Essay

Loss without Remedy: *Moby-Dick* and the Laws of Compensation

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Introduction: Arm and Leg

As he would later state in court, Nicholas Farwell entered into an employment contract as an engineer for the Boston and Worcester Railroad in 1835, "and continued to perform his duties as engineer till October 30th, 1837" (Massachusetts, Supreme Judicial Court, *Farwell* 49–50). On that unlucky day, Farwell was operating a train west of Boston when it struck a misplaced switch and derailed. The engine and cars, as Farwell's declaration stated in characteristically sober legal prose, "were thrown from the track of said rail road, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same" (50).

At the close of a decade in which industrial and railroad accidents had proliferated across the northern United States, Farwell followed the example of many of his fellow victims and took the railroad to court. Like most of them, he lost. In an 1842 opinion by Massachusetts Chief Justice Lemuel Shaw, Farwell's case became synonymous with a particularly onerous doctrine of nineteenth-century tort law known as the "fellow-servant rule."[1] Shaw reasoned that Farwell had voluntarily chosen to take on "the natural and ordinary risks and perils" of his job (57), and that he had presumably been compensated accordingly. Declining to meddle in the freely bargained contract between employer and employee, Shaw ruled that Farwell's only recourse lay in filing suit against "the actual wrong-doer" (59),

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the fellow employee who had misplaced the switch. The rule announced by Shaw, soon to be adopted in one state after another, thus curtailed the common-law rule that an employer is strictly liable for its employees' torts, leaving an employer answerable to its employees only for its own negligence. As a consequence, industry would enjoy near-complete immunity from liability to employees injured on the job; after all, how could an abstract, bodiless corporation act *except* through its employees? A loss like Farwell's, Shaw concluded, "must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell" (59).

Nine years after Shaw's landmark decision in *Farwell* left the amputee plaintiff with no effective recourse, the chief justice's son-in-law would publish a then-obscure novel whose plot also arises from a workplace accident. An employee in a profitable but perilous industry loses a limb when he is thrown from his conveyance and crushed by a sublime, superhuman force that seems to have agency and volition all its own, and in subsequently pursuing redress for his injury, he only suffers a second and even more catastrophic defeat. For obvious reasons, Captain Ahab cannot sue his injurer as did Nicholas Farwell. And yet Ahab's fiery hunt for revenge proves every bit as unavailing as Farwell's search for legal justice, the captain and crew of the *Pequod* defeated as soundly by Moby Dick as Farwell was in the courtroom of Lemuel Shaw. There is ultimately no difference between suing the Boston and Worcester Railroad and hunting the white whale, for both are equally fruitless; one might as well try to harpoon the intangible corporation or haul Moby Dick into a Massachusetts courtroom.

That parallelism lies at the core of this essay's argument: Herman Melville's *Moby-Dick* (1851) is a tragedy of failed revenge written for an era in which legal and prelegal channels of justice had alike been impeded. As Oliver Wendell Holmes, Jr., would later recognize in his evolutionist account of legal history in *The Common Law* (1881), Ahab's code of violent and proportionate revenge for injury—"dismember my dismemberer" (Melville 143)—had long ago been superseded. Although "the early forms of legal procedure were grounded in vengeance" (Holmes, *Common Law* 2), the subjective, irrational, and absolutist underpinnings of revenge were incompatible with the values of a modern market economy: objectivity, exchangeability, compromise, and the ignorance of sunk costs (Posner, *Law* 80). Hammurabi's Code and *lex talionis* thus gave way to what Starbuck calls the "Nantucket market" (Melville 139) and the law of damages, in which money was indeed the measurer of all things, whether a breached contract, damaged property, or the loss of limb or life. And if monetary damages had superseded individual vengeance, nineteenth-century American law increasingly denied even that form of justice. As "the shock troops of capitalism," in Charles Sellers's trenchant phrasing (47), pro-business lawyers and judges such as Melville's father-in-law advanced what the legal historian Morton Horwitz describes as an "instrumental conception of law" (1): that is, they employed (and sometimes drastically altered) the common law as a tool of public policy to subsidize and accelerate the rise of industry, at the primary expense of its victims. Weighing so many lost limbs against so many miles of railroad track—or, in *Moby-Dick*'s equivalent, so many drops of blood against so many gallons of oil—jurists such as Shaw pronounced in a growing range of circumstances that "the loss must lie where it falls," creating a tort regime in which liability was the exception and not the norm.[2] As Mark Twain and Charles Dudley Warner would later write of a horrific steamboat explosion in *The Gilded Age* (1873), all too many accident cases would close with "the inevitable American verdict which has been so familiar to our ears all the days of our lives—'NOBODY TO BLAME'" (33).

The possibility that nobody may be to blame is the very condition of modern life that Ahab is disastrously unable to accept. If Shaw helped to make the Boston and Worcester Railroad as indomitable and implacable an adversary as his son-in-law would make the white whale, the resemblance ultimately has implications that extend beyond specific tort doctrines to the very origins and ends of law.

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Drawing on Holmes's claim that law originates from revenge, Richard Posner suggests that the impulse for revenge operates hydraulically: that is, it "tends to break out whenever legal remedies are blocked" (*Law* 84), ultimately jeopardizing the rule of law itself. Ahab epitomizes this fatal recoil: as nineteenth-century tort law would grant no remedy for injuries like his, so he in turn violently dissents from each premise of Shaw's holding in *Farwell*. Not only does he reject the notion that his "dismasting" (Melville 139) was an assumed risk already balanced by the lucrative earnings of a whaling captain; he also denies the very commensurability of pain and money and, still more fundamentally, the possibility that his injury was a "pure accident" (Massachusetts, Supreme Judicial Court, *Farwell* 59) for which the "dumb brute" (Melville 139) of a whale is no more responsible than was the moving train itself in *Farwell*. Indeed, the fact that Moby Dick's degree of intentionality and responsibility is inscrutable only heightens Ahab's hatred and his resolve to "wreak that hate" upon the whale. In concentrating all loss and evil beneath the whale's ambiguous "mask" and vowing to "strike through" it (140), Ahab acts for all who have been told that there is nobody to blame, consolidating power aboard the *Pequod* by (in George Shulman's words) "conceiving collective objects as 'practically assailable causes'"—"capitalism," "big business," "the state"—"to hold to account and remake or destroy" (91). Ahab's monomaniac pursuit of vengeance is thus not so much the law's superseded past as its ever-threatening future, a return of the repressed that emerges in proportion to the law's denial of accountability and compensation.

