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# MELVILLE, SLAVERY, AND THE FAILURE OF THE JUDICIAL PROCESS

Steven L. Winter\*

*Coke and Blackstone hardly shed so much light into obscure spiritual places as the Hebrew prophets.*

—Herman Melville, *Billy Budd*\*\*

## INTRODUCTION

By the time he was thirty, Herman Melville knew his work would never be appreciated by his contemporaries. In 1849, he wrote his father-in-law and life-long benefactor, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts: “So far as I am individually concerned, & independent of my pocket, it is my earnest desire to write those sort of books which are said to ‘fail.’”<sup>1</sup> Despite the modest success of *White-Jacket*<sup>2</sup> the next year, Melville mostly made good on that promise. When his final novel, *The Confidence-Man, His Masquerade*, appeared in 1857, most of the notices were not kind. The *New York Dispatch* wrote that “it is trespassing too much upon the patience and forbearance of the public, when a writer possessing Herman Melville’s talent, publishes such puerilities . . .”<sup>3</sup> The *London Literary Gazette* declared that to read *The Confidence Man* in its entirety is “a feat which few will attempt, and fewer still accomplish.”<sup>4</sup>

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\*\* HERMAN MELVILLE, *BILLY BUDD, SAILOR: AN INSIDE NARRATIVE* 75 (Harrison Hayford & Merton M. Sealts, Jr., eds., 1962). Subsequent references are to this edition unless otherwise noted.

<sup>1</sup> Letter from Herman Melville to Lemuel Shaw (Oct. 6, 1849), in CORRESPONDENCE 139 (Lynn Horth ed., 1993) [hereinafter CORRESPONDENCE]. This is edition is Volume 14 of a larger collection of Melville’s works entitled THE WRITINGS OF HERMAN MELVILLE.

<sup>2</sup> HERMAN MELVILLE, *WHITE-JACKET: OR THE WORLD IN A MAN-OF-WAR* (Harrison Hayford et al. eds., 1970) (1850). This is edition is Volume 15 of a larger collection of Melville’s works entitled THE WRITINGS OF HERMAN MELVILLE.

<sup>3</sup> *New York Dispatch*, April 5, 1857, in BRIAN HIGGINS & HERSHEL PARKER, HERMAN MELVILLE: THE CONTEMPORARY REVIEWS 487-88 (1995). Excerpts from these reviews can be found online at <http://xroads.virginia.edu/~ma96/atkins/cmrvw.html> (last visited Apr. 11, 2005).

<sup>4</sup> *London Literary Gazette*, April 11, 1857, in HIGGINS & PARKER, *supra* note 3, at 491.

The *London Illustrated Times* called it “indigestible.”<sup>5</sup> The *New York Times*, which published what might be called a favorable review, lauded “the oddities of thought, felicities of expression, the wit, humor, and rollicking inspirations [which] are as abundant and original as in any of the productions of this most remarkable writer.”<sup>6</sup> Even so, the *Times* observed that “Melville has not the slightest qualifications for a novelist.”<sup>7</sup>

Lemuel Shaw—successful lawyer and distinguished jurist—was an old family friend. Shaw, a friend of Melville’s father, Allan, was once engaged to Melville’s aunt, Nancy (though she died in 1813 before they could be wed).<sup>8</sup> Shaw provided support and counsel to Melville’s mother, Maria, after her husband’s death. Later, when the family fur business failed, he helped her oldest son, Gansevoort, get started in his legal career.<sup>9</sup> Melville dedicated his first book, *Typee*,<sup>10</sup> to Shaw. Shortly thereafter, in early 1846, Melville began visiting Shaw and his daughter, Elizabeth Shaw, in Boston. Melville, who was largely self-taught, used Shaw’s membership at the Boston Athenaeum to borrow books.<sup>11</sup>

In August of 1847, Melville married Elizabeth. For the rest of his life, Shaw helped support Melville and his family. Shaw loaned them \$2,000 to buy their first house in New York. When Melville left New York for the Berkshires in 1850 (to be near Hawthorne), Shaw loaned him and his wife \$3,000—nearly a year’s judicial salary—to purchase the farm near Pittsfield that Melville renamed “Arrowhead.”<sup>12</sup> In 1852, when *Moby Dick* failed both critically and commercially, Shaw took Melville on a trip to Nantucket, Martha’s Vineyard, and Cape Cod to help him relax, recuperate, and refresh his spirits.<sup>13</sup> Four years later, he loaned Melville \$1,400 for a trip to the Holy Land.<sup>14</sup> Throughout the 1850s, he did his best to procure governmental appointments for Melville in various consulships abroad and at the New York Customs House—even enlisting Charles Sumner in this endeavor.<sup>15</sup> Shortly

<sup>5</sup> *London Illustrated Times*, April 25, 1857, in HIGGINS & PARKER, *supra* note 3, at 498, 500.

<sup>6</sup> *New York Times Supplement*, April 11, 1857, in HIGGINS & PARKER, *supra* note 3, at 494.

<sup>7</sup> *Id.*

<sup>8</sup> ROBERT L. GALE, A HERMAN MELVILLE ENCYCLOPEDIA 409 (1995).

<sup>9</sup> Robert L. Gale, *Bartleby—Melville’s Father-in-Law*, at <http://www.ku.edu/~zeke/bartleby/Gale.html> (last visited Feb. 14, 2005); see MERRELL R. DAVIS, *MELVILLE’S MARDI: A CHARTLESS VOYAGE* 7 (1952).

<sup>10</sup> HERMAN MELVILLE, *TYPEE: A PEEP AT POLYNESIAN LIFE* (1968) (Harrison Hayford et al. eds., 1968). This edition is Volume 1 of a larger collection of Melville’s works entitled *THE WRITINGS OF HERMAN MELVILLE*.

<sup>11</sup> Gale, *supra* note 9.

<sup>12</sup> GALE, *supra* note 8, at 410.

<sup>13</sup> Gale, *supra* note 9; see also GALE, *supra* note 8, at 410.

<sup>14</sup> GALE, *supra* note 8, at 410.

<sup>15</sup> *Id.* at 410-11.

before his death, Shaw released Melville from his debts in exchange for the deed to Arrowhead—which he promptly conveyed to his daughter, Elizabeth.<sup>16</sup>

After *The Confidence Man*, Melville was not to publish another novel in his lifetime. He worked at the Customs House in Lower Manhattan from 1866 to 1885, retiring when Elizabeth inherited the Shaw estate after the death of her brother Lemuel Shaw, Jr.<sup>17</sup> Melville spent the remainder of his life concentrating on his poetry. During this period, he published four books of verse—though only one commercially. *Billy Budd* began as one such poem—the ballad *Billy in the Darbies* that appears at the close of the novella. Melville began the book between 1885 and 1888; it was more-or-less finished on April 19, 1891.<sup>18</sup> Melville died in September of that year. The manuscript was discovered in the 1920s in a tin breadbox to which Melville had attached the inscription, “Keep true to the dreams of thy youth.”<sup>19</sup>

*Billy Budd* is a complex book of many themes: positive law in conflict with morality, good versus evil, the struggle between Christian *ressentiment* and pagan spontaneity, homoeroticism turned destructive, and ultimately, the possibility of forgiveness and redemption.<sup>20</sup> Nothing in my argument denies, conflicts with, or detracts from any of these interpretations. Still, I find it difficult to avoid the conclusion that, as Robert Cover first suggested in 1975,<sup>21</sup> *Billy Budd* is—at its heart—a book about Lemuel Shaw and the failure of the judicial process in confronting slavery and other forms of state sanctioned violence. It is not just, as Cover points out, that the fugitive slave cases were the context in which the moral-formal dilemma played out most acutely in Melville’s lifetime.<sup>22</sup> Rather, Melville is all but explicit in telling us that Vere is Shaw. In providing “an inside narrative” of his father-in-law’s judicial behavior in the slave cases and several of his capital cases, Melville gives his themes of *ressentiment* and legal immorality, destructive evil and ironic acceptance, a unique power and resonance: for he well understood what manner of man his father-in-law, the revered judge, really was. He was an exceedingly ugly man. And as,

<sup>16</sup> *Id.* at 286, 410; ELEANOR MELVILLE METCALF, *HERMAN MELVILLE: CYCLE AND EPICYCLE* 180-82 (1953).

<sup>17</sup> GALE, *supra* note 8, at 286.

<sup>18</sup> Harrison Hayford & Merton M. Sealts, Jr., *Editors' Introduction: Growth of the Manuscript*, in HERMAN MELVILLE, *BILLY BUDD, SAILOR: AN INSIDE NARRATIVE* 2-3, 11-12 (Harrison Hayford & Merton M. Sealts, Jr., eds., 1962) [hereinafter *BILLY BUDD*].

