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Abstract

This article responds in part to Bryan Schwartz's "A Meditation on 'Bartleby'" published in volume 22(3) of this Journal. The author here suggests that the Lawyer narrator of Herman Melville's "Bartleby, the Scrivener" is not transformed by his contact with Bartleby. Rather, the story exemplifies the Lawyer's unchanging reliance on and approval of common-law contract theory in order to identify and deal with societal problems.

"PLUS 'IL' CHANGE, PLUS 'IL' RESTE LE MÊME:" BARTLEBY'S LAWYER AND THE COMMON LAW

BY NATHAN M. GREENFIELD*

This article responds in part to Bryan Schwartz's "A Meditation on 'Bartleby,'" published in volume 22(3) of this Journal. The author here suggests that the Lawyer narrator of Herman Melville's "Bartleby, the Scrivener" is not transformed by his contact with Bartleby. Rather, the story exemplifies the Lawyer's unchanging reliance on and approval of common-law contract theory in order to identify and deal with societal problems.

A Reasonable Constitution

What though Reason forged your scheme?

'Twas Reason dreamed Utopia's dream:

'Tis dream to think reason can

Govern the reasoning creature, man.

— Herman Melville

I. INTRODUCTION

The effect the recalcitrant Bartleby has on his employer, the narrating Lawyer of Herman Melville's 1853 story "Bartleby, the Scrivener,"¹ continues to fascinate both literary critics and legal thinkers. For example, Bryan Schwartz, whose "Meditation on 'Bartleby'" appeared in a recent number of this Journal, turns to this "story of Wall Street" to illustrate his point that while lawyers might never be able to escape the "forms and conventions" that define the "middle kingdom"² of the common law, they can, nevertheless, become more sympathetic and humane individuals. Indeed, he argues that because of his encounter with Bartleby, the Lawyer goes from being a man who "refuse[s] to take into account

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¹ H. Melville, "Bartleby, the Scrivener" in *Billy Budd and Other Tales* (New York: The American Library, 1961) at 103.

² B. Schwartz, "A Meditation on *Bartleby*" (1984) 22 *Osgoode Hall L.J.* 441 at 469.

the wholeness of human beings"³ to one who feels, with Bartleby, "sadness"⁴ at the tragedy of human existence.⁵

Schwartz's interpretation of "Bartleby" admits a great debt to Leo Marx's article "Melville's Parable of the Walls."⁶ He follows Marx in seeing Bartleby as an agent who transforms the Lawyer into a more humane person. In this reading it is assumed that once Bartleby makes the Lawyer "aware of the pain in the lives of his fellow human beings," he becomes a man of "deeply felt and spontaneous sympathy."⁷ From being a man who was devoted to the method and prudence of contract and property law, and who, by his own admission, worshipped Mammon's emissary in the person of John Jacob Astor, the Lawyer changes. When he learns that people like Bartleby live lonely lives and that, propertied or not, all men die lonely deaths, the Lawyer becomes a man of "fraternal melancholy" who feels "sadness" at the vicissitudes of human existence.⁸ Although he does not cite these words, Schwartz's general approval of Marx's article indicates agreement that the most important aspect of this story is that dealing with Bartleby has "gradually br[ought] out the best in this complacent American."⁹

While perhaps the best known interpretations of this difficult story, Marx's and Schwartz's readings are not the only ways to understand the outcome of the dialectic that exists between the nay-saying Bartleby and he who begins as a "man of distinctly limited perception."¹⁰ Kingsley Widmer and William Bysshe Stein have advanced a different interpretation, arguing that the Lawyer is "incapable of a moral regeneration."¹¹ Far from being transformed by what Schwartz sees as the Lawyer's glimpse

³ *Ibid.* at 469-70.

⁴ *Ibid.* at 456.

⁵ Let me state clearly that my discussion of Schwartz's article is mainly concerned with his reading of "Bartleby." I will not deal with his discussion of "semantic pluralism" or with the aesthetic theories that underlie his conception of "great literature" and its qualities. Further, except for a few comments in my conclusion, I will not address Schwartz's argument that if only common law lawyers were more like Bartleby's employer they would be more humane and the common law would be reformed. See Schwartz, *supra*, note 2 at 441, 469-72.

⁶ L. Marx, "Melville's Parable of the Walls" in Thomas Inge, ed., *Bartleby The Inscrutable: A Collection of Commentary on Herman Melville's Tale "Bartleby, The Scrivener"* (Connecticut: Archon Books, 1979) 84. Schwartz claims (*supra*, note 2 at 454, 455) that Marx's essay is "brilliant" and later that it is "valuable."

According to Schwartz the major difference between his interpretation of "Bartleby" and Marx's is that he takes into account that this story is infused with Melville's preoccupation with "death" (see Schwartz, *supra*, note 2 at 455). As we will see below, while it is true that the Lawyer is conscious of "death," that alone is not enough to redeem or even transform him.

⁷ *Ibid.* at 104.

⁸ See Melville, *supra*, note 1 at 120; Schwartz, *supra*, note 2 at 457.

⁹ See Marx, *supra*, note 6 at 96; Schwartz, *supra*, note 2 at 460-61.

¹⁰ *Ibid.* at 86.

¹¹ W.B. Stein, "Bartleby: The Christian Conscience" in Howard Vincent, ed., *Melville Annual 1965 Symposium: Bartleby the Scrivener* (Ohio: Kent State University Press, 1966) at 104.

into Bartleby's private hell of complete disbelief, Widmer states that, from first to last, the Lawyer believes in the power of the "benevolent rationalism" of nineteenth-century American business law.¹² While it might be true that thinking about Bartleby and his fate introduces the Lawyer to "unfortunate circumstances and depressing knowledge," Widmer sees his final statement "Ah, Bartleby! Ah, humanity!"¹³ as only the "sentimental gesture" of a "rationalizing" mind that "fail[s] to understand Bartleby."¹⁴ Stein's argument that the Lawyer remains unchanged by his encounter with Bartleby turns on his analysis of the Lawyer's use of biblical allusions. He shows that each time the Lawyer alludes to the Bible his interpretation reveals an "utter perversion of the basic principles of Christianity."¹⁵ Accordingly, Stein's analysis cuts to the very heart of both Marx's claim that the Lawyer is somehow "better[ed]" by his encounter with Bartleby and Schwartz's (somewhat weaker) claim that one result of having dealt with Bartleby is that the Lawyer learns to "lament[] the failure of human beings to reach each other emotionally."¹⁶

The analysis presented here aligns itself with this second understanding of Melville's lawyer and includes an extended examination of this character from a legal point of view. An examination of whether the dialectical tension generated by Bartleby's self-proclaimed difference actually does force the Lawyer to abandon the "forms and conventions" of common, or more specifically, contract law, indicates that the Lawyer never repudiates the ways, means, or rationale of the common law and its assumptions about how society should be organized. For, although there are a few moments in which the enigmatic Bartleby does shake the Lawyer's faith in common-law assumptions and that might be said to have the potential to change or 'better' this counsellor, none of these moments actually does. No matter what perturbations might exist in the middle of any particular episode, at the end of it, and at the end of the story, the Lawyer remains faithful to the methods of the elegant science produced by men such as John Marshall, James Kent, Joseph Story, and Melville's own father-in-law, Massachusetts Chief Justice Lemuel Shaw.

This analysis does not provide a discussion of the many intriguing aspects of "Bartleby" about which Ann Douglas and Brooks Thomas

¹² K. Widmer, *The Ways of Nihilism: Melville's Shorter Works* (San Diego, California: California State Colleges, 1970) 119.

¹³ See Melville, *supra*, note 1 at 140.

¹⁴ See Widmer, *supra*, note 12 at 119.

¹⁵ See Stein, *supra*, note 11 at 108.

¹⁶ See Schwartz, *supra*, note 2 at 462.

have recently written.¹⁷ Neither is a complete analysis presented here of how, in his many works, Melville depicts the common law of contract. Suffice it to say that in the vast majority of his works, Melville depicts the person who has signed a contract or documents such as Ships Articles as no longer having the same rights and privileges as the contractor or the captain, respectively. We need only think of the way that other of Melville's characters, including Wellingbrough Redburn, White Jacket, and Ishmael must submit to the most petty commands in order to understand what would be found by extending this study to a greater number of texts.¹⁸ This article is limited to a careful delineation of the unchanging contours of this famous nineteenth-century lawyer because, only by showing how the traditional reading adopted by Schwartz is incorrect, can we begin to appreciate what it was that Melville wanted to depict about the socially powerful profession.

Although most discussions of "Bartleby" simply 'begin at the beginning' of the text, "Bartleby," in fact, begins with a retrospective prologue that tells us what the Lawyer is like in his old age. Accordingly, this discussion is divided into three parts chronologically, each covering different periods of the Lawyer's life. The first part covers the longest period. It begins with an examination of what the Lawyer's ideology and assumptions were before he met Bartleby, when he "advertiz[ed]" for "additional help."¹⁹ This section then goes on to discuss the Lawyer's attitude toward Bartleby through their contractual relationship and up until the Lawyer leaves Bartleby to his fate in the deserted office. The second section deals with the Lawyer's response to Bartleby's imprisonment in New York's Tombs, the scrivener's lonely death, and, most importantly, the "Sequel," which contains the Lawyer's later speculations on Bartleby's life and the rumour he heard about the scrivener's history.²⁰

¹⁷ A. Douglas, *The Feminization of American Culture* (New York: Knopf, 1977); B. Thomas, "The Legal Fictions of Herman Melville and Lemuel Shaw" (1984) XI *Critical Inquiry* at 21. For example, I do not deal directly with Thomas' insight that Melville structured this story in such a way as to have Bartleby's silence constitute a challenge to the epistemological structure of the common law. Nor is this a limited study designed to add anything to Douglas' point that Melville was one of the first American writers to abandon the absorbing practices of sentimental fiction and to create a "modern epistemology" *vis-à-vis* the reader. However, my findings can easily be fit into her discussion insofar as they reveal how the structure of this tale forces the reader to do a great deal of work by making him or her question, and then finally reject, the sincerity of the Lawyer's sentiment.

