Zhengmao Sheng

Professor Willrich

American Legal History I

Dec 6, 2018

The Legal History of Early American Whaling Industry

With Focus on Its Pioneering Features of Contract and Corporate Organization

Whaling, an ancient enterprise that dated back to antiquity, with its first commercial form emerging in the Basque region of Spain in the 12th century[1], for long has played an indispensable role in the marine peoples of the world. The native Indians of North America had engaged in whaling for centuries before the Europeans set foot on this continent, yet their ventures were mostly confined to small-scale huntings for subsistence, and despite a peculiarly religious feature of their campaigns, did not leave much noteworthy economic or intellectual imprints on today's world. However, whaling by pre-modern Europeans had its foundation firmly rested upon the pursuit of commercial profit yielded by whale oil[2], which required a high level of coordination and interpersonal organization. Other than its essentially economic functions, American whaling also had significant legal and social implications, rooted in the special, astonishingly modern features it assumed. Whaling was one of the rare industries back in the 17th and 18th century America that was seen as particularly dangerous and lucrative, both characteristics that naturally gave rise to an effective way of organizing labor, maintaining order onboard, and distributing income in a necessarily hierarchical fashion. All three demands led to

---

[1] R. Ellis, *Men and Whales,* (Alfred A. Knopf, New York, 1991).

[2] Bob Johnson, "A Peculiarly Valuable Oil: Energy and the Ecology of Production on an Early American Whale Ship". *The Journal of the Society for Industrial Archaeology, Vol. 40, No. ½, Theme Issue: New Bedford (2014).*

the rise of contractual papers and quasi-professional management structures among the American whalers since the 1640s, both influenced by, and influencing at the same time, the legal traditions of New England. This paper therefore seeks to look into the original documents with regard to the American whaling industry, arguing that this business had a multi-tiered and -faceted impact on the legal development of contracts, employment and investment that pioneered in a world that only just began the grand process of industrialization. It will also demonstrate that some of the particularities of this industry aforesaid, on the contrary, hindered its acceptance to some of the fundamental trends and notions of legal decisions and policies, and that this paradox greatly exemplified the incredible flexibility of early American law and business, which put profit and productivity at a paramount position, and strict adherence to law at a secondary stand.

Before a closer look at primary sources is dared, it would be beneficial to address the unexpected lack of scholarly works on this matter. Those that write about the early history of American whaling industry are of an abundant quantity, so are those on the legal issues involved in the business. Nonetheless, these two categories rarely, if ever, overlapped. The legal side of this discussion predominantly feature the 20th century controversy over commercial whaling, or the structure of international management and sanctions, as explored by Ray Gambell[3] and Michael K. Orbach[4], while only two sufficient scholarly works of the laws regulating American whaling in the first two centuries following the 1640s were found in the course of this research, by Palmer[5] and Hilt[6]. Yet the former of these two narratives is largely dictated by the

[3] Ray Gambell, "International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling." *Arctic, Vol. 46, No. 2 (1993)*.
[4] Michael K. Orbach, *Whales, Whaling and Ocean Ecosystems* (University of California Press, 2006).
[5] William R. Palmer, "Early American Whaling". *The Historian, Vol. 22, No. 1 (1959)*.
[6] Eric Hilt, "Incentives in Corporations: Evidence from the American Whaling Industry". *The Journal of Law & Economics, Vol. 49, No. 1* (2006).

governmental and administrative side of the story, supplemented by some interesting remarks on how whaling tied the local white residents to their Indian allies. Thus, this paper will primarily rely on whaling contracts, shipping documents, other contemporary maritime and journalistic sources, as well as court records and legal statutes to build a comprehensive picture of the interactions between business and law.

I. CONTRACTS AND PRODUCTIVITY

Contract, a legal document outlining and specifying mutual agreements between two parties, has its roots in the feudal Medieval Era[7], and had grown in the pre-modern times to dictate most personal transactions, and had evolved into a comprehensive system on which "almost all the rights of personal property… do in great measure depend"[8]. However, this more advanced notion of reciprocity and "due consideration" of contractual documents did not reach its maturity in the United States until well into the 19th century[9]. Similarly, for long the American courts and public clung to "the long standing belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange[10]" and were largely unaware of the will theory, which gave sufficient agencies and voluntary authority to each party involved in a contract, respecting their decision to place trust and recognition into its terms. The landmark case in America affirming this principle did not come until 1839, when the Supreme Court of Pennsylvania ruled, in *M'Farland against Newman*, "that the assent to every contract must be mutual; that every agreement must be so certain and complete that each party may have

---

[7] S. J. Stoljar, *A History of Contract at Common Law,* (Australian National University Press, Canberra, 1975) 3.
[8] William Blackstone, *Commentaries on the Laws of England, Book 2, Chapter 30, 1765* (University of Adelaide, online archives).
[9] Morton J. Horwitz, "The Historical Foundations of Modern Contract Law," *Harvard Law Review 87 no. 5 (1974): 917.*
[10] *Id.*

an action on it[11]", suggesting the legitimacy of any contract as long as its provisions were accepted and "assented" by the contracted parties.