<sup>19</sup> MERLIN BOWEN, *THE LONG ENCOUNTER: SELF AND EXPERIENCE IN THE WRITINGS OF HERMAN MELVILLE* 217-18 (1960), *quoted in* RICHARD WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 143-44 (1984).

<sup>20</sup> *See, e.g.*, HANNAH ARENDT, *ON REVOLUTION* 76-88 (1963).

<sup>21</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 2-6 (1975).

<sup>22</sup> *Id.* at 5.

Melville says: "The moral nature was seldom out of keeping with the physical make."<sup>23</sup> In a note crossed out in the original manuscript, Melville wrote: "Here ends a story not unwarranted in this incongruous world of ours—innocence and infirmity, spiritual depravity and fair respite."<sup>24</sup>

Figure 1 Chief Justice Lemuel Shaw<sup>25</sup>



"We contemplate him as the East Indian does his wooden-headed idol,—he knows that he is ugly, but he feels that he is great."

—Rufus Choate<sup>26</sup>

<sup>23</sup> BILLY BUDD, *supra* note 18, at 44.

<sup>24</sup> HERMAN MELVILLE, *Billy Budd, Foretopman*, in SHORTER NOVELS OF HERMAN MELVILLE 327 n.\* (Raymond Weaver ed., 1928) [hereinafter *Billy Budd, Foretopman*]. Hayford and Sealts render the sentence: "Here ends a story not unwarranted by what sometimes happens in this [one undeciphered word] world of ours—Innocence and infamy, spiritual depravity and fair repute." Harrison Hayford & Merton M. Sealts, Jr., *Editors' Introduction: Growth of the Manuscript* in BILLY BUDD, *supra* note 18, at 8.

<sup>25</sup> Daguerreotype from the 1850s, Albert Sands Southworth and Josiah Johnson Hawes, The Metropolitan Museum of Art, New York.

<sup>26</sup> Quoted in FREDERIC HATHAWAY CHASE, LEMUEL SHAW: CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1830-1860, 277 (1918). An alternative version of the quote reads: "I confess I regard him as the Indian does his wooden log, curiously carved; I

In making this argument, I am of course building on, amplifying, and extending Robert Cover's, Richard Weisberg's, and Brook Thomas's originative analyses of *Billy Budd*.<sup>27</sup> But where Cover stops short of the claim that Vere is Shaw, finding the evidence merely circumstantial, I will argue that Melville makes the case in such careful detail as can only be deliberate. Where Weisberg argues—persuasively, in my view—that Melville intentionally presents Vere as manipulating military law to achieve immoral ends, I will show that Melville's identification of Vere with Shaw makes this conclusion virtually inescapable.<sup>28</sup> Where Weisberg maintains that Vere co-opts the legal system for subjective ends, I will argue, in parallel with Brook Thomas,<sup>29</sup> that Melville's point is more general and more damning: in the face of evil, it is the very nature of judicial prudence and moderation that is—to use Melville's precise and, as we shall see, carefully chosen term—"calamitous." I will, moreover, employ Weisberg's own concept of "considerate communication" to make my case. Weisberg portrays Melville as self-consciously adopting the "considerate" mode of self-expression in concert with Vere: "For both," he says, "form has come to replace, rather than embody, meaning."<sup>30</sup> Here too, I follow Professor Weisberg's lead but come to a slightly different conclusion: as I hope to demonstrate, it is by this very mode of communication that Melville makes plain both his judgment of Vere/Shaw and this more general meaning of *Billy Budd*.

### I. *BILLY BUDD* AS "CONSIDERATE COMMUNICATION"

Among Professor Weisberg's important and intriguing contributions is the notion of considerate communication, which he deploys as a critical tool for understanding and appraising the morality of judicial rhetoric.<sup>31</sup> Considerate modes of communication, as

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acknowledge he's ugly, but I bow before a superior intelligence." *Id.*

<sup>27</sup> Scholarship, as I have suggested elsewhere, is an inherently communal enterprise. Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1610 (2001) (reviewing ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000)).

<sup>28</sup> As Professor Weisberg notes in his keynote, Richard H. Weisberg, *20 Years (or 2000?) of Story-Telling on the Law: Is Justice Detectable?* 26 CARDOZO L. REV. 2223 (2004), Judge Posner takes him to task for this argument. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 165-72 (2d ed. 1988). As I show below, any reading that, like Posner's, approves of Captain Vere's actions is seriously at odds with Melville's carefully constructed indictment. See discussion at text accompanying notes 112-59 *infra*.

<sup>29</sup> BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE* 212-23 (1987).

<sup>30</sup> WEISBERG, *supra* note 19, at 172 (citing Lukacs).

<sup>31</sup> Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 34-58 (1982).

Weisberg defines the concept, are ways of misleading the audience in the interest of their own well-being: they involve not so much lying as myth-making. Weisberg suggests that the ethical practice of considerate communication requires three elements:

- (1) that the communicator's perception of the audience's well-being stand uppermost in his mind, whatever the ancillary motivations for the speech; (2) that whatever factual distortions occur because of that perception involve predominantly *omissions*, or, at the worst, trivial misstatements of fact; and (3) that the communicator faithfully convey the essence of the underlying reality he is discussing (either through overt language, or tonal or structural elements), despite the omissions or mild misrepresentations of detail.<sup>32</sup>

Vere's speech to the drumhead court is analyzed and shown to be an example of considerate communication turned manipulative: "He does not communicate a selective view of reality primarily to establish comforting authoritarian interpretations of otherwise troubling realities. Rather, he uses legal argument to distort the law and to further purely *subjective* ends."<sup>33</sup> Vere's argument is not "genuinely considerate"—that is, designed to help the intended audience assimilate a painful truth—but rather "covertly considerate"—that is, intended instrumentally to achieve concrete results while at the same time concealing the speaker's own role under a cloak of purported obligation.

The concept of considerate communication is extracted from a passage in Chapter 3 of the novel. After recounting the basic story of the Nore Mutiny, Melville notes the reticence and tact of British historians reporting on the subject.

Like some other events in every age befalling states everywhere, including America, the Great Mutiny was of such character that national pride along with views of policy would fain shade it off into the historical background. Such events cannot be ignored, but there is a considerate way of historically treating them. If a well-constituted individual refrains from blazoning aught amiss or calamitous in his family, a nation in the like circumstance may without reproach be equally discreet.<sup>34</sup>

There are two things about this passage, not commonly noted, that nevertheless call out for attention. First, although Melville uses an incident from British naval history to introduce the idea that there is a "considerate way" of treating historical issues, he goes out of his way to observe that the same is true of "some other events" that offend the national pride of Americans. Second, and more importantly, Melville justifies this "discreet" mode of writing history as "without reproach"

<sup>32</sup> *Id.* at 35.

<sup>33</sup> *Id.* at 38; see also WEISBERG, *supra* note 19, at 172 ("Vere's use of language furthers an irrational personal vendetta against the heroic naval mode.").

<sup>34</sup> BILLY BUDD, *supra* note 18, at 55.

by reference to norms of social behavior in which "a well-constituted individual refrains from blazoning aught amiss or calamitous in his family."<sup>35</sup>

If, as I am suggesting, Melville was in fact critical of his father-in-law's conduct in the fugitive slave cases and in *Commonwealth v. Webster*,<sup>36</sup> the most notorious capital case of Shaw's career, surely he thought himself too well-constituted to say so explicitly. As Weisberg says of *Billy Budd*, "sometimes stories need to tell simple truths in nonstraightforward ways."<sup>37</sup> How much more so when one of the objects of the story is not only a family member, but also a life-long friend and benefactor. But what is the evidence that *Billy Budd* is a story about a calamity in or blemish on Melville's family? What is the basis for the inference that Vere is modeled on Lemuel Shaw?

Cover identifies many of the parallels that provide circumstantial evidence. Billy is impressed from a merchant ship called the *Rights of Man*. The hearing in fugitive slave cases was summary, as was the drumhead court. Both proceedings allowed little or nothing in the way of defenses. The alleged slave was not allowed to defend himself—in fact, under the 1850 Act, the proceedings could be entirely *ex parte*—just as Billy was mute and unable to speak in his own defense when faced with Claggart's charge of mutiny. In both the slave rendition proceeding and the drumhead court, the judgments were carried out immediately and without appeal. Just as the Mutiny Act was justified as necessary to maintain order in time of war, slavery and rendition were justified as necessary to preserve the Union. Finally, Cover notes that it would be remarkable if, in presenting a character caught between the demands of duty and the claims of conscience, Melville had not made the connection to his father-in-law's decisions in the fugitive slave cases.<sup>38</sup>

If that were all of the evidence on the question whether Vere is Shaw, one would have to conclude with Cover that the most one can say is "he might be."<sup>39</sup> But there is more than these parallels to suggest that Vere is Shaw. In fact, Melville provides a substantial number of rather pointed clues that, amongst its many other themes, *Billy Budd* is, at its heart, about the moral complicity of judges in slavery and the other forms of state sanctioned violence in which they participate.