Placing *Moby-Dick* in the discursive history of torts and accidents in the nineteenth-century United States thus illuminates the conditions that might engender an atavistic Ahab amid a burgeoning capitalist society. Such a reading of Melville's novel also challenges a still-influential interdisciplinary paradigm in which literature at once critiques and supplements narrowly formalist or utilitarian conceptions of the law. For critics as different as Martha Nussbaum (54–55) and Wai Chee Dimock (*Residues* 141), law and literature's particular antipode is the far more influential interdiscipline of "law and economics" ably championed by Posner, a neo-Shaw who identifies "wealth maximization" as "the best positive and normative guide to the law of torts" ("Wealth Maximization" 99) and who has praised the "efficiency" of *Farwell*'s fellow-servant rule (Landes and Posner 309).[3] Such Gradgrindian conceptions of the law, this critique charges, rest on "assumptions about the generalizability, proportionality, and commensurability of the world" (Dimock, *Residues* 1) that leave law "blind to the complexity of human lives" (LaCroix and Nussbaum 3). In its attention to the "stubborn densities of human experience" (Dimock, *Residues* 5) and its empathetic "ability to imagine what it is like to live the life of another person" (Nussbaum 5), literature thus "gives the law something it needs" (LaCroix and Nussbaum 10). Melville's own "Bartleby, the Scrivener" (1853) and *Billy Budd, Sailor* (posthumously published in 1924) are classics of the law-and-literature canon because they epitomize this interdisciplinary opposition, inviting individualized sympathy for their titular characters and exposing the limits of legalism—specifically, critics often suggest, Shaw's reasoning in *Farwell* (Thomas, *Cross-Examinations* 164–77) and in fugitive-slave cases (Cover 1–7; Delbanco 302; Winter).[4]

By contrast, *Moby-Dick* is less amenable to such a reading and, perhaps for that reason, has been less frequently examined in its legal context. To be sure, Ahab's pain and suffering are, to use Dimock's term, precisely the kind of incommensurable, unaccountable "residues" that a cost-benefit jurisprudence like *Farwell*'s cannot encompass. Moreover, no one in the novel more insistently demands sympathy and asserts his irreducible individuality—"In the midst of the personified impersonal, a personality stands here" (Melville 382)—than does Ahab. But if Ahab's eloquence and the "wild, mystical, sympathetical feeling" (152) it inspires correspond roughly to the role of "literature" in the above binarism, the implications are, to say the least, equivocal. In its vehemence, narcissism, and apocalyptic consequences, Ahab's self-assertion is merely the obverse of his premodern hatred for Moby Dick; to give him the full and undivided sympathy he craves is to deny

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it to everyone else and, as such, not to enrich but to destroy the possibility of equal justice under law. Against this seeming impasse—law's unsympathetic commensurability versus literature's sympathetic disparity—how might we imagine a different paradigm of literature's supplementarity to law, one in which sympathy and accountability alike are neither refused nor concentrated so much as universalized? In an era marked by irremediable losses that seem the work of forces as vast and ungraspable as the white whale—climate change, systemic racism, a global pandemic—how might law and literature, as one critic has recently put it, move "beyond the ideal of personhood . . . to think about large-scale systems and collective fates" (Smith 56)?

In envisioning an alternative law of compensation in which responsibility is untethered from fault, *Moby-Dick* points toward just such a new and expansive horizon in literature's relation to law. Indeed, Melville anticipates the subsequent course of workplace accident law in the twentieth century, when statutory workers' compensation schemes did away not only with victim-blaming doctrines such as *Farwell*'s fellow-servant rule but with blame altogether. In a further step in law's evolution away from revenge, workers' compensation preempted the tort system and replaced adversarial litigation with universal insurance for all work accidents, without regard to the individual fault of either the employer or the employee. *Moby-Dick* prophesies that shift, depicting both the self-inflicted downfall of the legal regime that Lemuel Shaw helped bring into being and its imminent supersession by a no-fault order embodied in the relationship of Ishmael and Queequeg. In emblematizing a "mutual, joint-stock world" (Melville 64) where "every mortal that breathes" bears a "Siamese connexion with a plurality of other mortals" (255), Ishmael and Queequeg repudiate both *Farwell*'s denial of responsibility and Ahab's concentration of it in favor of the same collective, actuarial logic that undergirded the move from tort to workers' compensation. Ultimately, the narration of *Moby-Dick* itself is Ishmael's most sustained act of "spreading the loss," diffusing responsibility for the *Pequod*'s shipwreck beyond one man and one whale to an entire industry and society.

From Whale Lines to Rail Lines

Less than a decade separated the publication of *Moby-Dick*, in 1851, from that of the first English-language treatise on tort law, by the Boston lawyer Francis Hilliard, in 1859. Hilliard's treatise—and, I shall argue, Melville's novel—arose in response to what John Fabian Witt identifies as a pressing new problem of industrializing society: "compensation for unintentional human injuries generated on a mass scale by the regular operations of economic life" (7). The rise of torts as a discrete branch of law was ultimately attributable to what Lawrence Friedman aptly describes as modern machinery's "marvelous capacity to cripple and maim" users and bystanders alike (284). As Nicholas Farwell knew all too well, chief culprit among these machines was the railroad. In surveying the swath of destruction that it wrought, Friedman tellingly resorts to animalistic metaphors: trains, he writes, were "wild beasts" (444) that "swept like great roaring bulls through the countryside" (284) and left in their wake a "rich harvest of death, injury—and potential lawsuits" (444). The fact that railroads and other industries were also highly lucrative enterprises with ample funds for the potential compensation of their victims only made such lawsuits all the more enticing. Underlying the new doctrines of tort law, and omnipresent in both the industrial workplaces and financial markets of the nineteenth century, was a concept that originated on the stormy seas of maritime commerce: risk, a word that originally referred not to danger per se but to a specific form of marine insurance protecting against such danger (Levy 3).