However, this theory had been put into exercise, or at least hinted at, within the whaling communities decades before this case in Pennsylvania. Each whaling company, vessel or master (captain) kept "accounting books" at hand, which in themselves acted as an early, crude, yet universally accepted and recognized, form of labor contract. The most ancient accounting book studied in the course of research for this paper dated back to 1812[12], and it is only reasonable to infer that this tradition must have extended back at least decades more, as so complex and enduring a quasi-legal structure could not have been designed and put to use without adequately sophisticated precedents. In these accounts the names of each sailor were duly recorded, next to which their respective shares in the whaling ventures were also logged. The reciprocity was evident: by entering their names, the seamen and officers agreed to devote labor and expertise to the owners and agents of the whaling companies, and doing so earned them the potential profits acquired from this lucrative trade. Nonetheless, the shares were, in most, if not all, circumstances, extremely unequal. The masters usually secured 1/16 or 1/17 of the profits, while their immediate litenents and subordinate officers could merely expect to receive no more than 1/30 or 1/50 and seamen 1/175 or 1/225. This discrepancy often translated into a massive income difference. As one account in 1834 suggests, the captain earned $2,854 for a hunting campaign "to Pacific Ocean", yet the average income of sailors amounted to approximate $250, barely one tenth to that of ship masters, who may not even own the vessel they travelled in[13].

---

[11] *M'Farland against Newman*, 9 Watts 55 (Pa, 1839).
[12] New Bedford Whaling Museum Ship's Papers Collection, Mss. 79.
[13] Hilt, "Incentives in Corporations," 201.

If approached from a legal perspective, this model of income distribution would have been inequitable and unjust, as those who performed the actual hunting of whales and the manufacturing of related products received compensation unreflective of the efforts they invested. However, taking the astonishing commercial and militant nature of the American whaling industry into consideration, it was understandable that it pioneered the will theory of contract, intentionally or not. In the more conventional arenas of American economy, the rise of modern contracts correlated with the emergence of a rapidly expanding market economy in which exchange of goods and money began to take place on a regular and massive basis, characteristics already exemplified by whalers. Starting from 1835 to 1860, the average annual imports of whale products, most importantly those of oil and bones, amounted to $8,000,000 of value[14], generated by a highly concentrated community of investors, navigators and whalers. This figure was equivalent to the annual profits of the American industries in sugar and glass combined in 1840[15]. During the same period, the whaling industry also employed a number of workers comparative to that of those employed in the production of cotton[16]. This high demand of whaling products, adding to the necessity of organizing whaling crew efficiently, pushed both vessel owners and seamen to place full trust into each other. The binding power of a contract cannot be better illustrated --- the owners expected the whalers to observe the rules and authority of the appointed captain so that the voyage may succeed, and the sailors accepted the comparatively low compensation so that they would not be alienated and excluded from the long-term-wise promising occupation. If this contractual relationship was to be placed under the

[14] Walter S. Tower, *A History of the American Whale Fishery,* (University of Pennsylvania, Philadelphia, 1907) 51.
[15] Which amounted to approximately $8,300,000, see United States Census Bureau, "Remarks on the Statistics of Manufactures," vi, in which the data of 1840 census is clearly listed.
[16] Id.

uncompromising grip of the contemporary courts where contracts may be nullified based on the Blackstonian notion that one *must* receive "as much as his labor deserves[17]", both parties will suffer. A fear of such litigation could have well reduced the incentives to invest in the whaling industry, resulting in increasing unemployment and decimating the importation of strategically vital fuel and raw materials. Thus, a desire to maintain and protect the economic interests of the whaling community, the application of contracts underwent a subtle change in principle which could be interpreted as an early example of the flexibility or, in the words of James W. Hurst, the "creativity[18]" of American laws.