¹⁸ The list of Melville's protagonists who signed contracts or other documents that placed them at the mercy of an arbitrary power is a long one. I will only point out that Toby in *Typee: A Romance of the South Seas* (London: J. Cape, 1923), White Jacket in *White-Jacket: or the World in a Man-of-War* (Evanston: Northwestern University Press, 1970), Redburn in *Redburn* (London: J. Cape, 1937) and Ishmael in *Moby-Dick, or The Whale* (Berkeley: University of California Press, 1981) all signed either the Ships Articles or the Articles of War and thereby relinquished all control over their own individual wills and the right to decide on what to expend their labour. Other works which specifically refer to contractual relations are "A Paradise of Bachelors: A Tartrus of Maids" and *Billy Budd*. (See Melville, *supra*, note 1 at 7.

¹⁹ See Melville, *supra*, note 1 at 110.

²⁰ *Ibid.* at 140.

The third part returns to the prologue, and demonstrates that even in his old age the Lawyer remains unaffected by the events he recounts.

II. BARTLEBY CONTRA THE EXPECTATIONS OF CONTRACT LAW

To understand fully why the Lawyer acts toward Bartleby as he does, it is necessary to begin with an examination of the assumptions the Lawyer as an employer makes about his future employee when he makes a public offer of contract. As conceived by early nineteenth-century political economists and jurists such as Story and Shaw, contract law was that branch of 'legal science' that described and, more importantly, prescribed the interactions of discrete, profit-maximizing individuals in a market society.²¹ The most important axiom of this 'private law' was that every party to contract was 'rational' in the Lockean or Blackstonian sense of the term.²² Due to the ideological assumptions that lay at the heart of the American Revolution and the Federal Constitution, Americans did not believe that 'reason' was limited only to those who had enough fungible property to engage in commerce.²³ Accordingly, they considered all those who were enfranchised to be capable of the "wilful" behaviour C.B. MacPherson has dubbed "possessive individualism" and thus of being able to engage in day-labour contracts.²⁴ While in eighteenth-century

²¹ My discussions of Justice Shaw's ideology and his understanding of "legal science" rests upon the work of L.W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957); M. Horwitz, *The Transformation of American Law* (Cambridge: Harvard University Press, 1977) and L.M. Friedman and J. Ladinsky, "Social Change and the Law of Industrial Accidents" in L.M. Friedman and H.N. Scheiber, eds., *American Law and Constitutional Order: Historical Perspectives* (Cambridge: Harvard University Press, 1978) at 269.

²² Although a full discussion of John Locke's and Sir William Blackstone's definition of 'reason' is beyond the scope of this paper, it is worth noting that their notion of 'reason' had nothing to do with the belief that certain men were incapable of logical inferences or of instrumental notions. Rather, when they claimed that certain men were 'rational', they were saying that these men were capable of partaking in specific types of social interaction, such as commerce. As C.B. MacPherson puts it in his *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962) at 255, Locke believed that once society had emerged from the "state of nature," a bifurcation occurred whereby "full rationality went the way of appropriating rather than with laboring."

For a discussion of how Locke's ideas formed the basis of Blackstone's assumptions about both man and history, see D. Boorstin, *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries* (Gloucester, Mass.: P. Smith, 1973).

²³ For a complete discussion of the changes in political assumptions brought about by the American Revolution and the ratification of the Federal Constitution see: B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967); G.S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg, 1967); H.W. Jones, *Political Separation and Legal Continuity* (Atlanta: American Bar Association, 1986); D.R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact" (1976) 51 N.Y.U.L. Rev. at 731.

²⁴ See MacPherson, *supra*, note 22 at 194-261. For a complete discussion of how nineteenth-century American common law developed a different definition of 'willful behaviour' from that which had existed in the eighteenth century, see Horwitz, *supra*, note 21 at 1-31, 160-210.

England the criterion of independent 'reason' was having enough property to avoid the temptation of selling one's vote, American workers demonstrated 'reason' by their willingness to consider their labour as a commodity subject to the laws and limits of contract.²⁵ Thus, in the eyes of Shaw, Story, or Marshall, all enfranchised men were "wilful" enough to sign contracts that could be enforced.

Although the Lawyer tells us nothing about the advertisement, we can assume that it described the position and stated that he would pay "the usual rate of four cents a folio."²⁶ The second stage of contract formation, 'consideration', begins when Bartleby answers the public offer. Again, the Lawyer tells us little: "After a few words touching his qualifications, I engaged him."²⁷ Yet, what he tells us is enough to indicate that there was a 'meeting of the minds' in the sense that two discrete individuals had reached an agreement to exchange their property in what formally appears to be a mutually beneficial exchange.²⁸

Until the Lawyer engaged him, Bartleby had the same rights and independent status as the Lawyer himself. When engaged in what legal scholars sometimes refer to as 'the dance of wills', Bartleby was theoretically free to object to any specific term and even withdraw from this incipient relationship.²⁹ Unlike the medieval serf, the slave, or an apprentice such as Ginger Nut, in the eyes of the law, Bartleby is a 'free' actor until he signals that he has, without duress from the Lawyer, accepted the offer to exchange his only 'property', labour, for the Lawyer's commodity, money. Only after the contract is concluded is the Lawyer entitled to have a "natural expectancy" that any "request made according to common usage and common sense" will receive "instant compliance."³⁰

²⁵ For a discussion of how, according to contract law, a worker was expected to conceive of himself, see *ibid.* at 160-210.

²⁶ See Melville, *supra*, note 1 at 117.

²⁷ *Ibid.* at 110.

²⁸ For a discussion of the concepts of a "meeting of the minds" and the "will theory" of law, see Horwitz, *supra*, note 21 at 160-210.

²⁹ For a discussion of what contract law considers to be a "free" promise, see J. Swan and B.J. Reiter, *Contracts: Cases, Notes and Materials*, 3d ed. (Toronto: Emond Montgomery, 1985) at 6-26 and 6-43.

³⁰ See Melville, *supra*, note 1 at 110.

In Max Weber's *Economy and Society*, edited by G. Roth and C. Wittich, Vol. II (Berkeley: University of California Press, 1968) at 729-30 the following point is made:

The possibility of entering with others into contractual relations the content of which is entirely determined by individual agreement . . . has been immensely extended in modern law, at least in the spheres of exchange of goods and of personal work and services. However, the extent to which this trend has brought about an actual increase of the individual's freedom to shape the conditions of his own life or the extent to which, on the contrary, life has become more stereotyped in spite, or perhaps, just because of this trend, cannot be determined simply by studying the development of formal legal institutions. . . . The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process.

In contrast to the eighteenth-century model of the 'exchange contract', the nineteenth-century 'day-labour' contract fundamentally altered the ontological status of one of its parties.³¹ The 'exchange contract' was an instrument that allowed the transfer of goods between those with property and, as such, was a means of extending their respective 'reason' throughout the market. The 'day-labour' contract, on the other hand, deprived workers of the right to exercise their 'will' for the duration of the contract. This is because what the contracted worker exchanged was not a true commodity: it could not be stored or mobilized. Rather, labour is "only another name for a human activity which goes with life itself."³² Labour only comes into existence as such when an "activity [is] detached from the rest of life" and subjected to an authority other than that of the individual himself.³³ In other words, workers have, by the logic of contract law, freely assented to having another's 'will' replace their own determination of how and on what they expend their life activity.

Although the common law of contract effectively stripped workers of their status as the contractor's ontological equal, it did not suddenly view them as *unreasonable* or non-rational. Rather, it precisely defines what constitutes the 'reason' of employees: the fulfillment of their promises to carry out appropriate commands. To see this we need only examine the Lawyer's attitude toward Turkey and Nippers. In contrast to the critics, who are nearly unanimous in considering these workers "markedly irrational" or even insane, the Lawyer himself never impugns their 'reason'.³⁴ Unlike *Bartleby*, whose refrain "I would prefer not to"³⁵ indicates that the alchemy of common law has failed to transform his 'will', Turkey and Nippers never — even at their most obstreperous — challenge the Lawyer's expectation that his 'will' is theirs.

It rather means, at least primarily, that the more powerful party in the market, i.e., normally the employer, has the possibility to set the terms, to offer the job "take it or leave it," and, given the normally more pressing economic need of the worker, to impose his terms upon him. The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others.

³¹ For a discussion of the differences between the 'exchange contract' and the 'day-labour contract', see Horwitz, *supra*, note 21 at 160-210.

³² K. Polanyi, *The Great Transformation, The Political & Economic Origins of Our Time* (Boston: Beacon Press, 1957) at 72.

³³ *Ibid.*

³⁴ Rather than following the traditional view of the other scriveners, shared here by Widmer (*supra*, note 12 at 108), I believe that it is more profitable to view them as products of contractual logic. The most important point, therefore, is not the possible theory that their paroxysms might mean that they too have an incipient "[will] to prefer not to" but the reality that they always support the Lawyer. I should repeat that although he may consider them odd, and at times describes them as "dependent" or as having "diseased ambition" (see Melville, *supra*, note 1 at 107-8) he never states that they are outside the bounds of 'reason'. Indeed, as I show later, he turns to them at the moment of crises.

³⁵ See Melville, *supra*, note 1 at 113.