The same migration of risk from sea to land informs *Moby-Dick*. Life on the *Pequod*, with its combined danger and profitability, foreshadows the hazards of life on what Ahab calls "the iron way" (Melville 143). Even before the whaleship sets sail, Ishmael reminds the reader that "of all ships, whaling vessels are the most exposed to accidents of all kinds" (89), and later warns of "the general

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perils of the grand fishery" (172). Those general perils are only heightened by Ahab's madness, leading Stubb to observe, in an apt allusion to risk's marine-insurance origins, that "whatever ship Ahab sails in, that ship should pay something extra on its insurance policy" (384) due to its "extra risks" (385). The narrative itself corroborates the point, containing enough disasters great and small to fill a minor treatise on tort law: consider not only the calamities wrought by Moby Dick himself on Ahab, the *Pequod*, and other ships encountered in the "gam" chapters but also (to give only a few examples) Tashtego's near entombment inside a whale's severed head, Pip's abandonment and near drowning, the fall of a nameless crewman from the masthead, and Ahab's final, fatal entanglement in the unspooling whale line. The whale line, in particular, emblematizes the "silent, subtle, ever-present perils of life" (229) to which (in *Farwell*'s phrasing) "all men, in all employments, and at all times, are more or less exposed" (Massachusetts, Supreme Judicial Court, *Farwell* 59): in the chapter "The Line" Ishmael tellingly compares its unspooling to "the manifold whizzings of a steam-engine in full play," and concludes that, whether at sea or on land, "[a]ll men live enveloped in whale-lines" (Melville 229). Likewise, whales themselves are metaphorically linked both to "the mighty iron Leviathan of the modern railroad" (414) and, when Ishmael stands inside the loom-like skeleton of a whale, to textile factories, two of the era's most common sites of accident.[5]

The unprecedented frequency, scale, and complexity of industrial accidents exploded earlier paradigms of legal responsibility, which had developed against a backdrop in which accidents were comparatively uncommon. Eighteenth-century tort law generally imposed strict liability for accidental injuries, asking not whether defendants had acted wrongly but simply whether they had acted at all. Under this regime, as Horwitz explains, "negligence" was synonymous not with careless misfeasance (as now) but with *non*feasance: "neglect or failure fully to perform a preexisting duty" (87). This framework of strict liability for injuries within particular preexisting status relationships (e.g., master and servant) would rapidly be attenuated by the new wave of industrial accidents, which often took place between complete strangers and without any fault on the defendant's part. Nineteenth-century tort law accordingly broadened its horizon of responsibility by reorienting itself around the new standard of "ordinary care," a universal duty owed, in Holmes's words, by "all the world to all the world" (qtd. in White 16, 19).[6] Left unmodified, however, such a universal duty seemed nothing less than a slippery slope to socialism, threatening a comprehensive redistribution of wealth from enterprise to its victims by way of near-endless chains of causal responsibility. Under such a scheme, Holmes imagines in *The Common Law*, "*any* act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage"; indeed, he drives the point home, "why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff?" (95; emphasis added).

Faced with what Holmes deemed the reductio ad absurdum of a state that might "make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members" (96), nineteenth-century courts imposed sharp doctrinal limits on the universal duty of care that they had just introduced.[7] Most importantly, a defendant could generally only be liable when it acted negligently—that is, in breach of the aforementioned duty of "ordinary care," defined as "that kind and degree of care, which prudent and cautious men would use . . . in the circumstances" (Massachusetts, Supreme Judicial Court, *Brown* 296). The words are once again Shaw's, in *Brown v. Kendall* (1850), the landmark American negligence case decided a year before Melville published *Moby-Dick*. The defendant's negligence also had to be a "proximate cause" of the plaintiff's injury, based on whether the harm was a typical or foreseeable consequence of the negligence, a determination often rooted more in policy than in fact. Finally and perhaps most dauntingly, the plaintiff's own conduct needed to be blameless. Under the harsh rule of "contributory negligence," plaintiffs who were themselves negligent, no matter how slightly, were

barred from recovery. As I have already mentioned, *Farwell*'s "fellow-servant rule" in turn insulated employers from liability for the negligence of one employee toward another, on the premise that employees were at once compensated for such risks and better positioned to monitor the performance of their coworkers (Massachusetts, Supreme Judicial Court, *Farwell* 57). And in the closely related doctrine of "assumption of risk," plaintiffs could not recover for those dangers that they voluntarily took on: recall Shaw's reasoning in *Farwell* that the plaintiff had "taken upon himself the natural and ordinary risks and perils" (57) of his job and that his wage had included "a premium for the risk which he thus assume[d]" (58), such that an award of damages would have amounted to a kind of windfall. In the early twentieth century, each of these limitations would be obviated by the rise of workers' compensation laws, a compromise in which workers gave up their common-law right to sue in exchange for certain fixed benefits for most workplace injuries.[8]

This discourse of upside and downside risk shapes Melville's novel no less than his father-in-law's jurisprudence. Whaling, Ishmael repeatedly reminds the reader, was a business as lucrative as it was perilous. Nearing its zenith when Melville wrote *Moby-Dick*, whaling was the third-largest industry in Massachusetts and the fifth largest in the United States (Dolin 206); one business historian recently deemed it America's first venture-capital industry (Nicholas 11–39). Unsurprisingly, Ishmael describes New Bedford, epicenter of the industry, as "perhaps the dearest place to live in, in all New England" (42). Moreover, the whaleships' performance-based "lay" system of compensation, in which crewmen were paid a share of the voyage's profits rather than a fixed wage like their counterparts in factories and railroads, gave even lowly greenhorns like Ishmael a stake in the venture. Between this incentivized pay system, the crew's relative racial egalitarianism, and the potential to rise from cabin boy to captain to shipowner (as in the case of the *Pequod*'s co-owner Bildad), the whaleship appears at first to be the perfect embodiment of the antebellum North's free-labor ideology, premised on the belief that "labor created all value, and that all men could aspire to economic independence" (Foner 31).

