Laws of honor

As Herman Melville and William Scoresby recognized, the whaling customs of fast-fish, loose-fish, and iron holds the whale were never strictly applied at sea. A fairness standard which Melville called justice and Scoresby deemed the “laws of honor” was also recognized. Whalemen were never able or never cared to explain exactly what they meant by fairness. Captains serving as expert witnesses in American courts often testified as to their personal sense of what was fair with the caveat that they spoke only for themselves. Yet, these inchoate ideas about just behavior were shared by whalemen to the degree that they were recognized when followed or breached. Major breaches such as failure to render assistance in times of danger or the refusal to provide accurate intelligence as to conditions or the location of whales were serious matters because they touched on the safety of crews and the economic imperative of killing and rendering whales.

Notions of fairness are always difficult to define and, perhaps, even more difficult to apply in the courtroom. While American courts were content to base a decision on a whaling custom that was – like fast-fish, loose-fish, or iron holds the whale – reducible to a relatively coherent rule, vague statements of fairness were quickly dismissed. The obligation to provide accurate – or at least not misleading – information to competitors which served as a sort of Golden Rule for whalemen was, for example, viewed by courts as unenforceable. Where whalemen saw foundational principles, judges observed behavior that, while perhaps admirable, was neither contractually binding nor, in the breach, tortious. This inability of courts to grasp the importance of fairness in resolving property disputes in combination with an abiding preference for settled rules does much to explain why legal professionals and institutions either failed or chose not to recognize the fluidity of customs and the improvisational nature of how whalemen went about their business.
The focus of the American whaling industry shifted to the bowhead and right whale fisheries of the North Pacific in the 1840s. Prior to 1840, there were no American whalers in the North Pacific. By 1855, half of all American whale ships could be found in latitudes above 50 degrees north. As with much of whaling history, the push toward Arctic waters at mid-century can be explained by a combination of supply and demand. Sperm whales in their Pacific habitat south of 40 degrees north grew increasingly difficult to catch after 1820. In the 1820s, a ship could expect to approach its capacity of sperm oil. By the late 1840s, the number of barrels of sperm oil per shipping ton had dropped in the previous twenty-five years from approximately 7½ to less than 5. The increasing scarcity of sperm whales coincided with a spike in the value of whale bone. The dollars per pound real value of unprocessed whale bone for the New Bedford market rose in the five year period beginning in 1839 from 0.16 to 0.52. A shift in women’s fashion to skirts made fuller by whale bone and a drop in sperm oil demand after 1840 drove whalenmen north to the baleen whale laden waters of the North Pacific. Fisheries off the coast of Kamchatka and in the Gulf of Alaska flourished by 1845, the year the first American whaler ventured into the Sea of Okhotsk. The expansion of the North Pacific fisheries was complete with the 1848 passage of the Superior of Sag Harbor through the Bering Strait and into the Arctic Ocean.¹

Whalemen intensively hunted bowheads in the Sea of Okhotsk for about twenty years. By 1871, commercial whaling in the Sea of Okhotsk was finished. No American ships slipped through the Kuril Islands that summer to chase bowheads around the Shantar Islands or any of the bays favored by hunters. The sudden rise and precipitous fall of the Sea of Okhotsk fishery is, in many respects, the quintessential whaling story. Whalemen, always anxious to find the next harbor or patch of ocean teeming with cetaceans, rushed to the Sea of Okhotsk, fished with tremendous vigor, and then moved on when other grounds showed greater promise.

In the North Pacific, bowheads can be found in latitudes from 54 to 75 degrees north. The Sea of Okhotsk, which extends from the southern tip of the Kuril Islands at a latitude of 44 degrees north to the far reaches of the Gulf of Shelekhova at about 63 degrees north, is – despite its latitude – subject to ice cover of up to 85% in late February and March. By comparison, ice cover in the Western Arctic’s Bering Sea is limited mostly to shelf areas. Strong, persistent

winter winds over the Siberian land mass and a high percentage of fresh water of lower salinity account for the extensive annual ice cover in the Sea of Okhotsk. Open water can be found in the winter on the eastern edge of the Sea of Okhotsk near the Kuril Islands and the coast of Kamchatka. The northern portion of the sea is also subject to wind driven patches of open water. Each year a hole in the ice can be found in the vicinity 55 degrees north and 145 degrees west, created when a warm current meets the slope of the Kashevarov Bank.2

While their winter home in the Sea of Okhotsk is unknown, bowheads can be found each spring in the vicinity of the Kashevarov Bank. Like all polynyas – areas of open water surrounded by ice that appear annually in the same location – Kashevarov Bank in winter teems with life across multiple trophic levels. Bowheads find here the necessary open water for respiration and, in spring, a bounty of zooplankton. Nineteenth-century whalingmen were well aware that their quarry gathered early in the hunting season near Jonas Island, the landmark by which they referred to the waters of the Kashevarov Bank. In 1863, Captain Otto Lindholm explained that bowheads gravitated to Jonas Island each spring in pursuit of the zooplankton that he believed was delivered annually to the region by the prevailing currents in the Sea of Okhotsk.3

A typical whaling season in the Sea of Okhotsk began with the departure of the fleet from Hawaii in March or early April. By the end of May, some of the fleet were chasing whales near Jonas Island and some headed into higher latitudes bound for Gizhignskaya Bay or what whalingmen called the Northeast Gulf. The main body of the fleet generally made its way by June 20th


through the melting ice from the vicinity of Jonas Island the five or so degrees of longitude west to the port at Ayan. The ice was not sufficiently degraded at this point in the season to permit passage of ships south along the coast into Udskaya Gulf. Whale boats, manned by crews of six, were, instead, dispatched to chase the bowheads as they made their annual migration toward the Shantar Islands. The small boats allowed whalemen to navigate or pull south, as needed, through and across the remains of the winter ice cover. Bowheads killed at this time could be anchored in the frigid water or hauled ashore to await a reunion with the ships made possible by rising temperatures over the course of the next few weeks. The Okhotsk fleet would then settle in for a season of whaling lasting until the middle or so of October.

Bowheads migrated to the vicinity of the Shantar Islands each year in pursuit of food. Supporting the nineteenth-century observations of Lindholm and other whalemen, scientists are, at present, revealing the mechanisms in the Sea of Okhotsk which in Spring drive the ice and zooplankton in tandem south along the Siberian coast. Gravitational circulation, tides, river inflow, and ice melt all play a part in concentrating zooplankton in the shallow coastal water south and west of the Shantar Islands. Whalemens moved in and out of the many bays and around the numerous small islands in this compact portion of the Sea of Okhotsk throughout the summer in search of their prey. By the middle of October, weather conditions—not the departure of the whales—drove whalermen out of the Sea of Okhotsk and back to Hawaii or another fishery in a more temperate region.