Indeed, when Bartleby crosses his Rubicon, the Lawyer tells us that he does so alone. Far from siding with him, the other contracted workers remain loyal to the Lawyer and confirm to him that, no matter what, “all the justice and all the reason”³⁶ remain on the side of contractual order. The Lawyer indicates by his statement that if Nippers “wanted anything, it was to be rid of a scrivener’s table altogether,”³⁷ an awareness that his employees might have thoughts challenging the established order. However, what is important to the Lawyer is the fact that Nippers never acts upon his own desires. Rather than concerning himself with the possibilities that his employees might act according to their own volition, the Lawyer assumes that a ‘reasonable’ person who has entered a contract will discipline himself or herself and thus remain within the law. Contract law assures employers that “by virtue of habituation a command will receive prompt and automatic obedience in stereotyped forms.”³⁸

It is on the third day of his employ that Bartleby first announces, “I would prefer not to.”³⁹ The Lawyer’s immediate reaction of “perfect silence” is instructive.⁴⁰ By telling us that his “faculties” were “stunned,” he reveals that he cannot imagine a state of affairs where workers’ preferences matter.⁴¹ Under the regime of contract law, such extra-contractual and non-rational possibilities are irrelevant. “Rallying”⁴² from the shock, he makes two speculative statements that could explain this jarring event and still keep his assumptions intact. Either Bartleby misunderstood his request because it was not made clearly enough, or perhaps the Lawyer’s ears “deceived” him.⁴³

After Bartleby replies in the same way to the renewed request, the lawyer now makes clear that the problem lies entirely with Bartleby’s deviation from ‘reason’. “Are you moon-struck?”⁴⁴ he asks, thus indicating that he believes that this outrage can be explained only by lunacy, by madness. The Lawyer’s suggestion that Bartleby might be mad is, at this point, based solely on the scrivener’s refusal to follow commands in a stereotyped way. At this point, it is not known that, unlike Turkey and Nippers, Bartleby is full of oddities that prevent him from fulfilling his promise to work on command. Thus, as far as the Lawyer is concerned, madness is not a clinical condition deduced from patterns of behaviour;

³⁶ *Ibid.*

³⁷ *Ibid.* at 107, 112.

³⁸ See Weber, *supra*, note 30, vol. I at 53.

³⁹ See Melville, *supra*, note 1 at 112.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.* The *Oxford English Dictionary* defines “moonstruck” as: “Affective in mind or deranged in conduct . . . a distracted or dazed condition apparently due to some mental obsession.”

rather, it is directly linked to an employee's willingness or, in this case, unwillingness, to carry out a reasonable and contractually sanctioned request.⁴⁵

This pattern is repeated a few days later when Bartleby not only refuses to copy, but, more significantly, declines to take his assigned place behind the Lawyer in the "seated column of clerks."⁴⁶ Having been

⁴⁵ For a full discussion on how mid-nineteenth century society tended to equate madness and an inability to function in a market society see: D. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, 1st ed. (Toronto: Little Brown, 1976).

⁴⁶ While a full discussion of the Lawyer's understanding of history (and how it differs from Melville's own philosophy of history) is beyond the scope of this study, it is worth pausing at the Lawyer's use of the word "column" to observe an aspect of the narrator's mind that has gone unnoticed. I am referring to the fact that each of the five or six historical allusions which are directly attributable to the narrator imply, if not a physically violent, then at least a hierarchical domination of the individual by an external rational order. For example, it is no surprise that the Lawyer would have a "plaster of Paris bust of Cicero" (112) for, as Robert A. Ferguson (*Law and Letters in American Culture*, (Cambridge: Harvard University Press, 1984) tells us, because of Cicero's devotion both to democracy and law, he was *the* role model for early American lawyers. Yet, we do not hear of the statue on the tour of the office which begins the story. Instead, the Lawyer first mentions his regard for Cicero after Bartleby asserts his own "will" and rejects the assumptions of contract law. It is almost as if the Lawyer alludes to Cicero because he symbolizes the entire history of forensic logic which Bartleby now puts in doubt. Rather than suggesting an interest in Cicero's attempt to preserve Roman democracy, it seems to me that the Lawyer alludes to this greatest of Roman lawyers in order to reassert the authority of a legal system which, since Roman times, has recognized the validity of contractual obligations. In a word, he knows that to accept Bartleby's assertion of the right of self-determination would be equivalent not only to throwing the statue out, but, more importantly, to destroying an authority that has been sanctified by almost two thousand years of legal science. Thus, what history offers this Lawyer is a justification for the *status quo*.

Most of the historical allusions in "Bartleby" are of a military variety. Not only is there the above use of the word "columns" (which is most obviously not connected to the word's architectural meaning), but, there are the references to Marius' destruction of Carthage and the "deserted city of Petra." Taken as a group these allusions tell us that what the Lawyer thinks is important in history is the establishment of military domination. Unlike some thinkers, such as Melville himself, the Lawyer does not develop from this fact a critique of history and those institutions which rely on it for their legitimacy. [An idea of Melville's attitude can be grasped in the following anonymous lament found in *Mardi and a Voyage Thether*, ed. by Harrison Hayford, Herschel Panter, G. Thomas Tanselle (Evanston: Northwestern University Press, 1970) at 529:

Students of history are horror-struck at the massacres of old; but in the shambles, men are being murdered to-day. Could time be reversed, and the future change places with the past, the past would cry out against us, and our future, fully as loudly, as we against the ages foregone. All the Ages are his children, calling each other names.

Instead of criticising the violence which mars the past, the Lawyer wants to subject his workers to the same type of discipline which is found in troop movements on a drill field, or better, in columns of troops which march in perfect order under Roman generals like Marius.

The last historical allusion that I will mention is that which reflects the Men's House of Detention in lower Manhattan. Now, while it is true the so-called Tombs are reminiscent of ancient architecture, the Lawyer's allusion to ancient Egypt is another illustration of his belief that the only important aspects of history are those which bespeak the domination of man by organized rational power. Instead of correctly identifying this massive structure as a species of Greek Revival, and hence implying, to some degree at least, the concept of democracy which was so dear to the Neo-classical Americans of his time, the Lawyer tells us that his understanding of ancient history centers on the despotism of a Pharaoh. It should also not go unnoticed that the oldest known contract, the Rosetta Stone, was found in Egypt by Napoleon's troops. Thus, the Lawyer tells us that at the foundation of his thought lies, not democratic beliefs (though he undoubtedly repeats such beliefs within the rhetoric of his legal discourse) but a fascination with despotism and hierarchy.

extraordinarily successful at putting the earlier incident behind him, the Lawyer is again nonplussed: "For a few moments I was turned into a pillar of salt."⁴⁷ After recovering, the Lawyer attempts to reason with Bartleby. Although he does not tell us much about their conversation, it is probable that he tried to get Bartleby to agree to fulfill his promise to perform his stipulated duties. The Lawyer's appeal to "common usage" and "common sense"⁴⁸ (terms that are familiar from the decisions of men like Justice Shaw) fails to convince Bartleby that it is his duty to comply with his contractor's 'will'.

Bartleby's reason for rejecting the Lawyer's request will not be speculated on here.⁴⁹ Of interest is the way the Lawyer characterizes Bartleby's recalcitrance: he calls it "unprecedented and violently unreasonable."⁵⁰ Because of its legal connotations, the first of these terms is the more interesting. By invoking the doctrine of precedent or *stare decisis*, the Lawyer reveals his conception of Bartleby's contention that although the scrivener had entered a 'day-labour' contract, he still retained his own desires and still claimed the right to control his own body and its activities. As Daniel Boorstin has shown in his book on Sir William Blackstone's *Commentaries on the Laws of England*, the common law viewed any argument that could not be deduced from either precedent or a pattern of judgments as lacking reason and common sense and, therefore, devoid of legal force.⁵¹ It followed that anyone who would make such an argument was outside the 'common sense' of humanity. Given the logic of common law, any such claim would necessarily be rejected by the appropriate court. To reinforce the Lawyer's "own plainest

⁴⁷ See Melville, *supra*, note 1 at 113.

⁴⁸ For references to how the terms "common sense" and "common usage" were used in the judicial language of the time, see Horwitz, *supra*, note 21 at 1-31.

⁴⁹ As can be seen from a glance at both Marx's and Schwartz's articles, there is a great tradition in which critics try to explain the *why* of Bartleby's refusal. Where Marx sees a Melvillian version of Thoreau, Schwartz sees a person who has become lost in the knowledge that all beings must die, and that it basically does not matter what one does. The problem with these attempts to fill in the missing piece is that while it might be intellectually satisfying to "know" what goes on behind the scrivener's blank eyes, Melville has specifically prevented us from having access to Bartleby's reason or, perhaps, lack thereof. It simply does not matter *why* Bartleby does or does not do what he has contracted to perform. Instead, the important issue is *how* the Lawyer responds to that which the scrivener does.

In answer to those who would still argue that we must somehow fill in the gaps left by a major character such as Bartleby, I could do no better than to direct them to Thomas' article "The Legal Fictions of Herman Melville and Lemuel Shaw" (*supra*, note 17). Thomas argues that Melville created a silent character because he was trying to depict those who are silenced by the legal and economic system. Thus, the question is not why are they silent, but who keeps them silent or, in our study, what are those actions which the law recognizes as 'reasonable'.

⁵⁰ See Melville, *supra*, note 1 at 113.

⁵¹ For a discussion of how Common Sense philosophy influenced Blackstone's conception of both law and history, see Boorstin, *supra*, note 22.

faith"⁵² in the universal applicability of common law, the Lawyer establishes a court of Bartleby's peers to consider the latter's plea.

The court that refuses to endorse Bartleby's claims is made up of Turkey, Nippers, and Ginger Nut. It is important that before he turns to them, the Lawyer is careful to characterize them in terms that conform to the Lockean notion of a judge. Not only are they "disinterested persons,"⁵³ but because of their presence in the world of business they can be assumed to understand the solemn system of contract that Bartleby throws into question. Their unanimous support, which goes so far as an offer to do battle with he who shirks his "business,"⁵⁴ reinforces the Lawyer's faith in the order of common law. For him, the other employees' unanimity proves that it is Bartleby who deviates from 'common sense', the fount of 'justice' and 'reason'. While one could argue that in this sequence there was a moment when the lawyer might have been on the verge of an understanding of non-contractual human relations, it comes to naught. At the end of this sequence the Lawyer hears his own earlier assessment of Bartleby issue forth from the mouth of his apprentice: "I think, sir, that he's a little *lunny*."⁵⁵ The court of 'common sense' rules against Bartleby's claim and the Lawyer remains committed to classical liberal ideology.