In *Supplement to Battle-Pieces*, Melville's 1866 cycle of poetry reflecting on the events of the Civil War, Melville identifies himself as

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<sup>35</sup> *Id.*

<sup>36</sup> *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850).

<sup>37</sup> Richard Weisberg, *The True Story: Response to Five Essayists*, 15 CARDOZO L. REV. 1245, 1249 (1994).

<sup>38</sup> COVER, *supra* note 21, at 5.

<sup>39</sup> *Id.*



one "who always abhorred slavery as an *atheistical* iniquity."<sup>40</sup> It was, of course, quite conventional to characterize slavery as unchristian. In *The Spirit of Laws*, Montesquieu had wryly argued that "[i]t is impossible for us to suppose these creatures to be men, because, allowing them to be men, a suspicion would follow that we ourselves are not Christians."<sup>41</sup> Indeed, the very first line of the Preface to *Billy Budd* announces that the story "belongs to a period which, as every thinker now feels, involved a crisis for Christendom."<sup>42</sup> Melville takes this characterization one step further, however. In referring to it as an "atheistical iniquity," he presents slavery as not merely sinful or unchristian, but *godless*. As Cover reports, it is characteristic of abolitionist rhetoric to refer to the fugitive as a Christ-like figure.<sup>43</sup> Thus, when Shaw refused to issue the writ in the case of George Latimer, a fugitive from slavery, William Lloyd Garrison himself accused Shaw of being willing "to act the part of Pilate in the Crucifixion of the Son of God."<sup>44</sup>

Weisberg offers a brilliant reading of *Billy Budd* as a reversal of the Christian allegory,<sup>45</sup> which is a point I shall return to in my conclusion. Nevertheless, as Weisberg himself notes, the standard reading is one in which most "agree that Billy is a Christlike figure, and Claggart a satanic one."<sup>46</sup> This reading is hardly surprising given that Melville is quite explicit on this score at key moments in the narrative. At the moment before Billy strikes out at Claggart in frustration, Melville describes Billy's paralysis as "bringing to his face an expression which was as a crucifixion to behold."<sup>47</sup> So too, Melville describes the scene at the moment of Billy's death:

[T]he vapory fleece hanging low in the East was shot through with a soft glory as of the fleece of the Lamb of God seen in mystical vision, and simultaneously therewith, watched by the wedged mass

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<sup>40</sup> HERMAN MELVILLE, *Supplement to Battle-Pieces*, in COLLECTED POEMS OF HERMAN MELVILLE 465 (Howard P. Vincent ed., 1947) (emphasis added).

<sup>41</sup> CHARLES MONTESQUIEU, 1 THE SPIRIT OF LAWS, Book 15, Chap. 5 (Thomas Nugent trans., 1899), quoted in COVER, *supra* note 21, at 14. Leonard Levy reports several similar reactions when, upon Shaw's denial of the writ of habeas corpus, Thomas Sims was returned to slavery. The poet John Granleaf Whittier wrote a poem entitled "Moloch in State Street"; Bronson Alcott wrote in his journal that he "had fancied till now that certain beautiful properties were mine . . . namely a City, Civilization, Christianity, and a Country." LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 104 (1957).

<sup>42</sup> *Billy Budd, Foretopman*, *supra* note 24, at 228. The preface does not appear in the Hayford and Sealts edition.

<sup>43</sup> COVER, *supra* note 21, at 252.

<sup>44</sup> LEVY, *supra* note 41, at 82.

<sup>45</sup> WEISBERG, *supra* note 19, at 172-76.

<sup>46</sup> *Id.* at 172.

<sup>47</sup> BILLY BUDD, *supra* note 18, at 99.

of upturned faces, Billy ascended; and, ascending, took the full rose of the dawn.<sup>48</sup>

Finally, we are told that after Billy's execution, the sailors kept careful track of the "spar from which the foretopman was suspended . . . . To them, a chip of it was as a piece of the Cross."<sup>49</sup>

If Melville is making a subtle allusion to slavery on the very first page, he leaves no doubt by the second. It will be recalled that Billy, together with the Lord Admiral Nelson, is portrayed throughout as an instantiation of the archetype of the Handsome Sailor. This archetype is introduced in quite general terms in the initial sentences of Chapter 1. The Handsome Sailor is compared to the giant red star Alderaban, which is part of the Taurus constellation and one of the brightest stars in the Northern Hemisphere; the Handsome Sailor is accompanied by fellow sailors who surround him like "the lesser lights of his constellation."<sup>50</sup> The narrator immediately comments on a "somewhat remarkable instance" of the type, "a common sailor so intensely black that he must needs have been a native African of the unadulterate blood of Ham."<sup>51</sup> Melville could hardly be more heavy-handed. Not only is the very model for the Handsome Sailor presented as an African, but he is identified with the traditional biblical justification of slavery in the curse visited by Noah on Canaan, the son of Ham: "Cursed be Canaan; a servant of servants shall he be unto his brethren."<sup>52</sup>

<sup>48</sup> *Id.* at 124. In addition, Melville twice associates Billy with the angels. The first is in Vere's exclamation immediately following Claggart's death: "Struck dead by an angel of God! Yet the angel must hang!" *Id.* at 101. The second occurs in the Chapter describing the Chaplain's exchange with Billy before the hanging. Melville writes that "a barbarian Billy radically was"; Billy is then identified both with the British captives of Germanicus and with "those later barbarians, young men probably, and picked specimens among the earlier British converts to Christianity" who were taken to Rome and displayed before a Pope who exclaimed: "Angles do you call them? And is it because they look so like angels?" *Id.* at 120.

<sup>49</sup> *Id.* at 131.

<sup>50</sup> *Id.* at 43.

<sup>51</sup> *Id.* Melville continues with further allusions to the divinity of the Handsome Sailor—though these are more pagan than Christian:

It was a hot noon in July; and his face, lustrous with perspiration, beamed with barbaric good humor. In jovial sallies right and left, his white teeth flashing into view, he rollicked along, the center of a company of his shipmates. These were made up of such an assortment of tribes and complexions as would have well fitted them to be marched up by Anacharsis Cloots before the bar of the first French Assembly as Representatives of the Human Race. At each spontaneous tribute rendered by the wayfarers to this black pagod of a fellow—the tribute of a pause and stare, and less frequently an exclamation—the motley retinue showed that they took that sort of pride in the evoker of it which the Assyrian priests doubtless showed for their grand sculptured Bull when the faithful prostrated themselves.

*Id.* at 43-44.

<sup>52</sup> *Genesis* 9:25. Ham (from the Hebrew "cham" or warm) was the father of Canaan (Palestine), Mizraim (Egypt), and Cush (Ethiopia) and, thus, considered in the biblical tradition to be the father of those who settled in Africa. See *Genesis* 10:1-8.

Billy is, of course, impressed from a merchant ship—taken by force and required to serve in His Majesty's Navy. The analogy between slavery and impressment is obvious: both involve forced service—though, in the latter case, for low wages—under harsh conditions and severe, utterly autocratic, discipline (as Melville dramatized in *White-Jacket*<sup>53</sup>). But, even here, Melville is anything but subtle. The merchant ship from which Billy is taken is called *The Rights of Man*. Though one could hardly miss the reference, Melville deliberately draws our attention to its significance. He tells us that, as the boat taking Billy to the *Bellipotent* “swept under the merchantman's stern, and officer and oarsmen were noting—some bitterly and others with a grin,—the name emblazoned there,” Billy jumps up from the bow where he is sitting, bids his former shipmates adieu, and then cries out, “good-bye to you too, old *Rights-of-Man!*”<sup>54</sup>

In the next Chapter, Billy is described as a kind of Noble Savage: “Billy in many respects was little more than a sort of upright barbarian, much such perhaps as Adam presumably might have been ere the urbane Serpent wriggled himself into his company.”<sup>55</sup> The narrator goes on to suggest that such characters embody “certain virtues pristine and unadulterate” ordinarily absent in civilized folk.<sup>56</sup> “The character marked by such qualities has to an unvitiated taste an untampered-with flavor like that of berries, while the man thoroughly civilized, even in a fair specimen of the breed, has to the same moral palate a questionable smack as of a compounded wine.”<sup>57</sup> The Noble Savage motif is a mainstay of abolitionist literature, and most particularly of the Romantic poets Wordsworth, Blake, and Coleridge.<sup>58</sup>

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<sup>53</sup> MELVILLE, *supra* note 2. Before the publication of *White Jacket*, Melville wrote to his friend Richard Henry Dana, Jr.:

This man-of-war book, My Dear Sir, is in some parts rather [sic] man-of-warish in style—rather [sic] aggressive I fear.—But you, who like myself, have experienced in person the usages to which a sailor is subjected, will not wonder, perhaps, at any thing in the book. Would to God, that every man who shall read it, had been before the mast in an armed ship, that he might know something himself of what he shall only read of.