The first American whaling dispute to go to litigation in the nineteenth century was *Taber v. Jenny*. The long journey to the United States District Court in Boston began with a rather common occurrence in the Sea of Okhotsk. A boat crew, having killed a bowhead, anchored their prize for recovery when weather conditions improved and their ship could be reached. When another ship found the whale and discovered markings on the harpoon identifying the slayer, fairness clearly required that the bowhead be returned to its rightful owner which was anchored nearby. The decision of the intervening vessel to keep the bowhead did not, however, incite the opprobrium of other captains. The slayer, having earlier lied to the intervener as to the presence of whales and their hunting success, forfeited the moral high ground and – in the opinion of the community of captains – ceded its right to the whale.

Fog was general and dense along the southern coastline of the Sea of Okhotsk from the Shantar Islands to Cape Elizabeth at 5:00 AM on the morning of July 23, 1852. John Leonard, the twenty-four year old New Bedford man serving as first mate of the *Hillman*, had spent the previous evening on shore with men from his ship and the *Massachusetts*. Through the fog, five or six whales were observed within a quarter mile of the shore. The men quickly pushed off in four boats to pursue their prey. Almost immediately, the boat commanded by Leonard struck a bowhead whale. For the next two-and-a-half to three hours, the whale – with the attached boat in tow – moved away from shore. Leonard recounted in a deposition taken two years later that they finally managed to kill the whale in fifteen fathoms of water about six miles out into the Sea of Okhotsk. The chances of quickly finding either the *Hillman* or the *Massachusetts* in the thick fog were not favorable. Rather than drag the dead whale to shore or search for their ships, Leonard decided to anchor the carcass where it had been taken. A seventy to eighty pound anchor was affixed to the whale by a doubled seventy-five fathom length of rope. A piece of pig iron was thereafter attached to the line to determine whether the whale was drifting in the current. Satisfied after nearly an hour of observation that the whale was securely anchored, the boats of the *Hillman* and the *Massachusetts* returned to shore to await improved weather. Before making their departure, a waif made of blue cotton sewn to a cedar pole was affixed to the dead whale to aid in its later recovery.

6 Depositions of John W. Leonard, George D. Whitney, John D. Maxfield, and James Fraser. Case file, Taber v. Jenney, United States District Court for the District of Massachusetts, Special Court, December 1855, United States National Archives, Northeast Region, Waltham, Massachusetts (National Archives, Northeast Region). The caption used by the District Court provided the correct spelling of defendant Levi Jenney’s name. When the court’s opinion was published, Jenney’s name was misspelled. *Taber v. Jenny*, 23 F. Cas. 605 (US Dist. Ct., D. MA, 1856). As the case has, as a result of this error, come to be known as *Taber v. Jenny*, that spelling is followed when referring to the court’s published decision.
Whalers in the bays of the Sea of Okhotsk frequented by bowheads often sent boats out to search for their quarry. Instead of waiting to sight a whale before lowering their boats as was common in fisheries far from land, Okhotsk whalemen – like their colleagues plying the bays and harbors of Australia, New Zealand, and the Galapagos Islands – found that they could cover more ground and kill more whales if multiple crews were set free to roam in protected waters. In the Sea of Okhotsk the small whaleboats had the additional advantage of being able to maneuver through the ice and reach the open water near the shore where bowheads could be found early in the hunting season. The breakup of the ice in the southern Sea of Okhotsk’s Shantar Bay was far enough advanced by the end of June to permit the entry of the season’s first whaleboats. Whaling ships were forced to wait sometimes weeks before conditions permitted a reunion with their boats. With the melting of the ice and clearer weather as the season progressed, ships were free to enter Shantar Bay or proceed to the more northerly bowhead grounds of the Sea of Okhotsk. Although whaling from the ship was practiced more frequently later in the season, boats were still sent out with provisions sufficient for extended periods of hunting. Boats, like those of the Hillman and the Massachusetts, often camped on the beach during these forays from their ships.7

The fog remained thick in the southern Sea of Okhotsk on the morning after Leonard and his men had anchored their whale. Captain Avery F. Parker aboard the Zone estimated in his journal that – judging from the sound of waves breaking on the beach – his ship was about a mile from land. Only the tops of nearby mountains were visible through the fog. At 8:00 AM that Saturday morning, Parker observed two boats heading toward shore. During a brief discussion, Parker learned that one of the boats was from the Massachusetts and that the other, under Leonard’s command, belonged to the Hillman. As was common in all whale fisheries, information as to the location of whales was exchanged. Leonard told Parker that the single whale they had spied since entering the bay was observed heading out to sea. This, of course, was not true. In addition to the whale he had killed the previous day, Leonard was almost certainly aware that other whales had been taken by boats belonging to the Hillman and the Massachusetts. Leonard stated in his deposition that on the morning of Saturday the 24th he had returned to the Hillman and observed a whale being towed to the ship. After eating breakfast aboard ship, Leonard headed back to the location near the shore where he had struck the bowhead the day before. It was at this point that Leonard presumably encountered Captain Parker. Why then did Leonard decide – at least about his

7 For contemporary descriptions of whaling in the Sea of Okhotsk, see “Northern Whaling,” Overland Monthly and Out West Magazine 6, no. 6 (June, 1871), 548–54; and Edward Dusseauult, “Recollections of Other Days,” Ballou’s Monthly Magazine 49, no. 6 (June, 1879): 556–61. Dusseauult recounts an 1857 whaling trip to the Sea of Okhotsk.
own success – to lie to Parker? Leonard likely wanted to discourage Parker from remaining in what seemed to be a promising portion of Shantar Bay.  

Leonard did, however, provide Parker with a useful bit of accurate information. The *Massachusetts* and the *Hillman*, Leonard revealed, were anchored about eight miles off shore. Hoping perhaps that the *Massachusetts* and the *Hillman* carried mail from home, Parker immediately set the *Zone*’s course in the direction of the anchored ships. The *Zone* came across the *Massachusetts* at about 10:30 AM and Parker discovered that Captain Bennett did, indeed, have mail for him. Aboard the *Massachusetts*, with the *Hillman* in sight, Bennett – repeating Leonard’s lie – offered that they had neither struck nor killed any whales. Bennett added that the whales that they had seen were wild which, in the parlance of whalemen, indicated that boats were having trouble getting within striking distance. It is possible that Bennett, who was well aware of the whales taken by the boats of the *Hillman*, was simply speaking of the *Massachusetts*, but this seems unlikely as he also revealed that the two vessels had entered into an agreement of mateship. Mateship was a common arrangement where two ships decide to share their catch at the end of a predetermined period. Parker, if not already aware of this pact, would likely have surmised as much from the close cooperation he had observed between the boats of the *Hillman* and the *Massachusetts*. The visit aboard the *Massachusetts* was brief and by 11:00 AM the boat which had taken Parker to see Bennett was making its way back to the *Zone*.  