Other than to facilitate productivity, the contract law of whalers also sought to maintain order, which was essential in combating the unpredictable weather, the mysterious and violently powerful Leviathans, as well as other apparent dangers. The market on land was well-regulated and sanctioned by the local government, with its endorsed policing power and license-issuing authority[19], but on the high seas this overarching, regulatory power can only rest in the hands of sea masters. Starting around 1830s, official contracts known as *Whalemen's Shipping Papers* emerged, and were printed in large quantities after a universal standard, containing the exact provisions and regulations that they could become immediately functional after the master fills in the name of his vessel and the names of his crew. These *Papers* ascertained the absolute power the masters were entitled to; the second provision reads:

> "...the said Seamen and Mariners… shall not go out of said [name of the vessel] on board any other vessel, or be on shore, under any pretence whatsoever… without leave first obtained of the Captain, or Commanding Officer on board"[20]

---

[17] Blackstone, *Commentaries, Book 2, Chap 30.*
[18] James Willard Hurst, *Law and the Conditions of Freedom,* (Madison, 1956) 7.
[19] William J. Novak, "Public Economy and The Well-ordered Market: Law and Economic Regulation in 19th-Century America," *Law & Social Inquiry, Vol. 18, No. 1(1993).*
[20] New Bedford Whaling Museum, Mss. 79.

While this clause added to the master a paternal role over his crew, it is without dispute that it explicitly allowed him to constrain the freedom and liberty of all those below his ranks. This inevitably resembled powers of a judge. This judicial nature was further strengthened and affirmed by the sixth provision:

> "...if [any Officer or Seaman's] abilities and disposition shall be judged by the Master incompetent or indisposed to the proper discharge of the duties of his station, the Master shall have a right to displace him and substitute another in his stead"[21]

These words are followed by the due process of reducing the payment these removed crew shall earn, and by instituting the sea master as the sole arbitrator onboard, these contracts provided no effective counter-powers to curb the potential breaches on the part of masters. The only avenue reserved for the officers and crew members to accuse their master of wrongdoing only deals with the possible mishandling of furniture and other "stores" of the vessel[22], and fails to remedy any physical or legal harms suffered under his command. This paper is of the opinion that these regulatory notions were put into print at the time to preserve the whaling industry as a whole, and that the whalers willingly accepted these seemingly restrictive terms so that their vested interests in the "economic well-being" of whaling ventures would not cease. After a mutiny on board the ship *Junior* in 1857, the *New Bedford Mercury* expressed the public sentiments of the town, whose population chiefly consisted of whalers and their families, showing great satisfaction at the death sentence issued to the leading conspirator:

> "The experience of this man shows the need of full and firm conviction that duty must be done and discipline must be maintained"[23]

---

[21] Id.
[22] Id, 8th provision.
[23] Chester Howland, *Thar She Blows!* (Wilfred Funk, New York, 1951), 223.

Therefore, the need to construct the rigidly hierarchical chain of command on whaling ships was also an indispensable feature in this particular industry, and its infringement on personal liberties, which within some other context should have destroyed the very foundation of this contractual employment relationship, was never brought to court or condemned by law. This again exemplified the transformation of American legal structures into the bulwark of economic growth, despite the shockingly undemocratic and uncreative nature it assumed.

II. CORPORATIONS: PRIVATE OR PUBLIC?

The initial formation of the whaling companies in 18th century America was similarly of a pioneering design, as these corporations were chiefly concerned about private profits rather than public good, which, however, was not completely disregarded by the whaling merchants. The legal identity of "corporations", which was different before the emergence of large-scale manufacturing and financial institutions, focused more on the public interests it served rather than the profit-seeking activities widely seen as the chief objective of corporations today. This definition was stated by Chief Justice Roger B. Taney in *Charles River Bridge v. Warren Bridge* with much clarity, that "private corporations" had their foundations rest upon "the grant of certain franchises by the public… in a matter where the public interest is concerned"[24] and that "any ambiguity in the terms of the contract… must operate against the adventurers, and in favor of the public"[25]. This widely accepted definition, nonetheless, did not correlate with the course of development experienced by the American whaling industry, and intriguing complications arose over this topic.

---

[24] *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837)
[25] Id.

As early as 1675, residents of colonial Long Island have been organizing collective whaling bands that shared costs and profits together in a primitively and informally corporate manner[26]. This model gradually gave rise to the larger and chartered whaling companies in Massachusetts, California and elsewhere, where adventurous investors funded expeditions with money and supplies, and expected specific shares of whaling profits in return[27]. Whaling fleets were purchased and maintained collectively, and their enterprises run by appointed agents, masters and affiliated vessel owners[28]. In no contract was the public good or interests ever explicitly mentioned, which at least partially hinted at an early adoption of the modern definition of corporates, fully devoted to producing monetary returns for private individuals.

Yet it would be irresponsible and unfair to dismiss the public side of the whaling industry entirely. First, reasonably, any industry of such a scale and economic vitality had significant economic and political implications to the local public, evidently shown by the prosperity of coastal towns like New Bedford or New London whose "livelihood" was retained only by whaling[29]. The products yielded by whalers, most noticeably whale bones, sperm oil and whale oil were also essential ingredients and fuel to a pre-industrial, and later industrializing, United States, which was only largely replaced by coal and plastic since the second half of 19th century. Supplying the industries ranging from lamp making to toy making, whaling in the United States never was the concern of a small of entrepreneurs.