In the aftermath of the Civil War, that ideology would collapse under the weight of its own contradictions, as business interests commandeered its freedom-of-contract rhetoric to impede the upward mobility such rhetoric had once promoted (Foner ix–xlii).[9] But even before the war, free labor was thrown into what Witt labels a "crisis" (22) by the rising frequency and severity of workplace accidents, which threatened, in Ishmael's words to which I shall later return, a "mortal wound" to "free will" (Melville 255). In apotheosizing, like Ishmael, the "abounding dignity. . . shining in the arm that wields a pick or drives a spike" (103), free labor offered scant dignity or consolation—or further employment, for that matter—to those who had *lost* their arms on the job. Assumption of risk, like Ishmael's "Loom of Time," was the means whereby jurists like Shaw attempted to reconcile "chance, free will, and necessity" (Melville 179), purporting to find the figurative equivalent of a prosthesis for Farwell's lost limb in the higher compensation that employees received for dangerous tasks. In reality, of course, the contractual calibration of wages to risk was often less than fair because of the disparate bargaining power of employee and employer (Thomas, "Narratives" 6–7). More fundamentally, the assumption-of-risk doctrine, like both insurance and monetary damages, presumes a questionable equivalence between pain and death on the one hand and dollars on the other. If we grant both premises, however, the promise of assumption of risk is that it obviates the need for damages by subsuming accidental injury within the laws of a self-regulating market.

In a further link to *Moby-Dick*, Shaw's reasoning on assumption of risk in *Farwell* was born from maritime precedents. In holding that Farwell had assumed his own risk and that the railroad was not liable for a fellow employee's negligence, Shaw cited a marine insurance case he had decided the previous year, *Copeland v. New England Marine Insurance Company* (1841), whose central facts strikingly resemble the plot of *Moby-Dick*: a ship was wrecked after its captain became insane

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and, like Ahab (the "before living agent" who "became the living instrument" of his madness [Melville 157]), "ceased to be a voluntary or responsible agent" (448). The true cause of the shipwreck was the inaction of the first mate, who showed a negligent "want of judgment in perceiving and determining that the master had become so deranged or incapacitated as to authorize and require him to interpose"; but such mistakes, Shaw went on as if anticipating Starbuck's dilemma, "may occur in every voyage, and must be considered as one of the contingencies incident to navigation" (449). Thus, despite the mate's negligence, Shaw had held that the ship's owners were entitled to recover from their insurer. *Farwell* accordingly cites the earlier case for the proposition that employers are not always responsible for their employees' negligence (57–58), thus analogizing the railroad company to the shipowners. But as Jonathan Levy suggests (12), the citation of *Copeland* also implicitly equates the *losses* suffered in the two cases—Farwell's arm and the wrecked ship—and thereby analogizes Farwell himself to the shipowners rather than to their employees: just as owners can insure their property, so one can either assume or insure against the risk of harm to one's body. Compensated in accordance with the dangers of his job, Farwell could have taken his wage risk premium and purchased a contract with one of the accident insurance companies that began to emerge in the mid-1840s. *Farwell* thus envisions risk to be as alienable as property, as severable from the self as a limb. The risk of harm, the wage adjustment for that risk, and the premiums for insuring against that risk: all three are at once exchangeable and (at least notionally) equal.

Dimock accordingly finds in *Farwell* an "economy of pain" (*Residues* 142) that exemplifies the reductionist "abstraction" and "commensurability" of legal reasoning (2), in contrast to literature's attention to the "incommensurate" and "nonintegral" (10). But this "compensatory equilibrium" (159) is even more pronounced in a literary text published a year before *Farwell*: Ralph Waldo Emerson's essay "Compensation" (1841), which Witt rightly identifies as the philosophical equivalent of Shaw's reasoning on the assumption of risk. Emerson's essay opens by rejecting a preacher's assumption "that judgment is not executed in this world" (55) and that compensation, envisioned by the preacher as the "revenge" of the virtuous (56), is deferred to the afterlife. Not so, Emerson argues, propounding instead a "law of Compensation" (57) rooted in both physics and economics. Every action has its equal and opposite reaction; everything in the universe, human labor included, comes not only at a price but at exactly the right price. Emerson's law thus anticipates what twentieth-century economists would call the efficient-market hypothesis: it asserts that it is impossible to beat the cosmic market, because the true value of every experience and thing is always already reflected in its price. Every calamity has its compensations, and, conversely, every benefit has its tax. Every deed, every mere utterance, Emerson writes in one of American literature's more uncanny intertextualities, "is a harpoon hurled at the whale, unwinding, as it flies, a coil of cord in the boat, and, if the harpoon is not good, or not well thrown, it will go nigh to cut the steersman in twain, or to sink the boat" (64).

By Emerson's logic, a legal system providing compensation in this life is every bit as unnecessary as divine judgment in the next one. The "laws" he speaks of are those of nature and of the "natural" market, not of the courts or the correctional system; even criminals are punished less by prison and gallows than by guilt and ostracism, such that the true "causal retribution is in the thing" itself (60). The possibility of "unpaid loss, and unpayable" (73) and the corresponding need for some external mechanism of restorative justice, whether judicial or extrajudicial, are either illusory or, what is perhaps the same thing, deserved. As a reconciliation of accident and autonomy, Emerson's law of Compensation thus offers little more in the way of consolation than Shaw's conclusion that "the loss must lie where it falls." Just as Twain's court announced the "inevitable American verdict," Emerson finds "NOBODY TO BLAME" except, perhaps, for the victim, for whom the calamity may simply be the inevitable "tax" imposed on every "advantage" (70).

In *Moby-Dick*, both of these possibilities are left open: Ahab has either nobody to blame for the loss

of his leg or nobody to blame but himself. Neither possibility, as Cindy Weinstein has pointed out (103, 106), is remotely palatable to him. Ahab, that is, cannot accept Emerson's law of compensation and its "deep remedial force that underlies all facts" (Emerson, "Compensation" 73); he would scoff at the notion that his injury already contains its own reparation, whether in his presumably risk-adjusted lay as a captain (as in Shaw's pecuniary version of the law of compensation) or in the form of wisdom and "growth of character" (as in Emerson's metaphysical version of it [73]). The very nature of Ahab's injury—dismemberment and, Melville hints, ensuing emasculation after a fall in which his prosthetic leg "all but pierced his groin" (355)—symbolizes a loss that is no more capable of self-repair than is Ahab's own body. Indeed, Ahab's subsequent groin injury compounds rather than compensates for his original dismemberment: in direct refutation of the karmic book balancing of "Compensation," Melville writes that "equally with every felicity, all miserable events do naturally beget their like" (355). Stripped by his disability of the manly autonomy that was a sine qua non of free labor (Thomson 44–46), Ahab would only be further incensed at the suggestion that his is a case, like Nicholas Farwell's, of *damnum absque injuria*, a loss without a remedy. In the absence of any other compensation, prelegal revenge seems the only remedy that can make Ahab whole again, as though the only prosthesis capable of replacing his lost leg and his lost manhood is the slain body of Moby Dick himself.