The fog was so thick that Parker’s crew was uncertain as to the *Zone*’s exact location. While attempting to find its way back to the *Zone*, the boat came upon a dead bowhead. Pulling closer, the crew observed the waif pole affixed by Leonard. Boatsteerer James Fraser testified that Parker, given his conversations with Leonard and Captain Bennett, appeared surprised to come upon a whale that – bearing no signs of putrification – had been recently killed. Captain Parker removed the pole and directed that the boat return to the whale and tow it back to the ship. Once the whale was relocated with some difficulty, Gifford and the boat’s crew discovered that a line was already attached. The men began hauling in the line. Their first pulls met with little resistance, but the work soon became more burdensome. An anchor of the

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sort commonly used to secure dead whales for later recovery was soon brought to the surface, cut loose, and placed in the boat. Gifford and some of the men, recognizing that whoever had killed the whale would likely return once conditions improved, hesitated before Gifford finally directed that they bring the prize back to the Zone as ordered. The sense that they were perhaps acting in a less than honorable fashion in taking a whale rightfully belonging to a competitor was likely heightened by the fact that although Gifford’s men could not see the Hillman, its crew could be heard at work. With the whale alongside the Zone, the process of slicing the blubber into pieces suitable for boiling – known as cutting in – began at around 1:30 PM. When the whale was cut into, two irons bearing the markings of the Hillman were discovered. Parker faced a decision. The thickness of the fog had allowed the Zone to recover the whale without drawing the attention of either the Hillman or the Massachusetts. Despite the proximity of the Hillman, Parker decided not to inform its captain, Christopher Cook, of the whale’s discovery. By 6:30 PM, the crew had finished cutting in and within two hours the tryworks were lit and the lengthy process of boiling the whale’s blubber had begun.¹⁰

Leonard, in the meantime, had not given up the search for his missing whale. After coming upon the Zone in the spot just off shore where he struck the whale, Leonard, in company with other boats, followed the path he had taken the day before in pursuit of the bowhead. By evening, Leonard was in the vicinity of where he believed he had anchored the whale. The fog, having begun to lift, allowed a view of the Zone boiling its prize. Disappointed, Leonard returned to the Hillman to report his failure to find the whale and the news that one of their competitors was boiling. Whether Leonard had any suspicion that the whale he had killed was presently being reduced on the Zone to barrels of oil and stacks of bone is unknown. That Leonard harbored such thoughts is likely as the following afternoon he decided to pay a visit to the Zone. Aboard the Zone, Leonard asked about the whale which was still being boiled. Captain Parker, perhaps wishing to indicate that the whale had drifted far from its original anchorage, stated that they had found it about twenty miles out into the Sea of Okhotsk. While estimates offered by the crew of the Zone as to the exact location of their discovery varied from ten to twenty miles from shore, it is difficult to believe that Parker was being honest with Leonard. Parker, to be sure, did not know his precise position. His journal contains much speculation as to his coordinates for the days surrounding these events. He did, nevertheless, imply in his journal that he encountered the Massachusetts – as Leonard said he would – at a distance of about eight miles from shore. Even in Parker’s remarkably disingenuous pleadings before the United States District Court, he averred the distance to be ten to fifteen miles. There can be no doubt, however, that both Parker and Gifford were lying when they

¹⁰ Journal of Avery Parker, July 24, 1852, NBWM. Depositions of John Smith, Owen W. Crosby, George D. Whitney, and James Fraser, Case File, Taber v. Jenney, National Archives, Northeast Region.
told Leonard that no anchor was recovered with the whale. Perhaps as a ploy to show his good faith, Parker ordered that the irons found in the whale be brought on deck for Leonard’s examination. Leonard immediately recognized the markings on the iron to be those of both the Hillman and his particular boat. Whatever Leonard reported upon his return to the Hillman sent Captain Cook – in company with Captain Bennett – to confront Parker about ownership of the now disputed whale.11

When Cook and Bennett reached the Zone around 11:00 PM on the 25th, the tryworks were still in full operation boiling out the last of the bowhead’s blubber. Bennett left little doubt that this was not to be a friendly social call – or gam in the whalemen’s argot – when he came aboard the Zone declaring, in the words of a witness, that “he wanted that whale and have it he must.” Parker provided no satisfaction and by several accounts the exchange was heated. Bennett and Cook, Parker noted in his journal, spoke to him “in a very ungentlemanlike manner,” accusing him of stealing the whale. “Finally my grey hairs and age,” Parker wrote, “was all that protected me.”12 The Zone’s second officer, George Whitney, corroborated Parker’s description of the encounter, overhearing Bennett say “if it was not for the grey hairs in your head, there would be some blood spilt.” Bennett blustered that with two anchors affixed to the whale it could not have drifted. Parker, in response, called Bennett’s bluff. What, Parker inquired, had become of the second anchor? Whitney, testified that this query appeared to deflate Bennett’s rage. Bennett’s reaction was that of someone caught in a lie. He undoubtedly knew that Leonard had attached a single anchor. Bennett must have suspected – correctly – that Parker was also lying when he stated that he did not have the Hillman’s anchor. If this portion of the argument had the pro forma quality of an exchange that had been repeated in some form or another by generations of whalemen, Parker struck at the heart of the dispute and the central paradox of whaling custom when he asked Bennett why he had lied in failing to acknowledge that the Hillman and the Massachusetts had struck and killed at least one whale. Whalemen – as Scoresby had recognized forty years before and a half a world away – are supposed to behave like Christian gentlemen, while, at the same time, beating their competitors. The deceptions of Leonard and Bennett clearly violated the first half of Scoresby’s whaling ethic in service of achieving the second. Bennett replied – in a lame defense exposing his violation of custom – that “he did not know as he had any business to let Capt. Parker or any body else know whether he had got any whales, or any thing of the kind.”13

11 Journal of Avery Parker, July 24–25, 1852, NBWM; Depositions of John Leonard; and Avery F. Parker, Answer to the Libel and Complaint of Henry Taber et al., Case File, Taber v. Jenney, National Archives, Northeast Region.

12 Journal of Avery Parker, July 25, 1852, NBWM; and Deposition of George D. Whitney, Case File, Taber v. Jenney, National Archives, Northeast Region.

13 Deposition of George D. Whitney, Case File, Taber v. Jenney, National Archives, Northeast Region.
Yet, Parker had also violated the expectation of honorable behavior in not notifying the nearby *Hillman* as soon as the whale was discovered. Parker justified his decision to keep the whale on two grounds. He observed that the whale had drifted many miles from where it was killed and that the *Hillman* would never have found it in the fog. Given that Parker had discovered the whale approximately fifteen minutes after leaving the *Massachusetts*, such a claim was, at best, disingenuous. Parker’s second justification was based on whaling norms. He wrote in his journal that “we have him nearly all boiled out and I don’t consider they have any claim on him, according to established rules.” A longstanding tradition dating back at least to the early nineteenth-century Greenland fishery provided that a ship finding a drifting dead whale was entitled to as much oil as it could boil out before the whaler that inflicted the mortal wound appeared and made a verifiable claim. Verification was generally made by examining the markings whalersmen made on harpoons in contemplation of such situations. The key aspect of this custom was that the whale must be drifting. A drifting whale was one that would escape utilization if not recovered before the blubber turned rancid. The single rule of whaling universally recognized in all fisheries in every period was, of course, that not a drop of oil or a pound of bone should go to waste. A securely anchored whale would, on the other hand, likely be retrieved by the boat that affixed the anchor. While determining exact coordinates was difficult, experienced mates were generally successful in returning to a location where a whale was anchored. Even if Parker believed that the bowhead had been drifting, he was aware of which ship had killed it once the *Hillman*’s harpoons were brought on deck.\footnote{Journal of Avery Parker, July 25, 1852, NBWM. Deposition of Abraham W. Pierce, Case File, *Swift v. Gifford*, United States District Court, March 1872, National Archives, Northeast Region; Deposition of George Whitney, Case File, *Taber v. Jenney*, National Archives, Northeast Region.}