The public feature of whaling was also suggested by the ready adoption of governmental regulations, and the active involvement of federal and local laws. The whaling companies were

---

[26] *Records of the Town of East Hampton,* December 2, 1675.
[27] Hilt, "Incentives in Corporations": 4-5.
[28] Id.
[29] Eric J. Dolin, *Leviathan, The History of Whaling in America,* (W. W. Norton & Company: New York, 2007): 294.

among the first groups to embrace the *Act for the Government and Regulation of Seamen in the Merchant Service* passed in 1790, when the new Constitutional order and the federal government it endorsed were still largely unconsolidated. The selected clauses of this *Act* were even printed on the reverse side of all *Shipping Papers* for reference[30], and they signaled a vested interest of the administration in overseeing the signing of maritime contracts and the inseparable public, even sovereign, characteristics they embodied. Clause One of the *Act* demands "every master... of any ship or vessel bound from a port in the United States to any foreign port, or… to a port in any other than an adjoining State, shall, before he proceed on such voyage make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel" on wages and terms[31]. In this provision a eagerness to exercise the freshly acquired right of regulating interstate and foreign commerce[32] can be easily perceived, and the involvement of American consuls in the protection and management of American whaling vessels abroad only reinforced the role played by the government in this industry. Thus, despite the overwhelming evidence that whaling in the United States was a predominantly private and profit-oriented enterprise, its intersection with the public sector was present at the same time, which provided an official means of ensuring the rights and profits of this business would not be violated, a situation that could readily translate into a more productive economy that benefited both investors and private economic actors, and the general public as well.

[30] New Bedford Whaling Museum, Mss. 79.
[31] Congress of the United States, *Act for the Government and Regulation of Seamen in the Merchant Service* (New York, 1790): https://cdn.loc.gov/service/rbc/rbpe/rbpe21/rbpe214/2140180a/2140180a.pdf.
[32] *The Constitution of the United States of America* (Government Publishing Office), Article I, Section 8.

Works Cited

Blackstone, William. *Commentaries on the Laws of England, Book 2, Chapter 30* (1765, University of Adelaide, online archives). https://ebooks.adelaide.edu.au/b/blackstone/william/comment/book2.30.html.

Congress of the United States, *Act for the Government and Regulation of Seamen in the Merchant Service* (New York, 1790): https://cdn.loc.gov/service/rbc/rbpe/rbpe21/rbpe214/2140180a/2140180a.pdf.

Dolin, Eric J. *Leviathan, The History of Whaling in America* (W. W. Norton & Company: New York, 2007).

Ellis, R. *Men and Whales* (New York: Alfred A. Knopf, 1991).

Gambell, Ray. "International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling." *Arctic,* 46, 2 (1993): 97-107.

Hilt, Eric. "Incentives in Corporations: Evidence from the American Whaling Industry". *The Journal of Law & Economics*, 49, 1, (2006): 197-227.

Horwitz, Morton, J. "The Historical Foundations of Modern Contract Law" *Harvard Law Review,* 87, 5 (1974): 917-956.

Howland, Chester. *Thar She Blows!* (Wilfred Funk, New York, 1951).

Hurst, James W. *Law and the Conditions of Freedom* (Madison, 1956).

Johnson, Bob. "A Peculiarly Valuable Oil: Energy and the Ecology of Production on an Early American Whale Ship". *The Journal of the Society for Industrial Archaeology,* 40, ½, Theme Issue: New Bedford, (2014): 33-50.

M'Farland against Newman, 9 Watts 55 (1839).

New Bedford Whaling Museum Ship's Papers Collection, Mss. 79. *Whalemen's Shipping Papers.*

Novak, William J. "Public Economy and The Well-ordered Market: Law and Economic Regulation in 19th-Century America". *Law & Social Inquiry,* 18, 1(1993): 1-32.

Orbach, Michael K. "Whaling, Law, and Culture". *Whales, Whaling and Ocean Ecosystems* (University of California Press, 2006).

Palmer, William R. "Early American Whaling". *The Historian,* 22, 1, (1959): 1-8.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).

Records of the Town of East Hampton, December 2, 1675.

Stoljar, S. J. *A History of Contract at Common Law.* (Australian National University Press, Canberra, 1975).

The Constitution of the United States of America (1789, Government Publishing Office).

Tower, Walter S. *A History of the American Whale Fishery* (University of Pennsylvania, Philadelphia, 1907).

United States Census Bureau, "Remarks on the Statistics of Manufactures".