The uncertainty as to whether Moby Dick is even capable of forming intentions and acting on them only underscores the adamance with which Ahab rejects the possibility of what Shaw in *Farwell* calls "pure accident." As Maurice Lee writes, "Ahab's denial of chance is crucial to his psychology and *Moby-Dick*'s philosophical architecture" (51). The *Pequod*'s captain faults Moby Dick not only for his own injury but for every wrong in human history, "pil[ing] upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down" (Melville, *Moby-Dick* 156). The contrast between Ahab's strict, backward-looking approach to liability and the instrumentalism of the nineteenth century is nowhere clearer than in his conflict with Starbuck, who serves as a veritable mouthpiece for Lemuel Shaw in the chapter "The Quarter-Deck."[10] When Ahab assembles the crew and announces the *Pequod*'s true mission, Starbuck promptly raises two objections in the spirit of Shaw's decisions in *Farwell* and *Brown*. First, Starbuck invokes the "Nantucket market" and, by extension, the law of Compensation: as if anticipating Posner's focus on "wealth maximization," he asks Ahab "[h]ow many barrels" of oil—or, to play on his apt name, how many bucks—his vengeance will yield (139). Revenge, Starbuck implies, is neither profitable nor necessary; Ahab's lost leg is merely a credit on the *Pequod*'s account to be offset by the barrels of oil the ship will bring home, and the lays its crewmen will earn, so long as it keeps to its business. Second, Starbuck protests the "madness" and "blasphemy" of Ahab's call for "[v]engeance on a dumb brute . . . that simply smote thee from blindest instinct!" (139). Described as "the most careful and prudent" of whalemen (188), and unwilling to have any man in his boat "who is not afraid of a whale" (102), Starbuck himself epitomizes the "prudent and cautious man" of Shaw's negligence doctrine (Massachusetts, Supreme Judicial Court, *Brown* 296; see also Goodman 49). It is only fitting, then, that he views the whale's attack on Ahab through the lens of fault and concludes that Moby Dick, as a mere "dumb brute," should not be held responsible. To Starbuck, Ahab's dismemberment is nothing more than bad luck, a *Farwell*-like accident with "nobody to blame."

Ahab, of course, makes quick work of both objections, articulating a premodern "little lower layer" (139) of retributive justice that the modern jurisprudence of Starbuck and Shaw can never quite supplant. Pounding his chest, he first tells Starbuck that "[i]f money's to be the measurer . . . my vengeance will fetch a great premium *here*" (139), and thereby, as C. L. R. James writes, "strike[s] at the very foundation of American civilization" (5). Ahab's words, and their extraordinary sway over the *Pequod*'s crew, expose the thin values of

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profit maximization as perennially endangered by the thicker values of a shared hatred. But they are also, more specifically, a rebuttal of modern law's conversion of injury and death (or rather life) into money. The two terms simply are not commensurable at either the individual or the social level: neither one-legged Ahab nor the legal system can stand firmly and cohesively on the values of the market alone. Ahab's lower layer goes deeper than Starbuck's merely pecuniary lay; his "great premium *here*" trumps Shaw's risk premium.

As for Starbuck's second objection, Ahab's famous response is at bottom a theory of strict liability. The white whale, Ahab repeats here and elsewhere, is as "inscrutable" as a "pasteboard mask" or a "wall"; it may be "agent" or "principal"; and there may or may not be "naught beyond" it (140). But for Ahab's purposes, "'tis enough": the whale's inscrutability is presumed to be "inscrutable malice" (140). "Malice" is, of course, the language of fault, but Ahab's conception of fault is not that of Starbuck and Shaw, in which accidents may occur without fault and thus without remedy. Rather, Ahab eschews the negligence standard and instead enlists the concept of fault, indeed evil, in service of strict liability: Moby Dick chomped off his leg and, ipso facto, could not "have smote him with more seeming malice" (156). For Ahab as for pre-nineteenth-century tort law, the only question is whether the whale acted at all, not whether it acted wrongfully. The action is per se wrongful; a whale that bites off a leg *must* be malicious and at fault, for otherwise there would be nobody to blame—for Ahab, an intolerable alternative. Ahab articulates a similar concept of responsibility when he questions his own free will in the chapter "The Symphony," asking, "Is it I, God, or who, that lifts this arm?" (406). It is, at the very least, a striking coincidence that Shaw's decision in *Brown* a year earlier also turned on the defendant's act of lifting his arm and accidentally hitting the plaintiff in the face. In absolving the defendant because he acted neither carelessly nor intentionally, Shaw was rejecting precisely the older vision of responsibility articulated by Ahab, which would turn solely on whether the defendant had voluntarily lifted his arm, not on his motives or carefulness in doing so.

Both in his rejection of monetary compensation and in his ascription of malice to the "dumb brute" of a whale, Ahab harks back to one of the "early forms of liability" cited by Holmes in *The Common Law* (1): the deodand, a legal nonperson (whether a slave, an animal, or an inanimate object) deemed responsible for an accident and "given to God" (24)—that is, killed or destroyed. For Holmes, the deodand epitomized a legal order grounded in vengeance, traceable to early Hebrew, Mesopotamian, and classical laws such as Exodus 21:28: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned" (*Bible*). As Holmes argues, rules such as this, imposing liability not on the deodand's owner but on "the body doing the damage, in an almost physical sense" (11), are illogical as a means of either directly punishing the owner or compensating the victim. Rather, the forfeiture of the deodand gratifies a "desire for retaliation against the offending thing itself" (34).[11] By the time of *Moby-Dick*, the deodand would indeed have seemed the barbarous, obsolete relic that Holmes later portrayed it as being. The doctrine never took hold in the American colonies, and by the mid–nineteenth century it had been definitively abolished in Great Britain by act of Parliament. But the reason for that abolition is itself revealing. After falling into disuse over the preceding centuries, the deodand made a brief return to nineteenth-century British law in response to a new agent of injury that, as we have seen, was hard to hold liable by other means: the steam-powered engine. Until its abolition, the deodand doctrine promised relief unavailable through more modern legal channels, saddling British railroads with fines in the thousands of pounds in the 1830s and 1840s (Pietz 105–08; Williams 338–43).