*Zone* boatsteerer John Smith testified that after Bennett and Cook left the ship without satisfaction, Parker decided to remain off shore to avoid contact with the other whalers anchored near the coast. The clear implication of Smith’s testimony was that Parker was concerned that the community of whalers in the Sea of Okhotsk would disapprove of his actions. While Parker may have harbored some concerns for his reputation, he did not behave like a man in fear of retaliation or the contempt of his fellow captains. On the following Saturday, Parker took a boat ashore and procured a “mess of fish” from the *Trident* and the *Cicero*. Sunset the following day was marked with tea aboard the *Zone* in the company of Captains Blackmer, Taber, and Churchill. When the *Zone* lost its anchor a few days later while Parker and most of the crew were out in boats pursuing a whale, the *Erie* and the *Trident* answered a call of distress and rendered assistance. Parker returned the favor when, shortly
thereafter, the Zone alerted the Trident to the location of one of its whales that had drifted far from its original anchorage.\textsuperscript{15}

It is, of course, possible that Parker was trying to salvage his reputation by a conspicuous show of collegiality. More likely, however, is that Parker was confident that a significant number of his fellow captains would – if placed in the same situation – have also taken the whale. Bennett’s deception violated the fundamental duty of every captain to supply accurate information concerning the location of whales to his fellow mariners. Presented with the opportunity to exact a measure of revenge and fill his hold with oil and bone at Bennett’s expense, Parker recognized that his own violation of whaling customs would be understood, if not applauded, by his peers. Parker did not have to guess how his actions would be received. The constant interaction between captains in the Sea of Okhotsk and in Hawaii allowed Parker to immediately gauge where he stood in the community. John R. Holt, captain of the Hunter, explained that the dispute was “common talk” whenever captains met that summer in the Sea of Okhotsk. Discussion of the incident continued when the fleet returned to Hawaii in Autumn and as many as forty or fifty captains gathered and, in Holt’s words, “loafed together.” While the tenor of those discussions is unknown, Holt assured Parker, both at sea and in port, that he would have acted in the same manner. Holt even told Captain Bennett that he believed Parker to have been in the right in taking the whale.\textsuperscript{16}

Parker’s confidence in the reaction of the whaling community did not extend, however, to how this matter would be viewed by a court in Boston should the litigation threatened by Cook and Bennett be pursued. Parker told Smith and other crewmen that he was going to understate the amount and keep separate some of oil taken from the disputed whale. Thus, Parker explained to his crew, in the event of an adverse result in court, he would have some oil for his trouble.\textsuperscript{17}

III

When attempts to resolve disputes at sea or in winter ports such as Honolulu failed, the next step was often negotiations between owners. If these efforts proved fruitless and one party was not willing to concede in the belief that the aggravation of the conflict was greater than the value of the disputed whale, arbitration before a panel of whaling captains was the last step before filing a court action. As Taber \textit{v. Jenney} demonstrates in the breach, owners generally accepted the decisions of the arbitrators. The initial acquiescence of Taber and

\textsuperscript{15} Journal of Avery Parker, July 31, August 1, August 3, August 6, August 7, and August 8, 1852, NBWM; Deposition of Owen W. Crosby, Case File, Taber \textit{v. Jenney}, National Archives, Northeast Region; and Deposition of John Smith, Case File, \textit{Taber \textit{v. Jenney}}, National Archives, Northeast Region.

\textsuperscript{16} Deposition of John R. Holt, Case File, \textit{Taber \textit{v. Jenney}}, National Archives, Northeast Region.

\textsuperscript{17} Deposition of John Smith, Case File, \textit{Taber \textit{v. Jenney}}, National Archives, Northeast Region.
Company – the Hillman’s owners – to a negative arbitration ruling faded as two pieces of information throwing the fairness of the proceedings into question was brought to their attention. While Taber and Company was willing to accept a ruling which they considered incorrect, they were not disposed to accede to one reached through deception.

On March 17, 1854 the Hillman returned to New Bedford after an absence of nearly three years. Captain Cook either immediately informed the ship’s agents and owners – Henry Taber, John Hunt, and William Taber of the firm Henry Taber and Company – about his dispute with the Zone or had done so previously by letter. The owners of the Zone were contacted and a parol or oral agreement was quickly reached to settle the dispute by arbitration. Pursuant to the agreement, each side would choose a man familiar with the whaling trade to act as a referee. Taber and Company selected George S. Tooker. As captain of the Martha, Tooker had recently returned from a whaling trip to the North Pacific. Levi Jenney, agent and part owner of the Zone, selected – at Captain Parker’s suggestion – Captain Holt. From their conversations in the Pacific and back in New Bedford, Parker was certainly aware that Holt would be a friendly arbitrator. After expressing reluctance and gaining assurances that the decision of the referees would be final, Holt agreed to serve. On March 28th, Tooker and Holt heard evidence in the New Bedford office of Taber and Company. Captains Cook and Parker provided the bulk of the testimony. A few additional questions were directed at Hillman second mate George Nye and one of the two Zone greenhands with the last name of Ritchie.¹⁸

Having heard the evidence, Tooker and Holt retired to render a decision before a freshly kindled fire. It was soon apparent that the two referees viewed the matter differently. Captain Tooker credited Cook’s testimony that the whale had been anchored and believed that the Hillman was entitled to a share of the bowhead bearing its harpoons. Holt, claiming that in his experience a

single anchor was not sufficient to hold a whale in the Sea of Okhotsk, argued that the Zone should be awarded the entire whale. The precise basis for Holt’s view of the matter is not entirely clear. In asserting that he had lost whales in the Sea of Okhotsk secured with two anchors, Holt either thought that the whale was – as Parker testified – adrift or that the currents in those waters precluded a reasonable dependence that such a catch could be found hours later. The latter belief does not, by necessity, require that the whale had actually drifted. Holt seemed to suggest that the likelihood of such a whale being dragged far from its original anchorage was sufficient to deprive the slayer of his prize. In asserting that the whale should be given to the Zone, Holt affirmed the industry’s interest in maximizing the catch. Had Parker deferred to the Hillman’s superior claim and allowed the whale to remain in the water, the poor weather conditions and the nasty currents in the Sea of Okhotsk might well have allowed the carcass to be carried beyond the reach of any hunter.\(^{19}\)