In arguing that the dialectic between the Lawyer and Bartleby does not significantly alter the former's *Weltanschauung*, or conception of the world, the most highly charged incident that occurs during the contractual relationship must be examined. In this incident, the Lawyer detours from his way to Trinity Church and discovers that Bartleby had been "keeping bachelor's hall" in his office.⁵⁶

Upon realizing that his contracted worker lives in "great" poverty and "horrible" solitude, the Lawyer tells us that he experienced, "for the first time" in his life "a fraternal melancholy."⁵⁷ He realized that there existed between them a "bond of a common humanity."⁵⁸ This "bond" has nothing to do with the previous contractual use of the term. Here it implies a more humane relationship than that envisaged by contract law. Instead of trumpeting liberal notions of discrete individuals who are connected only by market relations, the Lawyer paraphrases John

⁵² See Melville, *supra*, note 1 at 113.

⁵³ *Ibid.* at 113.

⁵⁴ *Ibid.* at 114.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 120.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

Donne. If Bartleby is “miserable” and “friendless,”⁵⁹ then so is he: “No Man is an Island.”

The most striking effect that this “fraternal melancholy” has on the Lawyer is evidenced by the series of images that appear to extend his new-found empathy to all humanity at all times. For a man who is “little given to poetic enthusiasm,”⁶⁰ we find allusions that are not unlike the famous expansive movement Henry David Thoreau sketches in the last chapter of *Walden*.⁶¹ However, where Thoreau tied the world together by mingling ice cubes from Walden Pond with the waters of the Ganges, the Lawyer’s imagination concentrates on humanity’s place in its own structures. He moves in quick succession from the “bachelor’s hall” (which recalls the Inns of Court where English lawyers trained), to the “deserted [city of] Petra”; from sounds of “industry and life” to “Marius brooding among the ruins of Carthage”; from the “sons of Adam” to the “bright silks and sparkling faces . . . sailing down the Mississippi of Broadway” and, finally, to the prophetic vision of the “scrivener’s pale form . . . laid out, among uncaring strangers in its shivering winding sheet.”⁶²

Yet after the Lawyer’s poetic flourish ends, two of his statements indicate his real beliefs. Although both statements follow the Lawyer’s reverie in time, only one of them does so textually. The other, which occurs inside the sequence of images, can best be understood as the narrating Lawyer’s own commentary on these allusions.

The former statement, although later in the text, is first in story time. The Lawyer’s “special thoughts” end when he is “suddenly . . . attracted by Bartleby’s closed desk.”⁶³ The desk, or to be more precise, the possibility of using the key to open it, reminds the Lawyer of the regime of contractual rights. From that point on he returns to his earlier self. In a few sentences he goes from the suggestive line, “Presentiments of strange discoveries hovered round me,”⁶⁴ and the poetic image of Bartleby’s end, to legalistic prose that justifies opening the desk: “I will mean no mischief, seek the gratification of no heartless curiosity . . . besides, the desk is mine, and its contents, too.”⁶⁵ There follows a mundane

⁵⁹ *Ibid.* See John Donne, “Devotions Upon Emergent Occasions: Seventeenth Meditation” in John Hayward, ed., *John Donne: Complete Poetry and Selected Prose* (London: The Nonesuch Press, 1955) at 538.

⁶⁰ *Ibid.* at 104.

⁶¹ H.D. Thoreau, *Walden* (Princeton: Princeton University Press, 1971).

⁶² See Melville, *supra*, note 1 at 120.

⁶³ *Ibid.* at 120.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

list of what was in the desk, a list noticeably lacking in any poetic speculation.

From here the pattern is very similar to what happens after Turkey and Nippers buttress the Lawyer's faltering mind. Recalled to the assumptions of common law, the Lawyer quickly distances himself from Bartleby and from his momentary holistic view of the world. Although he recounts how Bartleby did not engage in everyday activities, such as walking or reading newspapers, the Lawyer draws no suggestive inference. Rather than being insightful and sympathetic as many critics believe, his description of Bartleby's only action — his "looking out" his window at the "dead brick wall"⁶⁶ — as being a "dead-wall reverie[]"⁶⁷ is descriptive if not a little sardonic. Once again, the Lawyer concludes that Bartleby is clinically deficient. He assumes that the scrivener suffers from an "excessive and organic ill."⁶⁸ He is "the victim of [an] innate and incurable disorder" of the "soul."⁶⁹ In a word, Bartleby is incapable of fulfilling the 'rational' duties of contract law. One might even go so far as to say that the Lawyer's assumption that it was Bartleby's "soul that suffered"⁷⁰ indicates that he doubts whether Bartleby shares in what theologians call "right reason."⁷¹ There is no criticism of the law that he now assumes Bartleby cannot comply with.

At the end of this highly charged incident, the Lawyer, who had momentarily waxed poetic about their shared status as "sons of Adam,"⁷² and about their shared ontological condition, resolves to set up a situation that will allow him to dismiss Bartleby. He plans to "put certain calm questions" to Bartleby that he is sure the scrivener "would prefer not to" answer.⁷³ His calling them "calm questions" indicates that the Lawyer believes them to be within the sphere of information 'reasonably' allowed to an employer. If Bartleby refuses to answer these questions he will be in breach of contract. The Lawyer will then be in a position to either dismiss him or bring legal action to force him to fulfill his promise. Thus, if anything, the experience of this dialectical tension results in a hardening of the Lawyer's position. For now, instead of granting

⁶⁶ *Ibid.* at 121.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 122.

⁷⁰ *Ibid.*

⁷¹ For a discussion of 'right reason' in American religious thought, see Perry Miller, *The New England Mind, The Seventeenth Century*, vol. 1 (Cambridge, Mass.: Harvard University Press, 1939) 111-206.

⁷² See Melville, *supra*, note 1 at 120.

⁷³ *Ibid.* at 122.

“privileges and unheard of exemptions,”⁷⁴ he plans to dismiss Bartleby for refusing to “do his duty.”⁷⁵ To all accounts then, the Lawyer has not changed his belief that, as a contracted worker, the purpose of Bartleby’s existence is to satisfy those desires voiced by his contractor.

The second statement that allows us to determine whether this incident marks a significant change in the Lawyer’s *Weltanschauung* is uttered by the narrative voice recounting these events. This voice is, as we are told at the beginning of the story, the Lawyer in his old age, years after the events have taken place. Were the dialectic to have changed the Lawyer, as Schwartz suggests, then it is probable that the *raison d’être* of this voice would be to demonstrate how he is different from his earlier self. This would have been an excellent place to mark such a difference. However, in the midst of his reveries and immediately after the suggestive statement, “Ah, happiness courts the light, so we deem the world is gay, but misery hides aloof, so we deem misery there is none,” we read, “These sad fancyings — chimeras doubtless, of a sick and silly brain — led on to other and more special thoughts.”⁷⁶

From the narrator’s later point of view, then, the images of unity, “fraternal melancholy” and, indeed, the tragic observation that some men live in “gloom,” are “chimeras,” or products of sickness. The narrator leaves little doubt as to what he *now* thinks of these ideas. For, in calling the brain that imagined them “silly,” he implies much more than the notion of funny. Rather, according to the *Oxford English Dictionary*, in Melville’s era, “silly” implied senseless and had to do with people who were “weak and deficient in intellect” such as the “feeble minded.” Hence, the narrator believes that his earlier reveries lacked the hallmarks of ‘reasonable’ thought. While it is true that the “brain” he refers to is his own, it is imperative to the narrating Lawyer’s later consciousness that he be able to categorize his own earlier thoughts in such a way as to ensure that they have no lasting effect on his own status as a ‘reasonable’ man. By placing these observations inside the paragraph that contains the most suggestive notions, the narrator emphasizes the distance between his own former ‘silliness’ and his later ‘reasoned’ judgment of it.⁷⁷

Unable to get Bartleby to adhere to a pre-determined contractual model, the Lawyer gives up and decides to do his business elsewhere.

⁷⁴ *Ibid.* at 118.

⁷⁵ *Ibid.* at 114.

⁷⁶ *Ibid.* at 120.

⁷⁷ Later, I will show, via an analysis of the Lawyer’s retrospective prologue, that the narrating consciousness is not the least bit different from the man who adheres to the principles and assumptions of common law in the sections of the story we are now considering.

There is no indication that at the end of this dialectic the Lawyer is any less convinced that John Jacob Astor and common law methods "ring like unto bullion."⁷⁸ This section of the story ends with the Lawyer admitting that he bowed to the common sense of his friends who had commented on the "strange creature" that kept "deny[ing] his authority,"⁷⁹ and his obvious relief that the men he "engage[d]" to move him fulfilled their 'day-labour' contract in a stereotyped manner.⁸⁰

The next most often-cited evidence that his encounter with Bartleby has transformed the Lawyer is his desperate offer to take Bartleby home with him. Marx calls this offer "truly charitable"⁸¹ and thus contrasts it with the Lawyer's own earlier view that "charity" toward Bartleby was a way to "cheaply purchase a delicious self-approval" which "will eventually prove a sweet morsel for my conscience."⁸² The Lawyer's offer reads: "Bartleby . . . will you go home with me now — not to my office, but my dwelling — and remain there till we conclude upon some arrangement for you at our leisure?"⁸³ While the Lawyer offers Bartleby a place to stay, the real question is for what purpose? There is nothing to suggest that the phrase "conclude upon some arrangement" means anything but finding a job that Bartleby would "willingly" assent to perform. Accordingly, the Lawyer does not suggest that he has been impressed by Bartleby's assertion (albeit, an assertion via negation), that Bartleby is entitled to exercise his own will and not work and that he has the right not to bow to the wishes of the man of property. The Lawyer's invocation of contractual human relations indicates that he rejects the notion that Bartleby can exist outside of "arrangements" as he understands them. The Lawyer's attitude towards Bartleby's (in)action and the understated statement is still committed to the notion that the only proper way for an individual to behave is to conform to the limits and assumptions of contract law. Indeed, one might go so far as to say that even now the Lawyer can simply not understand how anyone could (want to) exist outside the settled order supplied by contract law.