Letter from Herman Melville to Richard Henry Dana, Jr. (Oct. 6, 1849), in CORRESPONDENCE, *supra* note 1, at 140. Dana, of course, was the author of *TWO YEARS BEFORE THE MAST* (1840). But he was also a practicing lawyer who appeared before Shaw with some frequency in both abolitionist and criminal cases. See COVER, *supra* note 21, at 178-79, 191, 212, 218; LEVY, *supra* note 41, at 51-52, 87-98, 222; and see, e.g., *Commonwealth v. York*, 50 Mass. (9 Met.) 93 (1845).

<sup>54</sup> BILLY BUDD, *supra* note 18, at 48-49.

<sup>55</sup> *Id.* at 52. Other references to Billy as a barbarian and “superior savage” who “stand[s] nearer to unadulterate Nature” appear in the scene in which Billy is visited by the Chaplain the night before his execution. *Id.* at 120-21.

<sup>56</sup> *Id.* at 53.

<sup>57</sup> *Id.* Wine, as we shall see in the conclusion, will prove to be an important trope.

<sup>58</sup> Patrick Brantlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, in “RACE,” WRITING, AND DIFFERENCE 187-92 (Henry Louis Gates, Jr., ed., 1985).

If the allusions to slavery are clear, the references to Shaw are more subtle. They require, for the most part, a familiarity with several of Shaw's most famous decisions. Two of these are historically important criminal law cases: the notorious *Commonwealth v. Webster*<sup>59</sup> and the less well-known *Commonwealth v. Rogers*.<sup>60</sup> The others are decisions by Shaw in several of the slave cases: *Commonwealth v. Aves*,<sup>61</sup> *In re Sims*,<sup>62</sup> and the unreported decisions in *Commonwealth v. Howard* and *Betty's Case*.<sup>63</sup>

Notable in its time, *Webster* is a decision of some importance in the development of modern criminal law. It is the basis for many of today's model jury instructions on reasonable doubt.<sup>64</sup> The Supreme Court upheld the constitutionality of the *Webster* charge as recently as 1994, though the Court disapproved of the continued use of the archaic "beyond a moral certainty" language.<sup>65</sup> Moreover, *Webster* is an early and influential instance of proof of murder by purely circumstantial evidence and, relatedly, the use of expert testimony. Finally, several other aspects of the *Webster* jury instructions, though not necessarily innovations at the time, became standards for model jury instructions.<sup>66</sup> Most important among them was the charge on the presumption of malice, which was rejected for the federal courts forty-five years later in *Davis v. United States*<sup>67</sup> and subsequently held unconstitutional by the Supreme Court in *Mullaney v. Wilbur*.<sup>68</sup>

In its own time, *Webster* was best known as a sensational and controversial murder case that received international attention. Dr. John Webster was a professor at the Harvard Medical School who was tried, convicted, and executed for the murder of Dr. George Parkman, a prominent Bostonian and one of the founders of the Harvard Medical

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<sup>59</sup> 59 Mass. (5 Cush.) 295 (1850).

<sup>60</sup> 48 Mass. (7 Met.) 500 (1844).

<sup>61</sup> 35 Mass. (18 Pick.) 193 (1836).

<sup>62</sup> 61 Mass. (7 Cush.) 285 (1851).

<sup>63</sup> These cases are discussed in LEVY, *supra* note 41, at 61-62, 68-69. See also Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1917-30, 1957 (1987) (discussing *Betty's Case*).

<sup>64</sup> *Victor v. Nebraska*, 511 U.S. 1, 8-9 (1994).

<sup>65</sup> *Id.* at 16-17.

<sup>66</sup> "Probably no charge ever delivered in this country has been followed as a precedent so frequently and so closely . . ." CHASE, *supra* note 26, at 200; see text accompanying notes 67-68 & 98 *infra*.

<sup>67</sup> 160 U.S. 469 (1895).

<sup>68</sup> 421 U.S. 684 (1975); see also *Sandstrom v. Montana*, 442 U.S. 510 (1979). As Levy discusses in some detail, LEVY, *supra* note 41, at 220-25, the charge in *Webster* was based on Shaw's earlier decision in *Commonwealth v. York*, 50 Mass. (9 Met.) 93 (1845). Indeed, in giving the jury instruction in *Webster*, Shaw prefaced this portion of the charge with the remark that he was stating "from a former memorandum, revised for this purpose." ROBERT SULLIVAN, *THE DISAPPEARANCE OF DR. PARKMAN* 135 (1971). The *York* decision was subsequently adopted in Maine, and was the basis for the charge struck down in *Mullaney*. See *Mullaney*, 421 U.S. at 694-95.

School. Webster, who was in debt to Parkman, was accused of luring Parkman to his laboratory, killing him, dismembering the body, and disposing of the body parts in the furnace and privy. The remains recovered by the police included only a thorax, pelvis, right leg, left thigh, and portions of the jaw with fragments of false teeth. The medical experts, who included Oliver Wendell Holmes, Sr., each testified that the remains were "not dissimilar" to Dr. Parkman.<sup>69</sup> The fragments of false teeth were identified by Dr. Parkman's dentist, Dr. Nathan Keep, who testified both that he recognized his work of three years earlier and that the jaw bone was identifiable as Dr. Parkman's because of its unusual protuberance.<sup>70</sup>

The defense was relatively meager. It consisted of several character witnesses including the President of Harvard, the testimony of Webster's three daughters, who testified to his demeanor and state of mind in the period following the disappearance of Dr. Parkman, and seven witnesses who testified that they saw or spoke to Dr. Parkman hours after the alleged murder. The most substantive testimony was that of Dr. William Morton, the dentist who had pioneered the use of anesthesia.<sup>71</sup> He testified that the fragments were too damaged in the furnace to be identifiable and that Dr. Parkman's jaw, though large, was hardly unusual. He then produced several plates of false teeth he had made for patients of his own that fit perfectly the mold Dr. Keep had made of Parkman's jaw.<sup>72</sup>

For all the gruesome sensationalism of the trial, the most controversial part of the proceeding was Shaw's charge to the jury. The instructions to the jury took three hours.<sup>73</sup> There was no official transcript, but one of the witnesses at the trial transcribed and subsequently published the charge—though only after first allowing Shaw to redact it.<sup>74</sup> A second version was published by George Beamis, the prosecuting attorney who had been hired by the Parkman family to

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<sup>69</sup> One of the medical experts who testified to the same effect was Dr. Charles Jackson who, not so coincidentally, also claimed both that Samuel Morse had stolen the idea for the telegraph from him and that he was responsible for the discovery of ether. As we shall see in a moment, the defense's key witness was Dr. William Morton, the man who actually pioneered the use of anesthetics. See SULLIVAN, *supra* note 68, at 123.

<sup>70</sup> Note that Melville gives Claggart precisely this chin. BILLY BUDD, *supra* note 18, at 64, 77.

<sup>71</sup> SULLIVAN, *supra* note 68, at 123. Morton had worked with Horace Wells, the man who discovered the anesthetic qualities of nitrous oxide. The two of them had consulted with Dr. Charles Jackson about the discovery in 1844, but Jackson rejected their claims. RENÉ FÜLÖP-MILLER, TRIUMPH OVER PAIN 107-09 (Eden & Cedar Paul trans., 1938). Morton's successful experiments with ether led him to consult with Jackson a second time. Ultimately, Morton agreed to include Jackson on the patent application rather than have to contend with the, in fact, baseless claims of the more renowned scientist. *Id.* at 131-35.

<sup>72</sup> SULLIVAN, *supra* note 68, at 123.

<sup>73</sup> *Id.* at 132-48.

<sup>74</sup> *Id.* at 134.

conduct the trial with the assistance of the state Attorney General. This too, was further redacted by Shaw and included some changes and additions made by Beamis.<sup>75</sup> A final, much shorter, version appears in the Massachusetts Reports.