Failing to agree upon the proper disposition of the whale, Tooker and Holt – in accordance with the terms of the arbitration agreement – went in search of a third person to break the tie. Holt suggested that Captain Seth Blackmer would, if available, be an appropriate choice given his 1852 experience in the Sea of Okhotsk. If Holt was, as Taber and Company later suspected, chosen by Parker because his favorable view of the dispute was known, Blackmer may also have been selected for the same reason. Within days of the whale’s taking, Blackmer and two other captains enjoyed tea on the Zone with Parker. The dispute was certainly discussed at this meeting and Blackmer likely expressed his opinion. Blackmer hesitated to serve, but relented when told that no other master was readily available and that the parties awaited a decision. The three captains proceeded to the house where Holt boarded to discuss the evidence and arguments. Tooker assumed the role of Captain Cook in presenting the Hillman’s case and Holt took the part of Parker in explaining the arbitration hearing to Blackmer. Captain Blackmer concurred with Holt in believing that the whale should be awarded to the Zone. Tooker – having never sailed the Sea of Okhotsk – deferred to the experience of Blackmer and Holt in those waters, permitting the panel to render a unanimous decision in favor of Captain Parker. Holt and Tooker returned to the office of Taber and Company to present the verdict. Jenney asked Taber if he was satisfied with the decision and the latter replied – to the best of Holt’s recollection – that he was.\(^{20}\)

\(^{19}\) Deposition of John R. Holt, Case File, Taber v. Jenney, National Archives, Northeast Region.

\(^{20}\) Deposition of John R. Holt, Case File, Taber v. Jenney, National Archives, Northeast Region. Journal of Avery Parker, August 1, 1852, NBWM. Seth Blackmer had a long career as a whaling captain. For his 1850 to 1853 trip to the North Pacific as captain of the Erie, see Starbuck, History of the American Whale Fishery, 2:470–1 and the New Bedford Library, New Bedford, Massachusetts online database at www.newbedford-ma.gov/library/whaling-archives. George Tooker would, unfortunately, later experience firsthand the difficulties of whaling in the Sea of Okhotsk. In 1864, he was captain of the Mercury when it was lost in the North East Harbor of the Sea of Okhotsk. Starbuck, History of the American Whale Fishery, 2:592–3.
The written decision of the panel was brief. The first of two sentences directed the owners of the Zone, without explanation, to provide the Hillman with a replacement boat anchor, line, and craft. Reaching the gravamen of the dispute, Captains Holt, Blackmer, and Tooker explained that the whale “was legally taken as Capt. Bennet (sic) gave Capt. Parker to understand that he had no whale at all.” The issue of the fastness of a whale anchored in the Sea of Okhotsk which animated the initial deliberations of Tooker and Holt was not mentioned. It seems unlikely, given his earlier insistence on the difficulty of anchoring a whale in those waters with even two anchors, that Holt suddenly abandoned this line of argument. Perhaps, Holt – in seeking to find a rationale upon which all three captains could agree – shifted his grounds to an argument that was based more on the general ethics of whaling than the peculiarities of currents in the Sea of Okhotsk. Having never fished in the Sea of Okhotsk, Captain Tooker might have felt more comfortable with punishing the Hillman for Captain Bennett’s violation of the rule that a whaleman should provide accurate intelligence to his competitors. Parker must have felt a measure of vindication. His decision to take the whale had been ratified by a trio of his fellow captains.21

If, as Holt testified, Taber expressed his satisfaction with the arbitration proceedings, what caused him and his partners to file a complaint five months later in United States District Court? The limited nature of the testimony and the prospect of a quick and inexpensive resolution does much to explain the appeal of arbitration. While there is no way to know how many cases were heard before panels of captains, the evidence from litigated matters suggests that it was fairly common and almost always resolved the dispute. Why then, to put the matter in different terms, did the issue suddenly strike Taber and Company as worthy of the cost, time, and effort of litigation? The likely answer begins with the unbidden visit by Zone boatsteerer John Smith to the New Bedford office of Taber and Company in mid-August 1854. Smith revealed that he had been aboard the Zone’s boat that had discovered the Hillman’s whale and that the bowhead had, indeed, been securely anchored. As the disputed whale had not – according to Smith – been adrift, any appeal by the Zone to the custom cited by Parker governing whales floating freely would be legally irrelevant. The principals of Taber and Company likely reasoned that with Smith’s testimony their chances of success in court warranted the expense of bringing suit. In addition, Taber learned within a week of the arbitration that Captain Holt was friendly with Parker and had – previous to the hearing – opined that the whale belonged to the Zone.22

21 Deposition of John R. Holt, Case File, Taber v. Jenney, National Archives, Northeast Region. A copy of the arbitration decision is attached to Holt’s deposition.

There was, up to this point, no indication that lawyers had been consulted. Clearly, there was no attorney involvement in the arbitration hearing. Once Taber and Company engaged, however, the services of the law firm of Eliot and Pitman, the matter began its path – as disputes often do when lawyers get involved – to the Boston courtroom of District Judge Peleg Sprague. Part of the calculation of Eliot and Pitman in filing this action within a week or so of the boatsteerer’s revelation would have certainly included that Smith – having left the Zone mid-voyage on less than congenial terms – would be subject to a brisk cross examination. Smith’s deposition, taken two days after the complaint was sworn and a week before the deponent’s return to sea, suggests that Parker had disparaged his boatsteerer’s whaling skills. Smith denied that he held any grudge against Parker and that, in fact, he had “always liked the man first rate since I have been with him.” Despite his protestation that he spoke with the owners of the Hillman only out of a sense of duty, Smith’s actions were probably not driven by a desire that whaling customs be vindicated. Prior to visiting Taber and Company, Smith called upon the Zone’s agent and part-owner, Levi Jenney. Smith testified that he simply wished to inform Jenney of his decision to reveal to Taber the circumstances surrounding the taking of the disputed bowhead. While there is no evidence that Smith asked Jenney for money or anything else in return for silence, Smith did state on cross examination that they discussed Parker’s poor opinion of his former boatsteerer and Jenney’s offer that forbearance would be rewarded with a desired position on a future voyage. Smith, in any event, did admit recently telling an acquaintance that he would make the Zone give up the whale taken two years earlier in the Sea of Okhotsk.