The Lawyer has not undergone even the beginning of a transformation because he does not doubt the legitimacy of the 'ontological reduction' of the worker. Given the severity of that reduction, proof of the Lawyer's change would be his viewing Bartleby as having a 'reason' equal to his

⁷⁸ See Melville, *supra*, note 1 at 104.

⁷⁹ *Ibid.* at 131.

⁸⁰ *Ibid.* at 133.

⁸¹ See Marx, *supra*, note 6 at 96. It should be noted that Schwartz (*supra*, note 2 at 462) realizes that the Lawyer's offer is not as pure as Marx would have us believe.

⁸² See Melville, *supra*, note 1 at 115.

⁸³ *Ibid.* at 136.

own. Does the Lawyer now believe that Bartleby is capable of deciding his future on his own terms? The answer, of course, is no. Indeed, he specifies that his offer is dependant upon Bartleby agreeing that his future is subject to joint control. As we know the axis on which the Lawyer's ideology turns, we can assume that he will do all he can to get Bartleby to accept once again the reduction of his person by contract law. In short, he wants Bartleby to return to being little more than an "old chair"⁸⁴ that can be used by whoever owns it.

There is another way of looking at this incident. Instead of arguing that the Lawyer wants to help Bartleby return to a contractual relationship, it can be argued that he now has concluded that Bartleby is totally incapable of functioning within this legal regime. However, if the Lawyer does have any doubt about the applicability of contract law to Bartleby, he still does not question the epistemological and ontological assumptions of the law itself. He immediately invokes a different model of social organization, namely apprenticeship, with which to control Bartleby. In this system, with which the Lawyer would have been acquainted both from his study of Blackstone's *Commentaries* and the rules that governed his relationship to Ginger Nut, the assumption is that an apprentice does not have a 'rational' or independent 'will'.

In contrast to contract law, the apprenticeship system viewed the labourer as a perpetual minor to be cared for and told what to do. The apprentice did not have the fungible property with which to express a unique 'will' in the marketplace. In the 'great chain of being', which had defined apprenticeship from its medieval beginnings, the "master stood *in loco parentis*" and as such was entrusted with "moral indoctrination, Christian training and instruction in literacy" and, more importantly, the power to decide all issues that pertained to the apprentices.⁸⁵

To argue that the Lawyer is reaching a more humane way of dealing with Bartleby is absurd. It is true that compared to the freedom from liability that Justice Shaw's creation of the "fellow servant" rule granted industrial employers, apprenticeship and its "master-servant" rule did offer a modicum of protection to the injured or aged worker.⁸⁶ Nonetheless, in the latter system, the worker was at the bottom of the social hierarchy. Where contract law posited a fleeting moment of ontological equality if only for the purpose of contract formation, in the apprenticeship system, labourers were *ipso facto* subordinated to their masters. In both readings, then, far from moving closer to an understanding of Bartleby's claim-

⁸⁴ *Ibid.* at 130.

⁸⁵ See Horwitz, *supra*, note 21 at 208.

⁸⁶ See Friedman and Ladinsky, *supra*, note 21 at 269.

to independence, the Lawyer remains faithful to the categories furnished by the history of common law and philosophical rationalism.

III. THE PRUDENCE OF PRISON YARDS AND SEQUELS

Although it has become traditional to link the scene in the prison yard and the sequel, it is important to separate the two. For, as the Lawyer himself points out, the events he recounts in the sequel occurred "a few months after the scrivener's decease."⁸⁷ Accordingly, the scene in the grassy part of New York's Tombs will be discussed first, followed by an examination of whether the sequel indicates that the Lawyer's deals with Bartleby here had any substantial effect on him.

Marx and Schwartz claim that one of the ways we can tell that the Lawyer has changed is that he perceives the "green grass"⁸⁸ of the prison yard in the same way that they understand Melville's version of the "pastoral." They argue that the Lawyer is affected by the profound tension that exists between the promise of the "leaves of grass"⁸⁹ and the proof of man's fall, as symbolized by the criminal voyeurs and the presence of death. He experiences, according to Marx and Schwartz, a "final revelation"⁹⁰ that carries him beyond the limits of common law, and thus beyond the classical liberal definitions of status, duty, and order.

According to Schwartz, Bartleby makes those around him realize that, propertied or not, each human consciousness is ultimately alone with the knowledge that "it will cease to be."⁹¹ The only real bond between people, then, is the "charity" with which they help others "meet the challenge of death."⁹² Clearly, this "charity" cannot be a variant of the rational calculus referred to earlier. Instead, it must be a "genuine and humane concern for other people,"⁹³ an unrestrained giving of oneself *a la* Ishmael and Queequeg.⁹⁴ If this is true, what we should now find is a Lawyer who wants to efface the institutional differences between

⁸⁷ See Melville, *supra*, note 1 at 140.

⁸⁸ See Marx, *supra*, note 6 at 104; see also L. Marx, *The Machine in the Garden: Technology and The Pastoral Ideal in America* (New York: Oxford University Press, 1964); see Schwartz, *supra*, note 2 at 462.

⁸⁹ *Ibid.* at 104.

⁹⁰ *Ibid.*

⁹¹ See Schwartz, *supra*, note 2 at 457.

⁹² See Marx, *supra*, note 6 at 104.

⁹³ See Schwartz, *supra*, note 2 at 455.

⁹⁴ For a full discussion of the relationship between Ishmael and Queequeg see R.K. Martin, *Hero, Captain and Stranger: Male Friendship, Social Critique and Literary Form in the Sea Novels of Herman Melville* (Chapel Hill: University of North Carolina Press, 1986) at 77-81.

himself and his former employee. We should also find that classical liberalism is no longer the touchstone of his thought.

Rather than undertake a full critique of Schwartz and Marx, this Part will focus on the Lawyer's behaviour in this supposedly "magical" setting⁹⁵ of the prison yard. If there is a moment when the Lawyer experiences anything like "deeply felt and spontaneous sympathy,"⁹⁶ it is when he sees the fulfillment of his earlier vision of Bartleby's enrobed corpse: "Something prompted me to touch him. I felt his hand, when a tingling shiver ran up my arm and down my spine to my feet."⁹⁷ This is the first time the Lawyer has referred to any type of human physical contact between men, and thus it might be seen as the moment when certain barriers are broken down.⁹⁸ However, the few statements that follow it are not that different. It is worth noting that in the "Dollars Damn Me" letter, which opens Marx's article, Melville himself warns against the "mischief" that follows when men forget that the "all feeling" of a summer's day on a hillside is only a "temporary feeling or opinion," and not the stuff of "universal application."⁹⁹ Accordingly, while the Lawyer might realize that, despite all his property, he too is human, the real question is whether he proceeds to make a link between what might be called eschatological democracy and a more equitable social order.

Nowhere in the remainder of the story does the Lawyer denounce the social system that brought Bartleby to his death. Nor is there an expansive movement that characterized the Lawyer's "special thoughts"¹⁰⁰ when he discovered Bartleby's horrible solitude. In contrast to the critics who, at this point in the story, begin to speculate on what it was that drove Bartleby to assert his own desires, the Lawyer's answer to the grubman's rhetorical questions "does he live without dining?" and "Eh! — He's asleep, ain't he?"¹⁰¹ will be the focus here.

Since the Lawyer's answer that Bartleby is now "[w]ith kings and councilors"¹⁰² is a citation from *Job* (3:14), it might at first seem as

⁹⁵ See Marx, *supra*, note 6 at 104.

⁹⁶ *Ibid.*

⁹⁷ See Melville, *supra*, note 1 at 139.

⁹⁸ For a discussion of how Melville uses physical-sexual contact between men as a way of showing a new and less hierarchical social order, see Martin, *supra*, note 94.

⁹⁹ The source of this letter of June 1851 is H. Melville, "Letter of June 1(?) 1851" in Leyda, ed., *The Portable Melville*, (New York: Viking Press, 1952) at 434.

¹⁰⁰ See Melville, *supra*, note 1 at 120.

¹⁰¹ *Ibid.* at 139.

¹⁰² *Ibid.* at 140.

though the Lawyer has finally undergone some kind of transformation.¹⁰³ However, far from being a sign that he has reached some "kind of awareness of human misery," this phrase indicates that his conceptual universe is still bounded by the institutions of legal science. He does not critique the contractual assumptions that are realized most clearly in the image of the money-grubbing grubman. The argument for this position would be that since in the end, there is an eschatological democracy where kings, counsellors, and scribes are all equal, any social system that allows the illusion of ontological inequality is necessarily at variance with the truth. However, had the Lawyer wanted us to assume that he was at variance with the grubman, he would have indicated it by adding something more than "murmured I"¹⁰⁴ after his half-hearted quotation.

In place of the kind of logic implying a critique of American society, the Lawyer uses the teleological aspects of theological thought to validate the existing social system. Rather than indicating that there are certain identifiable causes for human misery, the Lawyer's emphasis on the ultimate equality of death suggests that inequality is only transient. By focusing on the ultimate equality of death, the Lawyer indicates that he is well within the precepts of what can be called the American 'spirit of capitalism', which preached that in the next life, both the rich and poor will be equal.¹⁰⁵ Thus, the story proper ends with the Lawyer showing us that not even the "tingling shiver" he experienced after touching Bartleby's lifeless hand was enough to alter his belief in the systems of thought devised by sovereigns and their legal lackeys.