The criticism of Shaw's jury charge was overwhelming. The New York papers called Shaw a "bloody Jeffries," a reference to the Lord Chief Justice George Jeffreys who, in 1685, condemned three hundred and twenty men to death in the "bloody assizes" following the collapse of Monmouth's Rebellion.<sup>76</sup> Under the headline "Judicial Murder in Boston," one of the Philadelphia papers compared Shaw to the witchburners of Salem.<sup>77</sup> An anonymous pamphlet accused Shaw of having "directed their verdict to the jury" and expressed amazement that "a judge exists capable of such a performance in this high noon of the nineteenth century of Christ and in the heart of the Commonwealth of Massachusetts."<sup>78</sup> An anonymous hate letter, which Shaw preserved together with much of the newspaper criticism,<sup>79</sup> pointedly accused Shaw of having "in this case performed the double duty of judge and juror."<sup>80</sup> Shaw was accused of arguing facts not in evidence—a charge that, as we shall see, was in fact true. He was widely accused of misstating the law with respect to both proof of the *corpus delicti* and proof of malice. The commentary in the law journals was also critical of Shaw on these two points; though, as Leonard Levy has argued,<sup>81</sup> it is not clear that Shaw did misstate the law.<sup>82</sup>

What is clear is that, at critical points in the jury instructions, Shaw explicitly shifted the burden of proof to the defendant. He did so first with respect to the burden to disprove malice. On that point, the final, polished version of the charge reads as follows:

Upon this subject, the rule as deduced from the authorities is, that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, *all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced*

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<sup>75</sup> *Id.* at 134, 173.

<sup>76</sup> *Id.* at 143-44 & n.\*; LEVY, *supra* note 41, at 218.

<sup>77</sup> LEVY, *supra* note 41, at 218.

<sup>78</sup> SULLIVAN, *supra* note 68, at 166-67.

<sup>79</sup> THOMAS, *supra* note 29, at 203-04.

<sup>80</sup> *Id.*

<sup>81</sup> LEVY, *supra* note 41, at 220-28. Subsequently, in *Commonwealth v. Hawkins*, 69 Mass. (3 Gray) 463, 465 (1855), Shaw made clear that the defendant only carried a burden of going forward with evidence of mitigation and that the prosecution continued to carry the burden of proving malice beyond a reasonable doubt. See *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975).

<sup>82</sup> Shaw charged the jury that proof of the *corpus delicti* had to be beyond a reasonable doubt rather than by direct evidence and beyond doubt. But, this latter, higher standard appears to have been the minority view. See Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 182-83 (1962); *Raulston v. Jackson*, 33 Tenn. (1 Sneed) 128 (1853).

against him to prove the homicide, and the circumstances attending it. . . .

Therefore, when one person assails another violently with a dangerous weapon, likely to kill and which does in fact destroy the life of the party assailed, the natural presumption is, that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, *the consequence follows, that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice.*<sup>83</sup>

This is the very charge subsequently invalidated by the Court in *Mullaney* because of its tendency "to increase further the likelihood of an erroneous murder conviction."<sup>84</sup>

With respect to the "alibi" testimony that Dr. Parkman was seen out and about on the streets of Boston hours after the murder had allegedly taken place, Shaw was even more aggressive. He first indicated that alibi "is a defence [sic] often attempted by contrivance, subornation, and perjury" and, therefore, must "be subjected to a rigid scrutiny."<sup>85</sup> He then went on to discuss the defense of "alibi" in this case, that Dr. Parkman was seen several hours after the murder. The final, redacted versions of the instructions concede that "the court are of opinion that this proof is material" and that "if made out by satisfactory proof, we think it would be conclusive in favor of the defendant."<sup>86</sup> But, as the original report of the jury charge reveals, Shaw had gone much further:

[A] witness is always liable to be mistaken. Then, in order to establish the fact, it must be proved, *beyond reasonable doubt*, that the party was seen at the precise time and place where he is alleged to have been seen by the witness. And that is the difficulty with regards to proof of *alibi*. There is always room for the difference of time to be explained, owing to the difference of time-pieces, which sometimes vary five or ten minutes.<sup>87</sup>

Shaw went on to disparage the defendant's alibi witnesses in various ways. Most significantly, he argued that, if the well-known Dr. Parkman had been out and about in the late afternoon as the defendant's witnesses had testified, there should have been hundreds or thousands of witnesses to support the defendant's case. The full flavor of Shaw's partisanship can best be appreciated by considering his actual remarks to the jury:

Judge for yourselves. Would there not have been hundreds or thousands of persons who would have seen him and have testified to

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<sup>83</sup> Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 304-05 (1850) (emphasis added).

<sup>84</sup> *Mullaney*, 421 U.S. at 701.

<sup>85</sup> *Webster*, 59 Mass. (5 Cush.) at 319.

<sup>86</sup> *Id.* at 323-24.

<sup>87</sup> SULLIVAN, *supra* note 68, at 140 (emphasis added).

it? This, however, is negative testimony. But if anything happens and persons do not see it, if they were placed where they might have seen it, this, though negative, leads to an affirmative result. *That is one of the modes to lead you to a view of the truth.* If you are satisfied that there were a great number of persons along the streets where he was said to have been seen—Cambridge, Court, Washington streets, etc.—would there, or would there not, have been a great variety of persons who would have confirmed that statement? If so, it is a comparison of the testimony, negative on one side, positive on the other . . . .<sup>88</sup>

Of course, there was no such “negative” testimony in evidence. Nor had any been offered.<sup>89</sup> Rather, the prosecution had sought to call four or five witnesses to testify that someone who merely looked a lot like Parkman had been walking around Boston that afternoon. Shaw had disallowed that testimony as “too remote,” but nonetheless charged the jury that it could consider whether, on the basis of its general knowledge, there might not be other people resembling the victim in the street at any given time.<sup>90</sup>

*Webster* was not the only case in which Shaw played the part of the hanging judge. Two weeks before Webster’s trial, he had overridden a unanimous jury recommendation of mercy in a capital case involving a mentally retarded defendant.<sup>91</sup> Nevertheless, Shaw was said to have delivered the sentence in *Webster* tearfully. As Brook Thomas points out, Melville’s description of Vere immediately after communicating the drumhead court’s sentence to Billy is a direct mirror of Shaw. In his obituary for Shaw, Charles Loring wrote: “Indeed, in witnessing his discharge of his painful duty of his office upon the prisoner, it was often difficult to believe that he was not at the time the greater sufferer of the two.”<sup>92</sup> In *Billy Budd*, Melville says of Vere: “That the condemned one suffered less than he who mainly had effected the condemnation was apparently indicated by the former’s exclamation in the scene soon perforce to be touched upon.”<sup>93</sup>

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<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> Nor were these Shaw’s only remarks that went beyond the evidence. Twice during the charge, Shaw seemed to suggest that Webster might have killed Parkman by means of chloroform—though, of course, there was no testimony with respect to chloroform whatsoever. See SULLIVAN, *supra* note 68, at 138-39, 145-46. The *Boston Daily Times* reported the charge in just that way. When Beamis published his version of the trial, he actively encouraged Shaw to delete this passage. Shaw did not do so, but in the official report of the case he eliminated one of the references to chloroform and added the following sentence: “Of course, I do not mean to intimate that these supposed agencies were used in the present instance, but allude to them simply by way of illustration.” *Webster*, 59 Mass. (5 Cush.) at 321-22.

<sup>90</sup> SULLIVAN, *supra* note 68, at 130.

<sup>91</sup> *Id.* at 51.

<sup>92</sup> THOMAS, *supra* note 29, at 206.

<sup>93</sup> *Id.*; BILLY BUDD, *supra* note 18, at 115, 123 (referring to Billy’s final words, “God Bless Captain Vere!”).



Even more striking, as Thomas notes,<sup>94</sup> is the substantial parallel between the sentencing in *Webster* and Vere's critical speech to the drumhead court. In pronouncing sentence, Shaw remarked: "Nothing but a sense of imperative duty imposed on us by the law, whose officers and ministers we are, could sustain us in pronouncing such judgment."<sup>95</sup> He continued:

But as we approach this last sad duty of pronouncing sentence, *which is indeed the voice of the law, and not our own*, yet in giving it utterance, we cannot do it with feelings of indifference, as a formal and official act. God forbid that we should be prevented from indulging and expressing these irrepressible feelings of interest, sympathy, and compassion, which arise spontaneously in our hearts! and we do most sincerely and cordially deplore the distressing condition into which crime has brought you . . . .

And now, nothing remains but the solemn duty of pronouncing the sentence which the law affixes to the crime of murder . . . .<sup>96</sup>

In *Billy Budd*, Melville retains the precise sentiments merely reversing the order in which these expressions of compassion and duty appear:

But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?— Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. . . . For suppose condemnation to follow these present proceedings. *Would it be so much we ourselves that would condemn as it would be martial law operating through us?* For that law and the rigour of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.<sup>97</sup>

It would be remarkable enough were these the only parallels between *Webster* and *Billy Budd*. But, of course, they are not. In stating "that the implication of malice" arises from the very "fact of killing," Shaw charged the jury that: "This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts."<sup>98</sup> Likewise, Vere argues to the drumhead court that "irrespective of the provocation to the blow, a martial court must needs in the present

<sup>94</sup> THOMAS, *supra* note 29, at 206.