The slow progress with which this dispute made its way to a judicial resolution does much to explain why so few whaling contests were litigated in nineteenth-century American courts. As whaling voyages grew longer in the nineteenth century, it was increasingly difficult – if not impossible – to assemble a full complement of witnesses at any one location or time. When whaling was a part-time occupation in the eighteenth and very early nineteenth centuries, crew members could be rounded up with relative ease when the fleet returned in company at the end of the season. In the Greenland fishery of the Scoresbys, for example, the creeping formation of ice forced all ships to make the relatively short trip back to northern England and Scotland each August. Even if the British ships and crews of the Greenland fishery were fitted out for commercial service during the winter, the costs and uncertainties of proceeding to trial were minor compared those facing Taber and Company in 1854. Having drawn up the complaint, the attorneys representing the Hillman acted quickly to take the deposition of Smith, their star witness, before shipping out on a voyage that might last years. Owen Crosby was deposed four days later on the eve his

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departure. Other witnesses testified as they became available or were deemed necessary over the next two years. Recognizing that most witnesses would not be available to testify before a jury, depositions were taken with the intention that they would be read into the trial record. Defense of this action was doubtless complicated by its inception prior to the Zone’s May 5, 1855 return to Massachusetts. Fortunately, Captain Parker had returned to New Bedford in 1853 after falling ill at sea and was available to assist in the pleadings and defense strategy.\footnote{Depositions of John Smith, Owen W. Crosby, and John R. Holt, Case File, Taber v. Jenney, National Archives, Northeast Region; and Starbuck, History of the American Whale Fishery, 2:484–5.}

IV

Once lawyers got involved in the dispute and the action shifted to the United States District Court in Boston, the language and the entire tenor of the matter changed. Whalemen no longer controlled the proceedings and having ceded power to the legal system, the men who made their living from the oil and bone of whales were subjected to what must have seemed a rather esoteric discussion of Roman law and a curious application of the law of salvage. Whaling custom and practice – the law operating in the Sea of Okhotsk and in the office of Taber and Company – was dismissed by the court after a perfunctory discussion. It is likely that the litigants were surprised by the way in which the lawyers and Judge Sprague transformed the meaning of their dispute. No dispute over the possession of a whale had, after all, been litigated in a Massachusetts courtroom in the lifetime of any of the participants. For whalemen, the disagreement was about who should reap the benefits of the catch. The court was, on the other hand, more interested in the point at which a possessory interest in property ripens into an inviolate form of ownership. Judge Sprague was little concerned with the fate of a single bowhead carcass or even hundreds of anchored or drifting whales. It was more important to the court that property rights be upheld than that the whaling industry be allowed to operate in a manner that advanced the interests of participants.

Confirmation that the language in District Court would be very different from that expressed at sea and during arbitration was provided by the legal argument advanced by Eliot and Pitman on behalf of Taber and Company. Rather than point to the customs of the industry, counsel for Taber and Company turned to the same Roman law discussions of how one comes to own wild animals cited in the earlier British cases. In directing Judge Sprague to Book II, Title I, sections 13 to 16 of The Institutes of Justinian, Eliot and Pitman asserted that by killing the contested bowhead the crew of the Hillman had exercised to the greatest degree possible the control needed to acquire possession of the whale. While the parties likely found the Latin phrases such as \textit{res nullius} that were surely employed by those before the bar alien, the concepts were, of course,
familiar. Fast-fish, loose-fish was, after all, a more picturesque way of identifying the point at which control over a whale comes to signify possession which will ultimately ripen into ownership. Counsel agreed that in killing the whale, the Hillman acquired ownership. The issue was whether the Hillman relinquished that ownership when it left the whale anchored, but unattended.²⁵

Lincoln Brigham, representing the Zone, argued that the accepted custom of whaling was that a ship was entitled to any whale discovered adrift so long as the carcass was cut into before the slayer appeared and made a supportable claim. Judge Sprague determined that although the custom was successfully proven, it was inapplicable to the facts in the case. The whale, Sprague believed, was not adrift when discovered by Captain Parker and his crew. Judge Sprague allowed that, at most, the whale might have dragged the anchor a short distance. Even had the currents driven the whale and anchor a considerable distance from their original moorings, the result would be the same. There was, Sprague explained, no evidence of any usage covering a situation where an anchored whale was carried a great distance. Listening to Judge Sprague’s ruling in court or reading his opinion, Captain Parker must have determined that the jurist had not understood what whalemen meant when they spoke of a drifting whale. For Sprague, a whale was adrift when it was not fastened to an anchor or some other object employed for the same purpose. An anchored whale could be pushed hundreds of miles out to sea and still not, in Sprague’s estimation, be adrift. Sprague’s insistence on this particular definition of a drifting whale was to any whalemen – and particularly one experienced in the notoriously strong currents of the Sea of Okhotsk – ridiculous. As referee turned trial witness John Holt testified, even two anchors could not guarantee that a whale in the Sea of Okhotsk would be found where it was originally secured. Whalemen cared little what a carcass dragged. A whale in motion was in danger of escaping the trypot. The whole point of the custom concerning rights to a drifting whale was that it should be utilized. The slayer’s right to his prize lasted only so long as he remained able to quickly render his catch. In the Boston courtroom of Peleg Sprague the continued attachment of an anchor signified the preservation of the slayer’s property rights. In the Sea of Okhotsk, the need to turn a profit and the race against decomposition rendered Sprague’s expansive notion of property rights in an anchored carcass antithetical to the business of whaling.²⁶

²⁵ The opinion of Judge Sprague does not indicate the argument advanced by counsel on behalf of Taber and Company. For the argument of Pitman and Eliot, see Henry Taber et al v. Levi Jenny, et als, The Monthly Law Reporter (May, 1856), 27–36, 28. For the translation of Justinian used by Pitman and Eliot, see Thomas Collett Sandars, The Institutes of Justinian; with English Introduction, Translation, and Notes (London: John W. Parker and Son, 1853), 181–2.

²⁶ Taber v. Jenny, 23 F. Cas. 605. Deposition of John R. Holt, Case File, Taber v. Jenney, National Archives, Northeast Region. Sitting on the bench of the United States District Court in Boston, Judge Peleg Sprague presided over many maritime cases. He was credited by one contemporary as having “substantially created the law applicable to whalemen, whalers, and the whaling business.” Roberts, A Treatise on Admiralty and Prize, 419. Prior to his 1841 appointment to
When Judge Sprague pondered the facts and law in the case at bar, his inclination was to look for certainty and universally accepted legal principles. Marking a slain whale with a waif and harpoons bearing the ship’s initials and taking great care in securing an anchor, constituted – in Sprague’s estimation – “unequivocal marks of appropriation.” The whale, at this point, became “the absolute property of the Hillman.” For Captain Parker and the other whalingmen plying the waters of the Sea of Okhotsk, absolute ownership in a whale did not vest until it was cut into and its blubber boiling. Whalingmen were painfully aware that, prior to that point, there was much that could separate a ship from its putative catch. It was this uncertainty in bringing a slain whale aboard ship for its bubbling denouement and the omnipresent desire to maximize the industry’s profit that conditioned whalingmen to see disputes over ownership in less absolute terms than those announced from the bench of a federal court. In the fog of the Sea of Okhotsk – both literal and metaphorical – Avery Parker could, in good faith, reason that custom concerning drift whales and the lies of Leonard and Captain Bennett were enough to justify taking a bowhead which he, in other circumstances, might have returned to the Hillman.27

The basis for Judge Sprague’s certainty that the Hillman had acquired “absolute and unencumbered” ownership of the disputed bowhead was his application of the law of salvage. Salvage is the branch of maritime law that establishes the rights of one who saves a ship or its goods at sea or on the coast from loss or destruction. It is an axiomatic tenet of salvage law that the salvor gains only a lien on the rescued property in return for his service. Ownership remains in the original holder of the property. Sprague reasoned that a slain whale marked with an anchor, waif, and harpoons was no different than a boat abandoned after encountering some difficulty at sea. Things lost at sea remain the property of the original owner even if all hope of recovery has vanished and recovery efforts have been abandoned. While the amount of compensation for a salvor’s efforts depends, in large measure, on a subjective measurement of such factors as risk encountered and the owner’s attempt at recovery, the fundamental relationship between the parties in a salvage case and the subject property is constant: ownership never trades hands.28

the United States District Court in Boston, Sprague studied at the Litchfield Law School and served Maine in the House of Representatives and the Senate. He retired from the bench in 1865. For details of Sprague’s life, see his obituary in The Harvard Register 2, no. 5 (November 1880): 232.