Unlike the sequels to "Benito Cereno"¹⁰⁶ and *Billy Budd*,¹⁰⁷ the "Bartleby" sequel is narrated by the same consciousness that reports the story proper. This is an important difference because it means that in this case the sequel cannot have the role that critics ascribe to the other two.¹⁰⁸ The other sequels are cast as official versions of the events narrated in the stories, showing that far from being the unadorned 'truth', the products of legal reason are self-serving and biased presentations of a specific and limited point of view.¹⁰⁹ By contrasting in quick succession what he called an "inside narrative" of the stories proper with the official

¹⁰³ See Stein, *supra*, note 11 at 108.

¹⁰⁴ See Melville, *supra*, note 1 at 140.

¹⁰⁵ M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. by Talcott Parsons (New York: Scribner, 1958).

¹⁰⁶ See Melville, *supra*, note 1 at 141.

¹⁰⁷ *Ibid.* at 7.

¹⁰⁸ See Thomas, *supra*, note 17.

¹⁰⁹ *Ibid.*

and legalistic sequels, Melville shows just how the legal mind's *monologia* distorts the actions of human beings.¹¹⁰

Although the "Bartleby" sequel is technically different from that of "Benito Cereno" and *Billy Budd*, this does not mean that it has nothing to say about the legal mind. Quite the contrary. Here Melville focuses on another aspect of this mind, the hubris at the root of legal reason and its unchanging belief in its own 'assumptions'. The voice that speaks the sequel is the same one that has resisted the dialectical effect of Bartleby's presence all along. This Lawyer continues to believe that truth can only be gleaned by applying the methods sanctified by the common law.

This examination of the sequel begins with a discussion of the Lawyer's attitude toward the "vague report" that reaches him a few months after the prison yard scene.¹¹¹ If the famous exclamation that ends the story is to be taken, as Schwartz and Marx argue it should, as proof that the Lawyer has acquired a "sympathy" with those who "despair" for the human condition, we should find that the Lawyer has abandoned the Black Letter rules of legal method because they are unequal to the reality of ontological ambiguity.¹¹²

At first it appears as though the Lawyer has been transformed. Not only does he draw our attention to the fact that he cannot vouch for the rumour's veracity and that he finds that it has "a certain suggestive interest," but he also tells us that he was seized with inexpressible emotions when he heard that "Bartleby had been a subordinate clerk in the Dead Letter Office at Washington, from which he had been suddenly removed by a change in the administration."¹¹³ However, while the Lawyer might sound different, there are signs that just below the surface all is the same. For example, the Lawyer's warning to "the reader" that he could "never ascertain" just "how true" the rumour is does not stem from any great ontological insight.¹¹⁴

The Lawyer is unsure of the rumour's 'truth' because it remains uncorroborated. That is, it does not meet the common law standard of reliable evidence that would solve all problems for a Master in Chancery. Rather than raise vexing questions for the Lawyer, it supplies an answer for the problem of understanding Bartleby, an answer that confirms the Lawyer's interpretation of the evidence he had of Bartleby's behaviour.

¹¹⁰ See Melville, *supra*, note 1 at 7.

¹¹¹ *Ibid.* at 140.

¹¹² See Schwartz, *supra*, note 2 at 469-72.

¹¹³ See Melville, *supra*, note 1 at 140.

¹¹⁴ *Ibid.*

The Lawyer still thinks in a manner consistent with the common law's 'artificial reason'. As in other incidents, there is a brief moment when it appears that the rumour might cause an important change. Indeed, the line "Dead letters! does it not sound like dead men?"¹¹⁵ recalls the earlier links made by his "sick and silly brain."¹¹⁶ However, as with the other moments of the dialectic, the Lawyer never takes the next step. He does not criticize the social order that reduces men to the status of spent letters.

Rather than using this rumour to critique the system and his own role in reducing all human things to ciphers and letters on "bonds, and mortgages, and title deeds,"¹¹⁷ the Lawyer uses it to quarantine Bartleby and thereby exonerate both himself and society. In the same way that the 'artificial reason' of common law posits certain 'legal fictions' in order to remain internally coherent, the Lawyer builds an interpretation that is consistent with the assumptions he has found it proper to make about Bartleby.¹¹⁸ When they first met the Lawyer assumed Bartleby to be 'rational'. Now he assumes that the scrivener is incapable of behaving in accordance with the 'common sense' of Americans. He now considers Bartleby to be so far outside the boundaries of 'common sense' that his fate is unconnected to the social order.

The Lawyer describes Bartleby: "Conceive a man by nature and misfortune prone to a pallid hopelessness."¹¹⁹ In his mind, Bartleby is "by nature" outside of the hopefulness of American society and thus outside the bounds of 'reason'. Since American society is ordered by the 'reason' of common law, Bartleby, cannot fit into it. Most importantly, Bartleby's difference is not the fault of either society or the liberal definition of 'reason'. He is a freak of 'nature' and as such is completely disconnected from the ways, means, and ends of society. At the beginning of the story the elderly Lawyer assures us that Bartleby was the "strangest" scrivener he "ever saw or heard of,"¹²⁰ implying that his story is not to be taken as a model for others.

Of course, it is not difficult to imagine how the Lawyer could use Bartleby's story to critique the society produced by common law. The point is, however, that even though he mentions it, it never crosses the Lawyer's mind to link Bartleby's sad fate to the mysterious equality of

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at 120.

¹¹⁷ *Ibid.* at 104.

¹¹⁸ For a discussion of the role of "legal fictions" in the structure of the common law, see Boorstin, *supra*, note 22 at 98, 102, 133-35.

¹¹⁹ See Melville, *supra*, note 1 at 140.

¹²⁰ *Ibid.* at 103.

“rotation in office.”¹²¹ One of the most interesting aspects of this ‘fiction’ is that it allows the Lawyer to end any ambiguity that may remain *vis-à-vis* Bartleby and his past. Where earlier the Lawyer was unable to take possession of this aspect of his contracted worker (and thus was denied one of his prerogatives), now he asserts his own ‘will’ over Bartleby’s memory. There is no room left for what Bartleby might have “preferred” to be; like the contracted worker, he has become a symbol manipulated by the Lawyer.

The end of the sequel reads:

The report was this: that Bartleby had been a subordinate clerk in the Dead Letter Office at Washington, from which he had been removed by a sudden change in the administration. When I think over this rumor, hardly can I express the emotions which seized me. Dead letters! does it not sound like dead men? Conceive a man by *nature* and *misfortune* prone to pallid hopelessness, can any business seem more fitted to heighten it than that of continually handling these dead letters, and assorting them for the flame? For by the cartload they are annually burned. Sometimes from out the folded paper the pale clerk takes a ring — the finger it was meant for, perhaps, molders in the grave; a blank note sent in swiftest charity — for whom it would relive nor eats nor hungers any more; pardon for these who died despairing; hope for those who died unhoping; good tidings for those who died stifled by unrelieved calamities. On errands of life, these letters speed to death.

Ah, Bartleby! Ah, humanity!¹²²

In the few sentences before the exclamation, the Lawyer does seem to recognise the existence of human suffering. However, again the Lawyer is careful to insulate the social order from any blame. In the same way that he blithely accepts Bartleby’s ill fortune at the hands of the ‘spoils system’, the Lawyer’s references to fingerless rings and hungerless corpses are sufficiently abstract to suggest that these events have an ineluctable pattern, which is balanced by the unrealized “charity” of others.¹²³ Nowhere in the last few lines does the Lawyer seem conscious of the fact that hunger and the need for bank notes are products of a specific type of social system. Indeed, far from wanting to challenge the sadness of this fate, the Lawyer follows the creed of American capitalists like

¹²¹ “Rotation in office” (also known as the “spoils system”) was the name given to the practice whereby a new President would dismiss as many civil servants (*i.e.* Postal Inspectors, the Land Office or Collectors of the Customs) as he could, so that he could then award patronage to his supporters. This practice reached new heights under the Presidency of Andrew Jackson. For a discussion of the ideological underpinnings of “rotation in office” and a description of why antebellum Americans thought that it supplied a means to create some kind of equality in society, see William E. Nelson, *The Roots of American Bureaucracy, 1830-1900* (Cambridge, Mass.: Harvard University Press, 1982) at 1-40. A brief picture of how “rotation in office” worked can be found in the “Customs House” sketch which precedes Nathaniel Hawthorne’s *The Scarlet Letter; and Other Tales of the Puritans*, ed. by Harry Levin (Boston: Houghton Mifflin, 1961) at 5.

¹²² See Melville, *supra*, note 1 at 140.

¹²³ *Ibid.*

John Jacob Astor, who believed that suffering was a tragic reality of the human condition in a fallen world, but that it had nothing at all to do with the social systems.¹²⁴

Accordingly, we cannot read "Ah, Bartleby! Ah, humanity!" as an indication that the Lawyer has, finally, undergone some great transformation. The fact that it comes at the end of the sequel is not enough to override the evidence that the Lawyer remains true to the legal and social assumptions of Coke, Blackstone, and, most importantly, Shaw. There are several moments of dialectical tension, but after each crisis the Lawyer reverts to well established modes of thought. In the period of time in which he was in contact with Bartleby it might be argued that the Lawyer has become somewhat more aware of the "misery" that hides "aloof."¹²⁵ Nonetheless, the most important fact to come out of an analysis of each incident is that the Lawyer remains committed to the social order enshrined in common law.