<sup>95</sup> Quoted in *id.*

<sup>96</sup> SULLIVAN, *supra* note 68, at 150 (emphasis added).

<sup>97</sup> BILLY BUDD, *supra* note 18, at 110 (emphasis added).

<sup>98</sup> *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 305 (1850).

case confine its attention to the blow's consequence . . . ."<sup>99</sup> In *Webster*, Shaw argued that motive often must be inferred solely from the act because "this intent is a secret of the heart, which can only be directly known to the searcher of all hearts . . . ."<sup>100</sup> In *Billy Budd*, when the officer of the marines inquires with respect to Claggart's motive in bringing a false charge of mutiny against Billy, Vere replies in similar tones:

"That is thoughtfully put," said Captain Vere; "I see your drift. Ay, there is a mystery; but, to use a scriptural phrase, it is 'a mystery of iniquity,' a matter for psychologic theologians to discuss. But what has a military court to do with it? . . . The prisoner's deed—with that alone we have to do."<sup>101</sup>

Additionally, when the officer of the marines once again points out that Billy acted without the motive for homicide, Vere replies in language sharply reminiscent of the attacks on Shaw: "Surely not, my good man. And before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit."<sup>102</sup>

*Webster* is not the only Shaw opinion whose distinctive echoes can be discerned in the text of *Billy Budd*. Just a year after the House of Lords' opinion in *M'Naughten*, Shaw presided over the trial in *Commonwealth v. Rogers*.<sup>103</sup> Rogers had struck and killed the Warden of the state prison. The jury returned a verdict of not guilty by reason of insanity. Shaw's instruction to the jury was the first to articulate the "irresistible impulse" test; it also approved the use of expert medical testimony on the question of mental illness. That testimony had established that Rogers was suffering from "melancholy, accompanied

<sup>99</sup> BILLY BUDD, *supra* note 18, at 107.

<sup>100</sup> *Webster*, 59 Mass. (5 Cush.) at 316.

<sup>101</sup> BILLY BUDD, *supra* note 18, at 108. The phrase "mystery of iniquity" is from 2 *Thessalonians* 7.

<sup>102</sup> BILLY BUDD, *supra* note 18, at 111. Melville weaves into BILLY BUDD another reference to the *Webster* case and the period of Monmouth's rebellion and the Glorious Revolution. In describing Claggart, Melville remarks that his "chin, beardless as Tecumseh's, had something of strange protuberant broadness in its make that recalled the prints of the Reverend Dr. Titus Oates, the historic deponent with the clerical drawl in the time of Charles II and the fraud of the alleged Popish Plot." *Id.* at 64. In this aside, Claggart is identified with Dr. Parkman who, in turn, is identified with Titus Oates who, in the late 1670s claimed that he had infiltrated a secret conspiracy to return the Catholic church to power in England. As a result, at least 20 innocent people were executed before Oates was convicted of perjury in 1685.

Brook Thomas also notes a reference in *The Confidence Man* to a judge, a "judicial murderer and a Jeffries, after a fierce farce trial condemning his victim to bloody death." HERMAN MELVILLE, *THE CONFIDENCE-MAN: HIS MASQUERADE* 146 (Harrison Hayford et al. eds., 1984) (1857) [hereinafter *THE CONFIDENCE MAN*] (This edition is Volume 10 of a larger collection of Melville's works entitled *THE WRITINGS OF HERMAN MELVILLE.*), cited in THOMAS, *supra* note 29, at 204.

<sup>103</sup> 48 Mass. (7 Met.) 500 (1844).

by delusion,"<sup>104</sup> and that "the accused had been laboring for several days under monomania, attended with delusion,"<sup>105</sup> which led him to strike out and kill the Warden. In Shaw's words, "the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives."<sup>106</sup>

The parallel here to the fictional facts of *Billy Budd* is once again striking, but it is not the only hint that Melville provides. He raises the question of Vere's "adjudicatory insanity," but it is a curious one that does not advance the plot in any obvious way. Professor Weisberg makes persuasive use of this fact to support his argument that Vere's natural depravity leads him, like Claggart, to strike out at Billy in envious *ressentiment* against Nelson.<sup>107</sup> Here, again, I follow Weisberg's lead but come to a slightly different conclusion: Melville deliberately draws a parallel between Vere and Claggart's character as madmen, but the import of this parallel is to draw our attention away from Claggart to Shaw. It will be recalled that the rumor below decks was that Claggart "had volunteered into the King's navy by way of compounding for some mysterious swindle whereof he had been arraigned at the King's Bench."<sup>108</sup> Yet, invoking Plato's definition of natural depravity, Melville observes that this character trait is found not in the criminal but in the civilized, the intellectual, the respectable, the man of reason, and the person of sound and sagacious judgment:

Not many are the examples of this depravity which the gallows and jail supply. At any rate, for notable instances, since these have no vulgar alloy of the brute in them, but invariably are dominated by intellectuality, one must go elsewhere. Civilization, especially if of the austerer sort, is auspicious to it. It folds itself in the mantle of respectability. . . . It never allows wine to get within its guard. It is not going too far to say that it is without vices or small sins. There is a phenomenal pride in it that excludes them. It is never mercenary or avaricious. . . . It is serious . . . .

But the thing which in eminent instances signalizes so exceptional a nature is this: Though the man's even temper and discreet bearing would seem to intimate a mind peculiarly subject to the law of reason, not the less in heart he would seem to riot in complete exemption from that law. . . . That is to say: Toward the accomplishment of an aim which in wantonness of atrocity would

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<sup>104</sup> *Id.* at 502.

<sup>105</sup> *Id.* at 503. Melville attributes monomania to Claggart. *BILLY BUDD*, *supra* note 18, at 90.

<sup>106</sup> *Rogers*, 48 *Mass* (7 *Met.*) at 503.

<sup>107</sup> WEISBERG, *supra* note 19, at 145-47, 161-70.

<sup>108</sup> *BILLY BUDD*, *supra* note 18, at 65.

seem to partake of the insane, he will direct a cool judgment sagacious and sound.<sup>109</sup>

As if to seal the connection, Melville's discussion of Vere's possible insanity is couched in language taken directly from Shaw's opinion in *Rogers*. In *Rogers*, Shaw's instruction to the jury began by noting the polar cases of "intelligence and capacity," on one hand, and "the overwhelming violence of mental disease," on the other. Shaw then continued: "But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging . . ." <sup>110</sup> When, in *Billy Budd*, the Surgeon contemplates whether Captain Vere is "the sudden victim of any degree of aberration," the narrator muses:

Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blindingly enter into the other? So with sanity and insanity. In pronounced cases there is no question about them. But in some supposed cases, in various degrees supposedly less pronounced, to draw the exact line of demarcation few will undertake, though for a fee becoming considerate some professional experts will. There is nothing namable but that some men will, or undertake to, do it for pay.<sup>111</sup>

The passage is a direct, if more literary paraphrase of Shaw's charge to the jury in *Rogers*.

In Melville's hands, the enigmas of the insanity defense become a metaphor for the mysteries of moral responsibility. When, in the next paragraph, the narrator invites the reader to judge whether Captain Vere is the "victim of any degree of aberration" according to "such light as this narrative may afford,"<sup>112</sup> Melville is asking us to judge the moral responsibility by such clues as he has salted through the text. With the rainbow passage, Melville is pointing us to Shaw's jury instruction in *Rogers* and inviting us to judge Shaw by the sentiments he himself expressed in the balance of that paragraph:

A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong . . . . In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is

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<sup>109</sup> *Id.* at 75-76.

<sup>110</sup> *Rogers*, 48 Mass. (7 Met.) at 501.

<sup>111</sup> BILLY BUDD, *supra* note 18, at 102. Melville's disparaging comments about medical experts may be a reference to the weak medical and dental expert testimony offered by the prosecution in *Webster*. See *supra* text accompanying notes 69-72.

<sup>112</sup> BILLY BUDD, *supra* note 18, at 102.

contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.<sup>113</sup>

Melville underscores the motif in which the insanity defense is a metaphor for moral responsibility in a digression following the discussion of the "natural depravity" of rational madmen such as Claggart and Vere.<sup>114</sup> Wondering whether it is the phenomenon of natural depravity "that in some criminal cases puzzles the courts[,]” the narrator then asks why juries are forced

to endure the prolonged contentions of lawyers with their fees, but also the yet more perplexing strife of the medical experts with theirs? And why leave it to them? Why not subpoena as well the clerical proficient? Their vocation . . . would seem to qualify them to know something about those intricacies involved in the question of moral responsibility; whether in a given case, say, the crime proceeded from mania in the brain or rabies of the heart. As to any differences among themselves which clerical proficient might develop on the stand, these could hardly be greater than the direct contradictions exchanged between the remunerated medical experts.