Ahab's doomed quest for revenge on Moby Dick is tantamount to the brief recrudescence of the deodand amid the Industrial Revolution: both represent a return of the law's repressed origins in vengeance or, as Dimock describes Melville's novel, a "tragedy of the progressive failing to supplant the primitive" (*Empire* 122). Indeed, Ahab's

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resolve to "wreak [his] hate" upon Moby Dick (140) is echoed nearly verbatim in Holmes's description of the deodand as embodying "the *hatred* for anything giving us pain, which *wreaks* itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger" (*Common Law* 11; emphases added).[12] Both the white whale and the steam engine are, partly by the design of instrumentalist jurists like Shaw, difficult to shoehorn within modern legal doctrines of fault, causality, and responsibility. As Nan Goodman writes, the complexity of industrial accidents, and the possibility that "the machine itself" might be responsible, seemed to undercut the very purpose of modern liability: "to identify a source of *human* compensation to make the victim whole" (86). Much the same ambiguity governs Moby Dick's attack on Ahab. Ahab himself, as we have seen, is unsure—and ultimately indifferent to the question of—whether the whale is "agent" (the equivalent of a fellow servant) or "principal"; the narrator similarly equivocates about Moby Dick's intentionality by means of double negatives and qualifications, stating that the whale's attacks are "not wholly regarded as having been inflicted by an unintelligent agent" (156). With no one person or principal (God? the devil?) clearly behind the whale's pasteboard mask and answerable for Ahab's wound, and no means of sublimating his urge for vengeance into the pursuit of legal redress, Ahab's rage can only be heaped "on the manifest cause," Moby Dick himself, who may or may not be blameworthy. Blind and perhaps futile revenge thus returns to stand in for compensatory justice: lacking recourse to the unseen principal, industrial modernity's remediless Ahabs and Farwells can only strike at the visible source of their injuries, with disastrous consequences.

Spreading the Loss

At first blush, Ahab's failure to avenge himself and his ultimate demise may seem but another instance of what critics such as Sacvan Bercovitch and Brook Thomas have diagnosed as a strategy of "containment" (Bercovitch 189; Thomas, *Cross-Examinations* 6) or "cooptation" (Bercovitch 19) endemic to American Renaissance writings, whereby dissent and subversion are punished, defused through apolitical ambiguity or aestheticism, or converted into a reaffirmation of mainstream ideals. In such a reading, the novel's ending would appear to vindicate the progressive, capitalist consensus that shaped the era's tort jurisprudence. The immortal white whale embodies that consensus and renders it as inexorable as a law of nature, just as Ahab's demise literalizes Emerson's law of Compensation and its recoiling "harpoon hurled at the whale" (64). In snaring Ahab in a whale line, sinking the *Pequod*, and floating Ishmael to safety in the aptly labeled "vital centre" of the vortex (Melville 427), Melville dramatizes the fate of all who would depart from that center to challenge the status quo and (per Father Mapple's sermon) "pluck [sin] out from under the robes. . . of Judges" like Lemuel Shaw (54).

To be sure, this interpretation unquestionably has much to recommend it. No less than Shaw with his doctrines of assumption of risk and contributory negligence, Melville often seems to charge Ahab with full responsibility for his own destruction. Starbuck, again a surrogate for Shaw, does so when he warns Ahab to "beware of thyself" (362) and reminds him that "Moby Dick seeks thee not. It is thou, thou, that madly seekest him!" (423). Likewise, as Dimock suggests in a chapter aptly titled "Blaming the Victim," Ahab's own declaration that "Ahab is for ever Ahab" reasserts, against all accident and chance, the autonomous free agent at the root of both free labor and classical tort law (*Empire* 109–39). Ahab, that is, claims to be a law unto himself, the living embodiment of Emerson's "*Ne te quaesiveris extra*" ("Do not seek outside yourself," the epigraph to "Self-Reliance" [25]), so absolutely free from everything outside himself that he is also equally unfree to be anything other than himself or to serve anything other than his oft-cited "purpose." Such professions of autonomy and fixed identity are of course belied by Ahab's own "dismasting" and disability (Jonik 32–41; Thomson 44–46), but their frequency and vehemence invite us nevertheless to view Ahab's

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demise with dry eyes, as neither particularly unfair nor disproportionate—or, in Shaw's terms, as a freely and knowingly assumed risk.

The trouble with this reading, though, is that it is not merely Ahab but the entire *Pequod* and its crew, save one, that sink. One need not fully accept James's claim that the crew are "the real heroes" of *Moby-Dick* (18) to recognize that the consequences of Ahab's revenge quest for the crewmen—to say nothing of their widows and orphans, including Ahab's own—are grossly disproportionate to their own level of fault. Precisely because it so exceeds what is necessary to punish Ahab's antimodern rebellion alone, the sinking of the *Pequod* represents more than just a containment of one individual's dissent. It is the wreck of the entire legal and cultural order that might *elicit* such a calamitous dissent, and as such, it is as much Lemuel Shaw's tragedy as Ahab's. One tragic flaw of the free-enterprise society that Shaw helped to build was its insulation of wealth and power from accountability and its denial of recompense for the accidents and injuries "to which all men, in all employments, and at all times, are more or less exposed" (*Farwell* 59). Ahab emerges in reaction to this unaccountability with all the inexorability of Emerson's "back-stroke" and "kick of the gun" (63), rushing from the haven of the Nantucket market astern to strike at what he deems the "visibly personified" source of all humanity's unpaid and unpayable losses (Melville 156).[13]