IV. THE IDEOLOGY OF AN ELDERLY MAN

Neither Marx nor Schwartz investigate whether the 'transformation' they argue for actually exists in the latest moments of the Lawyer's consciousness to which we have access. However, they do not ignore the retrospective prologue that opens the story. Rather, they read it as though it sheds light only on that which is "indispensable to an adequate understanding"¹²⁶ of Bartleby and tells us nothing about what the Lawyer is like in his old age. Now, since the narrator of "Bartleby" is the same person who has supposedly undergone the transformation, it is nevertheless worth investigating what the narrating Lawyer is like long after the events have had a chance to affect him.

Those who believe that the Lawyer has been changed might object to any reconstruction of the story's chronology and prefer to pay attention to the narrator's diegesis. They could try to argue that, as he did in

¹²⁴ The classic statement of the link between Capitalism and theology is, of course, Weber's *The Protestant Ethic and the Spirit of Capitalism*, *supra*, note 105. For a short discussion of how with the aid of Herbert Spencer's philosophy of Social Darwinism, American Protestant theologians "enthusiastically leaped to defend the spirit of business" and *laissez faire* see Ben B. Seligman, *Business and Businessmen in American History* (New York: The Dial Press, 1971) at 207 and 200-25. In his biography of John Jacob Astor, Kenneth W. Porter points out that while Astor gave generously to some social aid organizations and lavishly to cultural causes (for example, the Astor, Tilden and Lenox Library in New York) he had the usual self-made man's contempt for those in financial distress. Porter quotes from a biography written in the 1860s that Astor "held beggary of all descriptions in strong contempt, and seemed to think that, in this country *want* and *fault* are synonymous." Kenneth W. Porter, *John Jacob Astor* vol. 2 (New York: Russell and Russell, 1966) at 1087.

¹²⁵ See Melville, *supra*, note 1 at 120.

¹²⁶ *Ibid.* at 104.

Moby Dick, Melville has employed the literary convention of the 'forgetful narrator' here. The 'forgetful narrator' is one who shows no signs of those changes that, according to strict chronology, he or she has already undergone. This kind of narrator is one who appears to have 'forgotten' the result of the story being told. This narrative strategy allows the reader to follow the path by which the narrator's consciousness is altered.

However, neither Marx nor Schwartz invoke this or any other justification for omitting an analysis of what the Lawyer of the prologue is like. It cannot be convincingly argued that the "rather elderly man"¹²⁷ who narrates this story is a 'forgetful narrator'. Not only is he careful to show us that he knows his past, but more importantly, he believes he is master of its interpretation. Further, the sequence when the narrator's voice breaks in to speak of a "sick and silly brain" (previously discussed) shows that the narrator is at one with the Lawyer who judged Bartleby so harshly. At the latest stage of his life — when most men in his position have looked back and found their career and actions wanting — this most anonymous member of this powerful profession remains true to the forms, conventions, and theoretical foundations of the elegant science of common law.

For heuristic purposes only, this discussion of the prologue is divided into two parts. First, the Lawyer's attitude toward both his past and present selves will be considered. Second, it will be shown that in his old age the Lawyer still abides by the forms, conventions, and epistemological foundations of common law.

The prologue is written from the point of view of an old man looking back on his life. At no point does the Lawyer reprove his former self. If anything, in the short biographical sketch that precedes his telling of the "advent of Bartleby,"¹²⁸ he views his life as an unbroken continuum. Indeed, if any one event is given especial importance, it is his loss of the office of Master in Chancery and not, as it should be if he has been transformed, his implication in the pitiful life and death of Bartleby.

In describing his beliefs before he met Bartleby, the narrating Lawyer moves effortlessly between his past and present, and at no point indicates that *now* his beliefs are different than they were then. "I am a man," he writes, "who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best."¹²⁹ His use of the present perfect tense — "has been filled" — indicates that now in his old age he continues to avoid the more energetic aspects of lawyering.

¹²⁷ *Ibid.* at 103.

¹²⁸ *Ibid.* at 105.

¹²⁹ *Ibid.* at 104.

Instead of allowing anything "to invade [his] peace," the narrator tells us that "I am one of those unambitious lawyers who . . . do a snug business among rich men's bonds, mortgages, and title deeds."¹³⁰ Since he does not say that this was the kind of "business" that at one time he *did*, it is clear that this is the kind of "business" he has continued to *do*. There is no indication that the experience of dealing with Bartleby has changed the Lawyer's mind about anything. He continues to believe that lawyers like himself should find their values in "bonds, mortgages, and title deeds."

The following reveals the way the narrating Lawyer wants to be thought of, as well as what he has always felt about one of the high priests of American capitalism:

All who know me consider me an eminently *safe* man. The late John Jacob Astor . . . had no hesitation in pronouncing my first grand point to be prudence, my next, method. I do no speak it in vanity, but simply record the fact that I was not unemployed in my profession by the late John Jacob Astor, a name which, I admit, I love to repeat, for it hath a rounded and orbicular sound to it, and rings like unto bullion.¹³¹

The narrator takes great pride in his past relationship to John Jacob Astor. It is clear from his reference to the music he hears when he recites Astor's full name that the narrating Lawyer has no quarrel with the forms and definitions of value embodied by he whose very name "rings like unto bullion." Were he a reformed man, we might expect to hear something about the music of the spheres; instead, he listens for tinkling silver. The fact that he does not take issue with the way that other professionals view both his present and past behaviour indicates that, far from forgetting this past, he is fully conscious of it; and he has a different understanding of his life than do Marx and Schwartz. There is no radical disjuncture between the pre- and post-Bartleby periods of his life.

If Schwartz and Marx are correct about what happens to the Lawyer, then it seems plausible that in this retrospective prologue one should find some sign that he has rejected (or at least questioned) the ideology which formed his former self and the story he is about to tell. In place of the certainty the man of legal method would claim to be his and the assumptions embodied in the Black Letter rules of law as to what 'truth' is, we should find, if not a total sceptic, at least a man who appreciates that human existence cannot be reduced to marks on a ledger. We would not be expecting too much if we looked for a man who wants

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

to use the techniques of literary discourse to expose the tragic error perpetuated by the methods of legal reason. However, the narrator continues to believe in the categories of legal reason and also believes in the theoretical foundations of common law.

Although he hides it beneath a genial matter-of-factness, the narrating Lawyer reveals several striking aspects about the way he thinks. For example, he states, "While of other law-copyists I might write the *complete life*, of Bartleby nothing of the sort can be done. I believe *no materials exist for a full and satisfactory biography* of this man. It is an irreparable loss to *literature*" (emphasis mine).¹³² The observation that Bartleby's life failed to produce the usual "materials" that allow biographers to write "full and satisfactory" volumes indicates that the Lawyer still believes in both the value of what we can call positive evidence, and the possibility of an author creating a 'total' and authoritative picture of another individual. This is a far cry from the epistemological doubt that is supposed to exist in Schwartz's and Marx's conception of the reformed legal thinker.¹³³

While he does not specify what "materials" Bartleby did not leave behind, we can infer that the Lawyer refers to the usual assortment of licences, bank records, contracts, and title deeds that not only indicate a person's place in the social hierarchy, but that also, after the individual has gone to the grave, allow Masters in Chancery to determine an individual's ultimate value. The measure of acceptable evidence is, then, not the traces or signs of a person's existence; rather, it is the formal *indicia* of a person's position in the legal and social hierarchy. The importance of this second type of evidence is that it allows both the Master in Chancery and the biographer to produce "the" (not 'a') "complete life" of another. While the Lawyer is aware that Bartleby had existed without leaving behind any of the usual "materials," he does not use this fact as a critical tool to illuminate the limits of the common law's notion of positive evidence.

Having told us that he does not have recourse to the usual "materials," the narrating Lawyer immediately adds that he alone is the source of all knowledge about Bartleby. However, it should not be assumed that the Lawyer's emphasis on his own 'self' as the source of 'truth' is in any way related to the conception of the 'self' held by the Romantics

¹³² *Ibid.* at 103.

¹³³ See Schwartz, *supra*, note 2 at 469, 471. See Marx, *supra*, note 6 at 102-05.

or their American Transcendentalist cousins.¹³⁴ Instead of aligning himself with those who saw the 'self' as a subversive concept, standing in opposition to a normative structure of society, this Lawyer is at pains to show that his reactions are formed, defined, and at all times in accord with common-law expectations. He states, "What my own astonished eyes saw of Bartleby, *that* is all I know of him."¹³⁵ For the Lawyer, "astonishment" is not the beginning of a different mode of thought. Each time Bartleby "prefer[red] not to" he was surprised, because he had expected the "penniless wight"¹³⁶ to behave in a predictable manner. The experience of "astonishment" does not signal a change in the Lawyer's structure of expectations. The word "astonishment" is not a sign that a norm is absent; on the contrary, it indicates that a norm is present.

Having raised the issue of his own incorrect expectations, the Lawyer makes no effort to use this knowledge to critique the assumptions which have been shown to be inadequate. In short, he makes no effort to distance himself from his earlier style of thought. Indeed, the use of the word "*that*" carries his past attitude into his present, proving that the opposite is the case. In the end, the fact that Bartleby causes the Lawyer to experience something out of the ordinary is further proof that first it is Bartleby who is "strange" (and thereby his fate is not a sign of a general problem) and second, the Lawyer has the ability to isolate and thereby naturalize those experiences that could lead less conventional thinkers to subversive questions.

The most important indication that the narrating Lawyer remains true to the epistemological assumptions lying at the heart of common law thought is his conception of "literature." This concept is evidenced by his vehement denouncement of Lord Byron. His negative judgment of Byron has nothing to do with whether or not he liked Byron's works¹³⁷

¹³⁴ The Transcendentalists have often been referred to as the American Romantics. Influenced by both the British Romantics (*i.e.* William Wordsworth and Thomas Carlyle), Ralph Waldo Emerson, Henry David Thoreau, William Ellery Channing and Margaret Fuller (to name only four), rejected the Neoclassical definition of literary order and, as Ferguson has shown, its conception of public and social order. Besides believing in the efficacy of reason, Neoclassicism emphasized fixed standards and hierarchical social and aesthetic orders. Further, it conceived of nature as a harmonious whole which supplied the model for both aesthetic decorum and an ordered society. In contrast, American Romantics emphasized the subjective imagination, originality, fluid emotionalism, spontaneity, and perhaps most of all, a belief in the rejuvenative power of experiencing nature.

