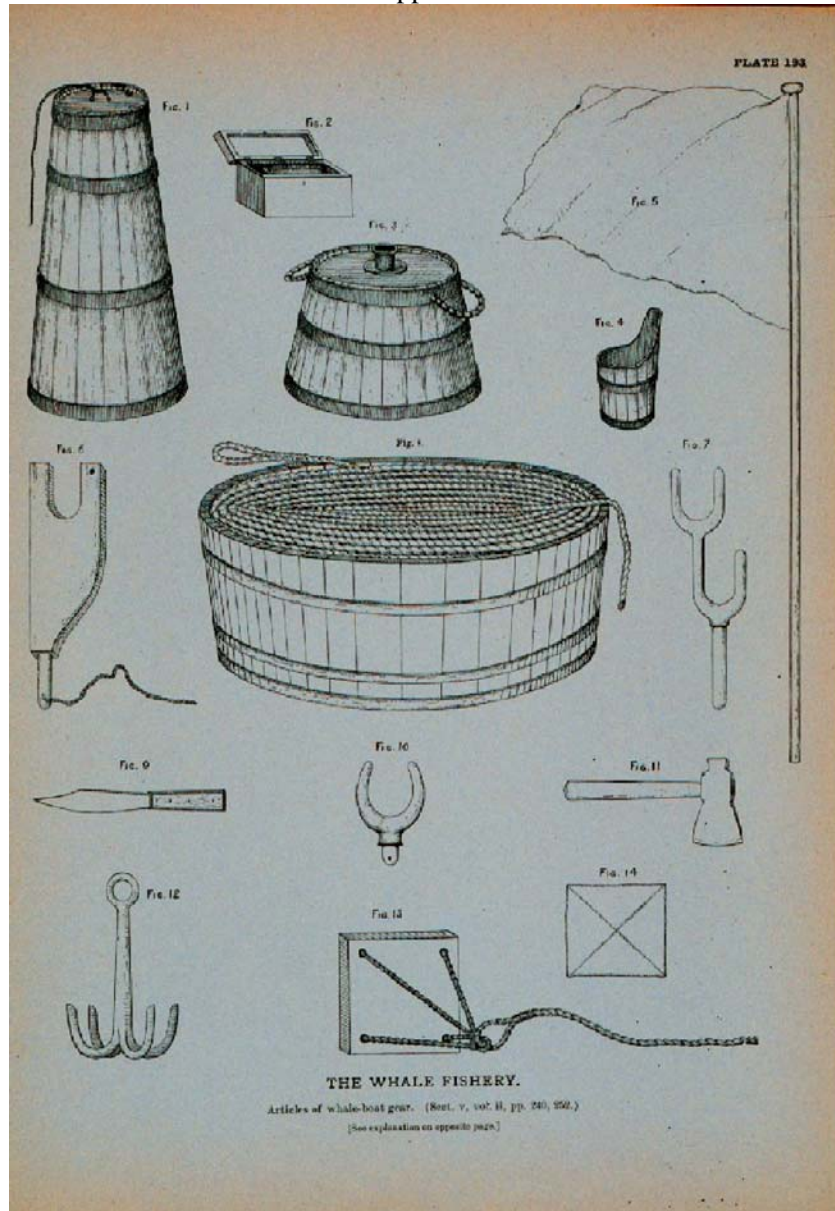
The dilemma, then, is how to handle these aspects of the reading.<sup>61</sup> Should it not be used at all? Without launching into a general defense of the value of using materials which, by virtue of their age reflect attitudes which are unacceptable now but were relatively unexceptional when written, 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. In some respects it further illustrates the last point about the power to make the rules.

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, to not comment seems equally suspect, as if these aspects were trivial, which they most certainly are not. I tend to play it by ear and wait for reactions in order 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 or most defensible decision on the matter, but it seems like the best I can do at this point. And perhaps there is no better reason for that than my desire to continue using this reading.

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60. *Id.* at 394.

61. Here the reader may once again want to refer to Professors Sturm and Guinier’s article since it deals in some detail with precisely these sorts of problems. Sturm & Guinier, *supra* note 43. Because the focus of my course, and indeed of this reading, is not gender or racial justice issues, I cannot explore them with the depth that Professors Sturm and Guinier do in their course and describe in their article. But their observations and experiences should be consulted with respect to this type of problem.

Appendix II<sup>62</sup>

62. Nat'l Marine Fisheries Serv., Nat'l Oceanic & Atmospheric Admin., Historic NMFS Collection, available at <http://www.photolib.noaa.gov/historic/nmfs/figb0194.htm> (last modified Sept. 30, 2002).