Neither Ahab nor Shaw/Starbuck survives the ensuing cataclysm, but what, finally, of the one character who does? Robert Milder's construal of the novel's ending as an American *Götterdämmerung*, in which the "exhausted cultural order" (75) embodied in Ahab is superseded by the more pragmatic perspective of Ishmael, is amply borne out in the characters' divergent approaches to responsibility and compensation. But while the opposition of an atavistic, totalitarian Ahab and a modern, democratic Ishmael has been a mainstay of *Moby-Dick* criticism since F. O. Matthiessen, Ishmael's views represent as much a supersession of Starbuck and Shaw as of Ahab.[14] As I have argued, the dialectic between Ahab and Starbuck suggests that the nineteenth-century law of torts has yet to transcend its origins in prelegal violence. Starbuck may oppose Ahab's quest for bloody revenge, but the thinness of his laissez-faire worldview leaves him powerless to stop the *Pequod*'s crew from backsliding; indeed, insofar as it posits a world of unaccountable, unredressable accidents, Starbuck's Shaw-like outlook is exactly what Ahab takes up arms against. As an alternative to both Starbuck's and Ahab's worldviews, Ishmael offers his "bosom friendship" with Queequeg (56). As filtered through Ishmael's narration, Queequeg bears malice toward none and has charity for all: he is concerned less with causes than consequences, less with pinpointing blame than with socializing the cost of accident. Like Ahab, he affirms strict liability, but he uncouples it from revenge; like Shaw, he affirms a universal duty of all to all, but without subjecting it to such limits as negligence, proximate causation, and assumption of risk.

Consider, in particular, Ishmael's meditations in "The Monkey-Rope," as Queequeg descends onto the half-submerged back of a dead whale while Ishmael stands on the ship and guides the rope on which both men are harnessed. The scene is ripe with potential for accident. If Queequeg slips into the shark-filled water, Ishmael too will be dragged down unless he pulls Queequeg out; the pair are thus, in Ishmael's words, "wedded" and joined in an "elongated Siamese ligature" (255). In the following paragraph, Ishmael proceeds to extrapolate the broader moral and metaphysical significance of the monkey-rope and the "dangerous liabilities" it entails:

> I seemed distinctly to perceive that my own individuality was now merged in a joint stock company of two: that my free will had received a mortal wound; and that another's mistake or misfortune might plunge innocent me into unmerited disaster and death. . . . I saw that this situation of mine was the precise situation of every mortal that breathes; only, in most cases, he, one way or other, has this Siamese connexion with a plurality of other mortals. If your banker breaks, you snap; if your apothecary by mistake sends you poison in your pills, you die. True, you may say that, by exceeding caution, you may possibly escape these and the multitudinous

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> other evil chances of life. But handle Queequeg's monkey-rope heedfully as I would, sometimes he jerked it so, that I came very near sliding overboard. Nor could I possibly forget that, do what I would, I only had the management of one end of it. (255–56)

Consistent with post-humanist readings of the novel foregrounding the role of nonhuman objects as Latourian "actants" that both join bodies together and sever them apart (Armstrong; Crawford; Jonik 20–66), the monkey-rope is the material and metaphoric counterpart of the fatal whale line. If the inescapable danger embodied in the latter may result in Ahab's "lonely death" (426), so too may it spur Ishmael's realization that "[a]ll men live enveloped in whale-lines" (229) and in turn foster the sense of interdependence embodied in the monkey-rope harnessing together "every mortal that breathes" (255). Such an object-oriented reading at once parallels and points beyond the course of legal history in Melville's time: as described earlier, the frequency and scope of accidents wrought by new technologies led nineteenth-century tort law to expand from a liability regime grounded in specific status relationships to one that presumed a universal (albeit instrumentally limited) duty of care. In much the same way, Ishmael's reasoning ascends upward from individual relationships (Ishmael and Queequeg, a client and a banker, a patient and an apothecary) to a "Siamese connexion with a plurality of other mortals," all bound together in mutual risk (255). Where Ahab curses such "mortal interindebtedness" (360), and where Shaw confined it to narrow doctrinal limits, Ishmael by contrast accepts that even the most "heedful" and "innocent" conduct on his part cannot save him from disaster if Queequeg slips, whether or not through any negligence of his own. Like the partners in a joint-stock company (a transitional form between the legal partnership and the corporation), the pair, and by extension all humanity, are jointly liable to and for one another.

What Ishmael previously imagines Queequeg calling a "joint-stock world," in which "[w]e cannibals must help these Christians" (64), is thus one in which profits and losses alike are shared among all. In such a world, everybody is not only at risk but also potentially at fault, which is ultimately to say that *nobody* can be particularly at fault relative to anybody else. Blame gives way to probability; "evil" becomes a quality not of people (or of nonhuman, deodand agents like whales, ropes, and railroads) and their actions, but of "chances." Both a "mortal wound" to "free will" and an "interregnum in Providence" (255), Ishmael's situation in "The Monkey-Rope" at once echoes his earlier conceit of the "Loom of Time," in which "chance, free will, and necessity . . . all interweavingly [work] together" and affirms that passage's conclusion that chance reigns supreme, having the "last featuring blow at events" (179). As we have seen, for Ahab, a "pure accident" is downright inconceivable, and for Shaw, the concept obviated the need for victim compensation. But Ishmael's awareness of the "evil chances of life" (256) undergirds a wholly different model of compensation rooted in solidarity and in what Weinstein aptly describes as "the (utopian) dissemination of individual accountability" (114).

The logic of "The Monkey-Rope" is thus that of the risk pool, or of what Jason Puskar calls "chance collectivity" (3), in which the omnipresence and arbitrariness of accident foster the same sense of interindebtedness that Ahab scorns. Where Ahab piles all loss upon one purportedly responsible entity, Ishmael instead imaginatively *spreads* the loss, and where Shaw's approach to accident presumes that there is often nobody to blame, Ishmael's instead points toward the recognition that there is always somebody to help. If fault and responsibility lie at the root of both vengeance and adversarial tort litigation, Ishmael repudiates both, in favor of precisely what Holmes had opposed: the narratorial equivalent of "a mutual insurance company against accidents" that "distribute[s] the burden of its citizens' mishaps among all its members" (*Common Law* 96). "The Monkey-Rope," that is, endorses the same paradigm shift that Witt chronicles through the successive rise of cooperative insurance, workers' compensation, and, ultimately, the welfare state: the "demoralization of the work accident," in which *Farwell*'s principles of "responsibility, autonomy, and independence" gave way to

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"[a]ctuarial categories and statistical laws" that revealed the inevitability of industrial accidents (Witt 143).[15] Rejecting *Farwell*'s premise of a freely bargained, risk-adjusted wage, the new laws of workers' compensation operated both through the employer's insurance premiums, to internalize accidental losses as a cost of doing business, and through the prices ultimately charged to consumers, to spread those losses to society at large (Calabresi 500–03; Witt 140).