Dark sayings are these, some will say. But why? Is it because they somewhat savor of Holy Writ in its phrase "mysteries of iniquity"?<sup>115</sup>

In this last set of questions, Melville simultaneously foreshadows Vere's statement during the trial that the issue of motive is "a mystery of iniquity" not fit for a military court, invokes his characterization of slavery as an "atheistical iniquity," and recalls his earlier admonition in *Billy Budd* that Coke and Blackstone shed less light on the human psyche than do the Hebrew prophets.

If the difficulty lies between the extremes, then the polar opposites of Shaw's slave decisions provide the most interesting frame for Melville's reflections in *Billy Budd*. In *Commonwealth v. Aves*, Shaw granted the writ of habeas corpus on behalf of Med, a six-year-old slave girl who had been brought from New Orleans to Massachusetts by her owner while on a family visit. Shaw first observed that slavery had been abolished in Massachusetts by the Constitution of 1780 "upon the ground that it is contrary to natural right and the plain principles of justice."<sup>116</sup> Following the reasoning of Lord Mansfield in *Somerset's*

<sup>113</sup> *Rogers*, 48 Mass. (7 Met.) at 501-02.

<sup>114</sup> See text accompanying note 109 *supra*.

<sup>115</sup> *Billy Budd, Foretopman*, *supra* note 24, at 266-67. The first paragraph of this passage is omitted from the Hayford and Sealts edition, but Hayford and Sealts nevertheless agree that it sheds light on the later trial scene. Harrison Hayford & Merton M. Sealts, Jr., *Editors' Introduction: Growth of the Manuscript in BILLY BUDD*, *supra* note 18, at 36-37. As Hayford and Sealts note, the "dark sayings" is an allusion to *Psalms* 78:2: "I will open my mouth in a parable: I will utter dark sayings of old." *Id.* at 164.

<sup>116</sup> *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 210 (1836).

*Case*,<sup>117</sup> Shaw held that slavery could only exist by force of positive law and that, because it was against natural right, could not be recognized by a jurisdiction whose positive law did not provide for it.<sup>118</sup> As a consequence, any slave brought into the state by his or her master becomes free, “not so much because any alteration is made in their *status*,” but because local law is simply incapable of recognizing property in another human being.<sup>119</sup> Rather, “if they choose to avail themselves of them,” formerly enslaved persons are entitled to the benefit of the local laws that prohibit their forcible detention or removal from the state.<sup>120</sup>

In these cases, Levy tells us that “it was Shaw’s custom to retire to his private chambers with the person, inform him of the fact of his freedom, and ascertain his choice as to his future.”<sup>121</sup> In *Howard* and in *Betty’s Case*, the affected parties chose to return South with their masters and, accordingly, the writ did not issue. In cases like *Med’s*, where the person was too young to consent, the child would be discharged from the master’s custody and a legal guardian would be appointed.<sup>122</sup>

In cases where the person had escaped from slavery, on the other hand, Shaw refused to interfere with the enforcement of the Fugitive Slave Acts. In *Latimer’s Case*, Shaw declined to issue the writ that would have discharged Latimer from the custody of the slave catcher while the question of rendition was pending in the federal court. According to William Lloyd Garrison’s account, Shaw said that “he probably felt as much sympathy for the person in custody as others; but this was a case in which an appeal to natural rights and the paramount law of liberty was not pertinent!”<sup>123</sup> In the next case to come before Shaw, concerning an escapee named Shadrach, he refused to entertain the writ on a series of flimsy technicalities—leading Richard Henry Dana to note in his diary that Shaw had behaved in “a most ungracious manner.”<sup>124</sup> As Dana wrote: “I felt that all these objections were frivolous and invalid, but seeing the temper the Chief Justice was in, and his evident determination to get rid of the petition, I left . . .”<sup>125</sup>

Finally, in *In re Sims*, Shaw reluctantly entertained the application for the writ but, with the courthouse itself literally bound by iron

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<sup>117</sup> 20 Howell’s State Trials 1; 98 Eng. Rep. 499 (1772).

<sup>118</sup> *Aves*, 35 Mass. (18 Pick.) at 217-18.

<sup>119</sup> *Id.* at 217.

<sup>120</sup> *Id.*

<sup>121</sup> LEVY, *supra* note 41, at 68; see also Soifer, *supra* note 63, at 1917-30, 1957.

<sup>122</sup> LEVY, *supra* note 41, at 69; *Aves*, 35 Mass. (18 Pick.) at 225.

<sup>123</sup> LEVY, *supra* note 41, at 81.

<sup>124</sup> *Id.* at 88.

<sup>125</sup> *Id.* at 89.

chains,<sup>126</sup> upheld the constitutionality of the Fugitive Slave Act of 1850. Unlike the Act of 1793 which had relied on state courts and justices of the peace to determine rendition, the Act of 1850 appointed specially designated federal commissioners who were to be paid by the case: ten dollars if they ordered rendition and five dollars if they did not.<sup>127</sup> Sims's counsel argued that the Act violated Article III and the Due Process Clause.<sup>128</sup> Shaw rejected the argument on three grounds. First, he held that the issue had been decided by the cases upholding the 1793 Act, ignoring the obvious fact that the two statutes differed on precisely this issue.<sup>129</sup> Second, he held that the role of the commissioners in rendition was akin to that of a justice of the peace who is not a "judicial officer" subject to the salary and tenure protections.<sup>130</sup> Third, he ruled that the Fugitive Slave Clause was an essential element in the compact that formed the Union and that rendition of fugitives from slavery was "absolutely necessary" to the Union and "essential to the peace, order and prosperity of all the United States."<sup>131</sup>

<sup>126</sup> LEVY, *supra* note 41, at 92-93.

<sup>127</sup> *In re Sims*, 61 Mass. (7 Cush.) 285, 288 (1851).

<sup>128</sup> *Id.* at 289-90 (emphasis added):

If the act requires that the alleged fugitive from service shall be sent back, without finding out whether or not he be actually held to service under the laws of another state, the act is unconstitutional . . . . On the other hand, if it is first to be ascertained whether or not the party claimed be really held to service, then the decision of the commissioner is final on this question; his decree is the last act of judicial power, which power the commissioner has no authority, under the constitution, to exercise, not having the unchangeable salary or the permanent tenure of office, without which no man can constitutionally be made a judge.

Cover reads the argument of counsel as raising the Due Process question, *see* COVER, *supra* note 21, at 177, though it seems less than clear from the context. On the other hand, providing a higher fee for rendition than for discharge would seem plainly to compromise the impartiality of the commissioner and an obvious Due Process violation in any era. *Tumey v. Ohio*, 273 U.S. 510, 524 (1927):

We have been referred to no cases at common law in England prior to the separation of colonies from the mother country showing a practice that inferior judicial officers were dependent upon the conviction of the defendant for receiving their compensation. Indeed, in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.

*See also id.* at 532:

the requirement of due process of law in judicial procedure is not satisfied by . . . [a] procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . .

(\$12 fee to mayor for presiding over convictions in prohibition cases); *Connally v. Georgia*, 429 U.S. 245 (1977) (\$5 fee to justice of the peace contingent on issuance of search warrant unconstitutional).

<sup>129</sup> *Sims*, 61 Mass. (7 Cush.) at 302-04.

<sup>130</sup> *Id.* at 302-03. As in *Rogers*, Shaw noted: "it is difficult, by general terms, to draw a precise line of distinction between judicial powers and those not judicial. It is easy to designate the broad line, but not easy to mark the minute shades of difference between them." *Id.* at 302.

<sup>131</sup> *Id.* at 310.

Melville artfully weaves references to these cases into the narrative of *Billy Budd*. In a passage that otherwise adds nothing to the plot, Captain Vere, "of his own motion," meets with Billy privately to communicate the court's decision: "Beyond the communication of the sentence, what took place at this interview was never known."<sup>132</sup> Also making a cameo appearance is Lord Mansfield, the author of *Somerset's Case*.<sup>133</sup> Just as Shaw countenanced enforcement of the Fugitive Slave Acts as necessary to save the Union, Melville makes a point of telling us that Mansfield sanctioned impressment as necessary to maintain "the British navy [which] could so little afford to be squeamish in the matter of keeping up the muster rolls."<sup>134</sup> For both distinguished jurists, morality took a back-seat to the expedients of state policy. Or, as Holmes was later to say approvingly of Shaw, "the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was."<sup>135</sup>

But perhaps the most striking reference to Shaw appears in the description of Vere. Vere leans toward the "intellectual." He loves books in which he finds confirmation of his own views. Vere, in other words, is the sort of man who, "as touching most fundamental topics," needs to have "established in him some positive convictions" that "would abide in him essentially unmodified so long as his intelligent part remained unimpaired."<sup>136</sup> One would be hard put to find a more apt description of Shaw's position on slavery, which remained utterly constant over the course of his life.