27 Taber v. Jenny, 23 F. Cas. 605.
Judge Sprague’s application of salvage law to the proceeds from a dead whale was not without precedent. In 1831, the British High Court of Admiralty affirmed the ancient principle that a whale that washed ashore or was caught in coastal waters was – as a royal fish – the property of the crown. All other parties involved in such a whale’s discovery or capture were entitled to claims of salvage. Far from the British coast and royal prerogative, the application of salvage law to whaling was less certain. The Swan, a Hull whaler trapped in the Davis Strait in October 1837, was freed the following May by the cutting of a channel through the ice of nearly a quarter-of-a-mile by the crews of three other ships. When one of the rescuing ships claimed salvage, the Swan argued that it was the custom of whalemen to provide “gratuitous assistance” whenever colleagues were discovered in a dangerous situation. The High Court of Admiralty, without deciding whether such a practice existed, determined that the facts in the case at bar could not support application of the alleged custom. Judicial enforcement of the custom and the resulting abrogation of salvage law required, in the court’s estimation, that the Swan and its rescuers be engaged in a common enterprise and in a position to render aid to one another. The Swan’s near fatal entrapment in the ice of the Davis Strait left it unable to provide the sort of reciprocal assistance required to place ships outside the law of salvage by virtue of a special arrangement or understanding born of a shared endeavor.29

The High Court of Admiralty revisited the issue of whaling custom and salvage a few years later. In The Harriot, Judge Stephen Lushington determined that South Seas whalemen customarily eschewed claims of salvage when rendering aid to one another. On November 2, 1838 the Harriot – a British whaler – ran afoul of a coral reef as it entered the port of Honolulu. The crew of a second whaler, the Folkestone, answered the call for assistance and helped lead the Harriot to a safe anchorage. The Harriot rejected the Folkestone’s request for compensation as a salvor on the basis of two customs. It was the custom of the port of Honolulu for the harbormaster to dispatch ships to assist, without compensation, other vessels that encountered difficulty in making their entrance. While this custom was local and applied to all ships, the Harriot also invoked the practice universally observed by whalemen of rendering aid to their whaling colleagues without remuneration. Affidavits were produced on behalf of the Harriot from merchants, ship owners, and whaling masters that the international community of whalemen had followed this custom for many years. None of these witnesses could, in fact, recall a whaler claiming salvage

for services provided to a whale ship in distress. Having avoided a ruling in *The Swan* on the existence and legality of a whaling custom renouncing claims of salvage, Judge Lushington faced the issue directly in ruling that the *Folkestone* was not entitled to compensation as a salvor. “It appears to me,” Lushington observed after noting the *Folkestone*’s failure to cite a case of salvage between whalers, “to be scarcely possible, considering the immense number of vessels engaged in this trade, that some such demand should not have been preferred, unless it were generally understood that it could not be successfully maintained; or, in other words, that a custom to the contrary was in existence.”

Whether Judge Sprague was aware of the British cases concerning salvage rights between whalers is unknown. His contemporary on the federal bench, Judge William Marvin of the Southern District of Florida, cited *The Swan* and discussed the issue in an 1858 treatise on the law of wreck and salvage. Judge Marvin explained that in the slave trade and other dangerous pursuits, ships “do not stand so independently of each other as vessels meeting accidentally, and it may therefore be fairly supposed that they feel the policy and duty of rendering material assistance, and a smaller compensation is sufficient.” In particular trades, Marvin indicated, this idea of a shared pursuit in perilous circumstances has led to customs where no remuneration is sought when one vessel comes to the aid of another. In addition to South Sea whaling, Marvin cited the steamboats on the Mississippi River that eschew salvage for rescuing a colleague that has run aground. Sprague, an experienced admiralty court jurist, was likely aware of this line of salvage cases. His decision not to discuss the whaling exception to salvage law was probably twofold. Most importantly, the *Zone* did not claim salvage. Judges, as a general proposition, are loathe to raise claims and possible defenses not advanced by counsel. In addition, the *Zone* had not acted as a salvor. Captain Parker’s intent in taking the whale was clearly to appropriate it for his own use, not save it for the *Hillman*. Sprague’s discussion of salvage law was not, in any event, directed at explaining the relationship between the disputing ships. Salvage law – for Sprague – provided a way of thinking about property rights in goods lost at sea. That whalermen might have decided among themselves not to claim salvage, was of no concern to Sprague. Absent a clear custom to the contrary – which Sprague found not to exist in the case of a whale remaining affixed to an anchor – general legal principles of property ownership must prevail.  

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The Zone’s attempt to turn the court’s attention to Parker’s reliance on the false information provided by Captain Bennett was summarily dismissed by Judge Sprague. Sprague observed that as Captain Cook of the Hillman was not present during the exchange between Bennett and Parker, his legal right to the disputed whale could not be impaired. The agreement of mateship between Cook and Bennett was not sufficient, in Sprague’s analysis, to convey legal rights in the disputed whale to Bennett as master of the Massachusetts. Without a joint property right in the anchored bowhead, Bennett was not able to alter the Hillman’s legal ownership of the wayward cetacean. Mateship merely gave the Massachusetts a possible future right to share in the proceeds from the Hillman’s catch should – at the end of a designated period – the latter have more bone and oil in its hold. While Sprague’s legal analysis of mateship was certainly correct, he failed – as in much of his decision – to see the issue from the whaleman’s perspective. Mateship, for whalemen, was about more than legal rights. It was a reflection of a deeper commitment to the shared welfare of two crews. It was also a relationship that merged the interests of the mated ships in the eyes of other captains in the fishery. This blending of the Hillman and the Massachusetts helps explain why Captains Holt, Blackmer, and Tooker ruled at arbitration that Parker was entitled – based on Bennett’s representation that no whale had been taken – to the bowhead anchored by Leonard and the crews of the mated vessels.