"For God's sake," Ishmael implores the reader after describing the perils of the whaling industry, "be economical with your lamps and candles! not a gallon you burn, but at least one drop of man's blood was spilled for it" (172). That nineteenth-century audiences would have read *Moby-Dick* itself by the light of those whale-oil lamps and spermaceti candles only underscores Ishmael's vital role as loss spreader, realizing the interdependent, post-fault vision of "The Monkey-Rope" through the very act of narration. As the novel's Greek chorus, Ishmael, in Charles Olson's words, "creates the *Moby-Dick* universe in which the Ahab-world is, by the necessity of life . . . *included*" (58). No man is an "*Isolato*" (Melville 107), not even Ahab; Ishmael's task is thus to make *Moby-Dick* not only Ahab's tragedy but also the *Pequod*'s, and not only the *Pequod*'s but also that of the entire industry and society of which Ahab and the *Pequod* are products. To write the *Pequod*'s going under is also to *under*-write it; to pass on its story is also to pass on its loss. And if the shipwreck is, as I have suggested above, the consequence of a worldview that curses interindebtedness and refuses to spread losses, the very act of retelling it in such a "mutual, joint-stock" (64) manner is a means not only of indemnifying for a past calamity but also, as George Shulman suggests (80), of "forestalling" a future one, allaying the sense of unredressed grievance from which another vengeful Ahab might emerge. For although the particular inequities of the law and the particular grievances they provoke may change from one era to the next, the counterpoise between them—the law of Compensation—endures. As insurance against that law's fatal operation, Ishmael offers his audience no more and no less than *Moby-Dick* itself.

Notes

1. *Tort*, derived from the Norman word for "wrong," refers to the branch of law that deals with civil wrongs such as personal injuries, distinct from both criminal law and the law of contracts.

2. By 1881, Holmes thus could state in *The Common Law* that "[t]he general principle of our law is that loss from accident must lie where it falls" (94), while also lauding Shaw as "the greatest *magistrate* which this country has produced" and citing his unsurpassed "understanding of the grounds of public policy to which all laws must ultimately be referred" (106). Later in life, Holmes was similarly effusive in praise of *Moby-Dick*: in a 1921 letter, he described Melville's "mighty book" as a "revelation" that compared favorably to Shakespeare in its "feeling of the mystery of the world and of life," and he singled out for praise the narrator's treatment of "his fellow-sailors . . . and captain with the same unconscious seriousness that common men would reserve for Presidents and Prime Ministers" (327).

3. For, respectively, laudatory and critical comparisons of Posner and Shaw, see Ursin (1293–94) and Hager (39–49).

4. Tort and accident law more broadly, and sometimes *Farwell* specifically, has become an increasingly common subject of literary scholarship. See Dimock, *Residues* 140–81; Goodman; Hollingshead; Macpherson; Margolis; Mariano; Mudgett; Puskar; Reichman 15–39; Siraganian 141–76; Thomas, "Narratives"; Weinstein 101–14; Wertheimer; Williams.

5. Melville's metaphoric allusions to railroads and factories are analyzed further in Evans and in Marx (277–319).

6. The literary-historical significance of this expansion of responsibility is discussed further by Dimock (*Residues* 140–81) and Margolis.

7. Along with these instrumental limits on liability under the common law of torts, business interests also benefited from an important legislative innovation of the mid–nineteenth century: corporate limited liability, under which a corporation's shareholders could not be held personally liable for the business's debts. In Massachusetts, limited liability was codified in 1830, a year before the Boston and Worcester Railroad was chartered (Blumberg 593).

8. Negligence, proximate cause, and assumption of risk remain important limitations on tort liability outside the workplace, although contributory negligence has been largely replaced by the rule of "comparative negligence," in which the plaintiff's negligence does not bar recovery but merely proportionally reduces the damages award.

9. For a reading of *Moby-Dick* that locates the same contradictions in Ahab's leadership aboard the *Pequod*, see McGuire.

10. Critics have long read Starbuck, in contrast to Ahab, as the novel's capitalist par excellence: Gilmore, for instance, deems him a "spokesman . . . for the commercial ethos of the age" (114), while Dimock writes that he seeks to "position [vengeance] within a system of exchange" and to replace it with "a different set of terms, like its value on the Nantucket market" (*Empire* 120).

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11. Holmes completes his account of tort law's evolution by showing that the forfeiture of the deodand was gradually eroded by the custom of the owner's "buying off vengeance by agreement" (*Common Law* 15), until paying damages rather than surrendering the deodand became the norm.

12. Mudgett (139–41) also compares Ahab's "Quarter-Deck" monologue to this passage from *The Common Law* to portray Ahab as a throwback to more primitive forms of justice, but her reading does not address what I take to be the more important question of *why* such a reversion might occur.

13. This conception of Ahab as both a product of and a reaction to liberal individualism is explored further in, inter alia, James (5–48); McWilliams; Rogin (102–51); and Shulman.

14. For dissenting views on the familiar Ahab/Ishmael opposition, see James (34–48) and Pease.

15. See also Levy 264–316. The influence of this socialized, no-fault paradigm on twentieth-century narratives is the subject of Puskar and of Robbins (86–126).

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Abstract: Reading *Moby-Dick* alongside the groundbreaking tort and accident jurisprudence of Melville's father-in-law, Massachusetts Chief Justice Lemuel Shaw, reveals that the white whale's attack on Captain Ahab involves the same questions of risk, responsibility, and redress posed by nineteenth-century industrial accidents. More specifically, Ahab embodies the recrudescence of an earlier, revenge-based conception of justice that emerges in reaction to the pro-business jurisprudence of Shaw, in which industry was increasingly shielded from liability to its victims in cases of "pure accident"—precisely the possibility Ahab is fatally unable to accept. As narrator, Ishmael in turn augurs the rise of a new legal order that disavows the focus on blame and responsibility altogether.