In 1820, ten years before his appointment to the bench, Shaw wrote an article characterizing slavery as a necessary evil, declaring it "exclusively a question of local jurisdiction" with which other states should not interfere, and recommending a "safe and gradual abolition" to avoid what would otherwise be a "great national calamity."<sup>137</sup> He held fast to these views throughout his life. Even when he issued the writ in *Aves*, he referred to Dana and his colleagues dismissively as "overzealous philanthropists."<sup>138</sup> He remained, as Levy observes, "an old-line Whig when less conservative men drifted to the new Republican banner."<sup>139</sup> At the end of his life, he was the lead signatory of a petition urging Massachusetts to appease the South and honor the

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<sup>132</sup> BILLY BUDD, *supra* note 18, at 114.

<sup>133</sup> *Id.* at 58-59.

<sup>134</sup> *Id.* at 65.

<sup>135</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 85 (Mark Howe ed., 1963) (1881).

<sup>136</sup> BILLY BUDD, *supra* note 18, at 62.

<sup>137</sup> LEVY, *supra* note 41, at 60.

<sup>138</sup> *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 219 (1836).

<sup>139</sup> LEVY, *supra* note 41, at 91. Cf. BILLY BUDD, *supra* note 18, at 62 ("His settled convictions were as a dyke against those invading waters of novel opinion, social, political and otherwise, which carried away as in a torrent no few minds in those days, minds by nature not inferior to his own.")



Fugitive Slave Act in order to stave off secession. Five days later, South Carolina seceded.<sup>140</sup> Shaw's much trumpeted adherence to the letter of the law in *Sims*, like Vere's in *Billy Budd's*, appears in the end futile and unnecessary.

If *Billy Budd* appears to reserve judgment, Melville elsewhere had already made clear his opinion of Shaw's complicity on the slavery question. In *The Confidence Man*, a passenger from Missouri asks the herb-doctor if he is an abolitionist. To which the herb-doctor replies:

As to that, I cannot so readily answer. If by abolitionist you mean a zealot, I am none; but if you mean a man, who, being a man, feels for all men, slaves included, and by any lawful act, opposed to nobody's interest, and therefore, rousing nobody's enmity, would willingly abolish suffering (supposing it, in its degree, to exist) from among mankind, irrespective of color, then am I what you say.

To which the interlocutor replies:

Picked and prudent sentiments. You are the moderate man, the invaluable understrapper of the wicked man. You, the moderate man, may be used for wrong, but are useless for right.<sup>141</sup>

But, of course, *Billy Budd* is not really silent on the question. As Billy's execution approaches, he is visited by the Chaplain. Melville describes the Chaplain's attempts to minister to Billy as "futile" and "in vain."<sup>142</sup> A Chaplain on a warship, Melville says, "is as incongruous as a musket would be on the altar at Christmas."<sup>143</sup> He is there only because "he subserves the purpose attested by the cannon"—he lends the sanction of religion to "that which practically is the abrogation of everything but brute Force."<sup>144</sup> A page later, when Billy is hung, Vere stands "erectly rigid as a musket in the ship-armorer's rack."<sup>145</sup>

There it is; the judgment of Vere/Shaw is plain: he is a tool, a tool of violence. Nothing more.

## II. MORAL CERTAINTY

It might fairly be objected that my reading is far too narrow and parochial to do justice to a literary work as rich as *Billy Budd*. This is a criticism that I am quick to endorse. There is so much more going on in the book, so much in it that transcends both the details of the plot and the historical specifics of its provenance. *Billy Budd* is great literature

<sup>140</sup> LEVY, *supra* note 41, at 107-08.

<sup>141</sup> THE CONFIDENCE MAN, *supra* note 102, at 112 (emphasis added).

<sup>142</sup> BILLY BUDD, *supra* note 18, at 121.

<sup>143</sup> *Id.* at 122.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 123-24.

precisely because it has many meanings, and so many of them profound. I have little doubt, for example, that Professor Weisberg is correct in reading *Billy Budd* as reflecting Melville's life-long "quarrel with God."<sup>146</sup> Characteristically, moreover, Melville presents us with a text that amply supports both sides in this quarrel: Billy is both a Christ-figure crucified by the Pilate-like Vere and the Nietzschean *übermensch* who destroys the Claggart-Christ only to be destroyed, in turn, by the *ressentiment* of the Babbitt-like Vere who, in his turn, is felled by a musket-ball from a French ship called "the *Atheist*."<sup>147</sup> Melville offers no closure, just a double reversal of the Christian allegory in which the quarrel with God seems endlessly to repeat.

The question of meaning, however, is always a question of audience. The relevant question, therefore, is what *Billy Budd* means to us as law professors and scholars of law and literature. After all, the reason we read *Billy Budd* in our classes and discuss it in our writing is because we understand it as a book about law.

Knowing that Melville carefully crafted *Billy Budd* to pass judgment on Lemuel Shaw, who so often made a show of sentiment in passing judgment on others, changes our understanding of judging. For a professional culture that celebrates the appellate judge as a Hercules,<sup>148</sup> Melville's insider narrative of the most celebrated common law judge of the nineteenth century should catch our ideals up short. For Melville, the upright judge "must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him."<sup>149</sup> He or she must always keep in mind that the office of the judge is not to be the officer of the community but to follow the "dictates of justice."<sup>150</sup> Judges who forget those crucial considerations, Melville tells us, are nothing more than functionaries of the state who—for all their good intentions or pretensions—do the violent work of the state no less than Vere. "Judges," as Cover so bluntly puts it, "are people of violence."<sup>151</sup> Like the Chaplain, and like Vere, their role is to lend the veneer of civilization to a system that so often stands just a step from depravity.

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<sup>146</sup> WEISBERG, *supra* note 19, at 172. Reporting on a discussion with Melville upon visiting him in Liverpool (where Hawthorne was the U.S. consul), Hawthorne wrote in his journal: "He can neither believe, nor be comfortable in his unbelief, and he is too honest and courageous not to try to do one or the other." See LAWRENCE THOMPSON, MELVILLE'S QUARREL WITH GOD 142-43 (1952). The reference is to Thomas Carlyle's line, "Life is one long quarrel with God, but we make up in the end." On Melville's violent disagreement with Carlyle, see *id.* at 128-34.

<sup>147</sup> BILLY BUDD, *supra* note 18, at 129. In the draft, the name of the ship was the *Athéiste*, which Hayford and Sealts changed to *Athée*. *Id.* at 199.

<sup>148</sup> See RONALD DWORKIN, LAW'S EMPIRE 239-40 (1986).

<sup>149</sup> Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 502 (1844).

<sup>150</sup> *Id.*

<sup>151</sup> Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

If there is any issue on which the modern law school can be said to persevere, it is the problem of judicial subjectivity and the attendant fear that, unless they follow rules, judges will impose their own values. *Billy Budd* is, at its heart, a rebuke to that obsession. It is, at its core, about the failure of a judicial process that aspires to rule out “the exceptional in the matter [that] moves the heart[] within you.”<sup>152</sup> The very ideal of an impartial justice, Melville tells us, is partial. Coke and Blackstone, he admonishes, shed less light into the “obscure spiritual places” of justice than do the Hebrew prophets.<sup>153</sup>

Though one might fairly ask, why in a book so saturated with Christian imagery does Melville specify the Hebrew prophets? The considerate clue comes a short paragraph later when Melville tells us that natural depravity “folds itself in the mantle of respectability” and “never allows wine to get within its guard.”<sup>154</sup> Why no wine? The reason is that Melville does not want us to miss the passage in Proverbs from which Shaw’s Christian name is taken:

It is not for kings, O Lemuel,  
it is not for kings to drink wine;  
nor for princes strong drink:  
Lest they drink, and forget the law,  
and pervert the judgment of any of the afflicted.  
Give strong drink unto him that is ready to perish,  
and wine unto those that be of heavy hearts.  
Let him drink, and forget his poverty,  
and remember his misery no more.  
Open thy mouth for the dumb  
in the cause of all such as are appointed to destruction.  
Open thy mouth, judge righteously,  
and plead the cause of the poor and needy.<sup>155</sup>

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<sup>152</sup> BILLY BUDD, *supra* note 18, at 111.

<sup>153</sup> *Id.* at 75.

<sup>154</sup> *Id.* at 75-76.

<sup>155</sup> *Proverbs* 31:4-9 (King James ed. 1611).