One of the debates that has animated legal scholarship over the last eight or so decades has concerned the concepts of instrumentalism and formalism in describing and understanding how judges decide cases. Starting in the 1920s, the so-called Legal Realists attacked what they saw as the prevailing formalism of a deeply conservative American judiciary. Legal Realists such as Karl Llewellyn believed that the ability of the law to accommodate the rapid rate of social and technological change of the twentieth century was hindered by a slavish adherence to the past. Nineteenth-century jurists and, in the estimation of the Legal Realists, many of their heirs on the bench believed that cases must be decided by a strict application of rules, precedent, and natural law. When confronted with a novel situation such judges – decried as formalists – relied on deductive reasoning to apply these accepted sources of the law to resolve the issue at bar. The result of this almost mechanistic process of deciding cases was that such judges never considered the effect of their rulings on how people conducted their business. As an antidote to such an inherently conservative way of looking at law, the Legal Realists prescribed what later scholars have termed instrumentalism. Rather than look exclusively to existing laws and cases for guidance, the instrumentalist view was much more expansive in what it was willing to consider as relevant in making the proper decision. Taking the law in the direction of a desired social policy was, for an instrumentalist, far more
important than following an established rule. Instrumentalism was, therefore, directed at ends rather than means. For legal scholars of a progressive bent anxious to defend the New Deal, the appeal of instrumentalism was obvious.\textsuperscript{32}

Legal historians have largely accepted the formalist/instrumentalist dichotomy as useful in understanding the development of American law in the long nineteenth century. Most notably, Morton Horwitz has explained that in the wake of the Revolution American judges threw off the formalist mantle of English common law and fashioned new, instrumentalist approaches to old issues. While the moment was ripe for an American law that would make good on some of the promises of the new nation’s foundational documents, the instrumentalist ends served were, instead, those of the rising class of entrepreneurs and businessmen. In the first half of the nineteenth century, judges, in Horwitz’s central example, reconceived the \textit{sine qua non} of a valid contract law from an equitable exchange to the existence – regardless of the advantages in bargaining power enjoyed by one side over the other – of agreed upon terms. Having banished the old common law concern for fairness, judges were able, by mid-century, to push American commercial contracts toward a standard that interpreted agreements to reflect the preferred practices of the business class. Horwitz’s narrative reaches an apotheosis of sorts with a discussion of how the established principle that an employer is responsible for torts committed by his workers (\textit{respondeat superior}) was recast to exclude other employees. What Horwitz terms “The Triumph of Contract” explains how judges were able to ignore an employer’s duty of care and declare that workers calculate risk of injury in negotiating their wages and terms of employment. Once the capitalist legal agenda was achieved and the impetus for change declined, the American judiciary, in Horwitz’s narrative, once again placed precedent and settled rules atop the hierarchy of legal virtues and entered a new period of formalism.\textsuperscript{33}

Horwitz’s story of nineteenth-century American legal history is, in large part, driven by a conspiracy between judges and a commercial and business elite. While Stephen Presser’s comment that the world of Morton Horwitz is “Dark and Doestoyevskyan” is certainly overstated, there is in Horwitz’s \textit{The Transformation of American Law, 1780–1860} much about the alleged alliance that is shadowy and mysterious. Horwitz never really explains how it worked.


How did judges know exactly what merchants wanted? The case of *Taber v. Jenny* is instructive and – while certainly not disproving Horwitz’s thesis – suggests that it functions better on the macro than the micro level. The lawyers and the judge in *Taber* never understood what the whalers wanted from the court. In addition to the obvious – a favorable decision and in the case of *Taber* and Company perhaps recognition that Parker had fixed the arbitration – both sides sought a tribunal that understood what was important to men who financed whalers and whose economic survival depended upon successful voyages. Whalers did not care about property rights in the abstract and they certainly were not interested in a decision that would mean fewer whales rendered.\(^{34}\)

If nineteenth-century courts were so attuned to the needs of commercial interests, why did the judge in *Taber* and, as we shall see, in the other American whaling cases so misunderstand an industry of such importance to the national economy? The first and perhaps simplest explanation is that Judge Sprague, instead, knowingly ignored how the litigants viewed the dispute. Courts found whaling property cases insignificant and Sprague – aware that *Taber* was a case of first impression – had the freedom to view the matter as he saw fit. While insurance and employment issues involving the whaling industry were often litigated, whalers had proven adept at resolving disputes over contested whales on their own without violence or disruption in the valuable supply of oil and bone. This ability of whalers to settle arguments without filing actions might have suggested to Judge Sprague that it was better to view the case in terms of general property law rather than the particularities of industry practice. Why issue a ruling on a minor matter applicable only to whaling that might be used as precedent in other situations that could disrupt settled principles of commercial law? Seen in this way, Judge Sprague may have understood that his application of salvage law and definition of a drifting whale was antithetical to whaling custom, but determined that it was a safer basis upon which to draft an opinion.

This possibility is undercut by the fact Sprague’s successor on the District Court bench, John Lowell, explicitly stated that it was the singular nature of whaling and the degree to which its crews formed a discrete branch of maritime service that dispelled any concern that precedent in a whaling property dispute would be applied to another form of commerce. The unique nature of whaling reduced its property law, in the view of Lowell and others, to a sort of legal backwater. Sprague even indicated in his *Taber* opinion that he would follow whaling custom if he found it applicable to the facts at bar. It is, therefore, more likely that Judge Sprague did not appreciate how preserving the rights of a slayer to an anchored whale increased the chances that a cetacean would escape

the blubber knife and was led, in any event, to believe from counsels’ arguments that such a concern was not relevant. The central legal argument offered by Eliot and Pitman on behalf of Taber was, after all, based on *The Institutes of Justinian*.\(^{35}\)

What ultimately explains this disconnect between whalemen and the legal system was that the latter did not grasp that for the former the taking of the maximum amount of oil and bone while abiding by the laws of honor was more important than a consistent application of property law principles or even such whalemen created customs as fast-fish, loose-fish or iron holds the whale. The entire dispute began with individual decisions by Leonard and Cook to provide false intelligence concerning their success and the location of whales. Had Leonard and Cook not broken the laws of honor, Parker would have likely turned the bowhead back to the *Hillman* which all whalemen would have considered the rightful owner. Likewise, if Parker had not attempted to hide the amount of oil produced by the bowhead and not tried to fix the arbitration hearing, Taber would not have filed the cause of action. Had this dispute been simply a good faith disagreement about which vessel should be granted the whale, it would have been resolved at sea or, as it almost was, in arbitration. As the positions taken by Holt and Tooker in their arbitration deliberations indicate, that resolution would have had more to do with common sense and a loose application of customs than what Melville and subsequent legal scholars have deemed the universal laws of whaling.

What *Taber* suggests is that reading court decisions can be misleading. It is easy to assume that judges and attorneys understood litigants. Without a close examination of what participants considered important, the perception that a judicial ruling was favorable to commercial interests may prove illusory or merely fortuitous. In the case of whaling litigation, the failure to consider the cases from the perspective of men in the Sea of Okhotsk and New Bedford counting houses has led to the incorrect conclusion that courts ratified the customs of whalemen and rendered decisions that maximized the welfare of the industry. The decision in *Taber* – if followed at sea – would certainly not have increased the take of whales.

\(^{35}\) Judge John Lowell upheld a whaling custom with the observation that whaling “is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception.” *Swift v. Gifford*, 23 F. Cas. 559–60 (US District Court, D. MA, 1872).