For a discussion of the major differences between Romanticism and Neoclassicism see: Walter Bate, *From Classic to Romantic: Premises of Taste in Eighteenth Century England* (New York: Harper and Row, rpt., 1961). See also Ferguson, *supra*, note 46; Julie Ellison, *Emerson's Romantic Style* (Princeton, N.J.: Princeton University Press, 1984).

¹³⁵ See Melville, *supra*, note 1 at 131.

¹³⁶ *Ibid.* at 117.

¹³⁷ Lord Byron, *The Works of Lord Byron: A New, Revised and Enlarged Edition, with Illustrations*, ed. Ernest Hartley Coleridge (London: John Murray, 1898) 13 Volumes. For a short discussion of Byron's work and his activities during the Greek Revolution, see Paul G. Trueblood, *Lord Byron* (New York: Twayne Publishers, 1977).

or even the poet's activities in Greece. The problem with this "mettlesome poet"¹³⁸ is, rather, that he expresses a view of the individual that has no place for the notion that people should willingly subject themselves to the discipline of "dull, wearisome, and lethargic affair[s]."¹³⁹ The Lawyer sees Byron as representing all those who have a conception of reality and value opposite to that of the common law.¹⁴⁰

The narrator's attitude toward the Romantic conception of the individual's value and imagination, a concept opposed to that of a structured and organized society, is similar to that when he judged his own musings on "fraternal melancholy" to be "mere chimeras of a sick and silly mind."¹⁴¹ For, to accept the implications of his own imagination or the arguments of the Romantics means that the Lawyer must accept that, organized as it is, society crushes the most important aspect of human beings. He would then have to adopt a standard of values that does not give pride of place to contractual exchange and predictable completion of assigned labour. He would see that, for the masses, the social system that is supported and defined by the elegant science he practices is little short of an agony.

The narrating Lawyer's knowledge of Romanticism and his vehement rejection of it are not surprising. Although he is not affected by *Bartleby* and never questions the legal fictions of common law, he is not an ignorant man. Indeed, as both Perry Miller and Robert Ferguson have shown, antebellum lawyers were keenly aware of the dangers posed by the Romantic Movement.¹⁴² No less a person than Justice Story saw it as "threaten[ing] the very foundations of the intellectual edifice he and his fellows had patiently constructed," "fellows" like Blackstone and his followers on both sides of the Atlantic.¹⁴³

The intellectual edifice of common law was constructed largely out of the epistemology of eighteenth-century Neoclassical aesthetics.¹⁴⁴ As Boorstin has shown, Blackstone transformed the notion that there was a hierarchy of genres, where each type is isomorphically related to a particular subject, into a justification of the social hierarchy, and he

¹³⁸ See Melville, *supra*, note 1 at 111.

¹³⁹ *Ibid.* at 111.

¹⁴⁰ For a discussion of Romanticism's threat to the common lawyer's Neoclassical conception of both his own social role and the structure of society, see Ferguson, *supra*, note 46 at 75-76, 248-57 and *passim*.

¹⁴¹ *Ibid.* at 120.

¹⁴² P. Miller, *The Life of the Mind in America, from the Revolution to the Civil War* (New York: Harcourt, Brace and World, 1965).

¹⁴³ *Ibid.* at 146.

¹⁴⁴ For a discussion of the American common lawyer's debt to Neoclassicism, see Ferguson, *supra*, note 46 *passim*.

adopted the aesthetic notions of decorum and balance to forestall any questioning of the existing order.¹⁴⁵ In the same way that literary forms must ultimately show that all is as it should be in the most balanced possible "Kingdoms," what Boorstin calls Blackstone's "mysterious science"¹⁴⁶ was dedicated to showing that every law of England is as it should be.

That the narrating Lawyer is faithful to this Neoclassical constellation is easily demonstrated. First, although we are told nothing of his training, it would have been based on either Blackstone's work or that of his American followers. Second, American intellectuals also looked upon Neoclassicism as a way to cull the best from the classical democracies.¹⁴⁷ The Lawyer's attitude toward his "bust of Cicero"¹⁴⁸ indicates that even if he did not want to follow in the tradition of Ciceronian eloquence, he had probably heard Rufus Choate's admonition to "soak your mind with Cicero."¹⁴⁹ As telling as these indications of the Lawyer's Neoclassicism are, it is more important to see that his own actions and beliefs are in accord with Neoclassical assumptions that were so dear to the intellectual giants of the common law.

The Lawyer uses the word "literature" in the quotation cited above¹⁵⁰ in anything but an innocent manner. It is not a catch-all term for letters or professional writing. Rather, it is defined in the previous sentence by the phrase "a full and satisfactory biography." As we have seen, this phrase contains certain assumptions as to what the purpose of written discourse is. Since the only kind of evidence that has any value is that indicating the subject's place in the social hierarchy, we can assume that the purpose of "literature" is to explicate, explain, and, like Blackstone's science, mystify the logic by which the individual lives in society. Thus, "literature" has less to do with the imagination than it does with justifying the *status quo*. For the Lawyer, "literature" is simply another set of discursive practices that allow the authorities to indicate precisely what is important to know about other social actors. The fact that he never tries to speculate on Bartleby's attitude toward the contractual system shows that the Lawyer believes that "literature" is of a piece with mortgages, bonds, and title deeds.

¹⁴⁵ See Boorstin, *supra*, note 22 at 84-105.

¹⁴⁶ *Ibid.* at title.

¹⁴⁷ See Ferguson, *supra*, note 46 at *passim*.

¹⁴⁸ See Melville, *supra*, note 1 at 112.

¹⁴⁹ See Ferguson, *supra*, note 46 at 75.

¹⁵⁰ See Melville, *supra*, note 118 and accompanying text.

That the narrating Lawyer is true to the Neoclassical notions of order, decorum, and hierarchy can also be seen in the complex way he speaks of the loss of his “pleasantly remunerative” office: “I seldom lose my temper, much more seldom indulge in dangerous indignations at wrongs and outrages, but I must be permitted to be rash here and declare that I consider the sudden and violent abrogation of the office of Master in Chancery by the new Constitution, as a _____ premature act.”¹⁵¹ The Lawyer adopts this apologetic tone because he knows that while he might be able to use his pecuniary loss to justify his attitude, by putting even his own economic self-interest before his fidelity to decorum, he runs the risk of duplicating certain aspects of Romanticism’s emphasis on the ‘self’. To complain too loudly about the system takes one some distance from it. Hence, the notion that the economic ‘self’ has a value independent of the mysterious workings of the law is dangerous, since it shows that the individual need not accord with the heart and soul of the order that is the common law. Although he has given himself momentary leave to be indignant, the Lawyer is still decorous enough to avoid penning a strong adjective to describe the “_____ premature act.”

While he obviously disagrees with the abolition of his sinecure, the Lawyer does not attack the legal system that extinguished it. He holds up the decision to abolish the post as an example of indecorous, if not unbalanced, reasoning on the part of the Constitution makers. Their actions were “sudden and violent,” and therefore not in conformity with the Blackstonian notion of the slow evolution of legal genres. Further, the loss was “premature,” and hence a threat to the established hierarchy if not to common sense reason itself. Finally, after voicing these complaints showing that he has measured the legal system with its own cubit and found it wanting, the Lawyer dismisses his observation as “by the way,”¹⁵² indicating that he does not want to draw too much attention to the problems of legal reason and social structures.

I began this discussion of the retrospective prologue by observing that those critics who argue that there has been a great transformation in this man do not look at his latest consciousness. Having examined his judgments about himself and his past, his attitude towards evidence and his continued fidelity to the Neoclassical concepts that defined the unreformed legal rhetoric of his day, we can say that at no point in his old age does he appear to have broken from the “forms and

¹⁵¹ See Melville, *supra*, note 1 at 104.

¹⁵² *Ibid.*

conventions" that defined the pre-Bartleby period of his life. In the final moments to which we have access, he is what he always was: a man "not insensible to the late John Jacob Astor's good opinion."¹⁵³

V. CONCLUSION

Following Marx, Schwartz's discussion of this attorney concludes with the assertion that after seeing his former employee on the "natural grass" of the prison yard, the "lawyer begins to treasure life now that he realizes what an ephemeral gift it is."¹⁵⁴ Extrapolating from what he sees as the Lawyer's "deepened sympathy and appreciation of the despair of his fellow human beings," Schwartz asserts that change in legal actors is possible.¹⁵⁵ True, a reformed legal mind could never deal with what he calls the more "metaphysic[al]" questions raised by the law: "Is the person now in jail for a crime committed half a lifetime ago enough of the same person that we can justify his or her continued incarceration?"¹⁵⁶ However, within the limits of the "middle kingdom" and its "forms and conventions," change can occur. He states that "there are many ways in which legal officials can recognize the humanity of the people they deal with."¹⁵⁷ Not only can lawyers "be more sensitive to what clients really want to do, rather than what lawyers want them to do," but also "[w]here appropriate, prosecutors can drop charges or lessen the penalties they demand."¹⁵⁸ Finally, he suggests that "judges can be merciful in their sentencing."¹⁵⁹

While one can applaud the 'humanism' behind Schwartz's hopes, it should not go unnoticed that his suggestions leave both the structure and the assumptions of the common law untouched. What assurance is there that a client's intentions are any less inhumane than a lawyer's? Had the Lawyer in "Bartleby" hired one of his colleagues to sue Bartleby with all the vigour that our narrator could never muster could it be said that the common law had become infused with a new humanity? What Schwartz would (correctly) dub 'inhumanity' is a function of the philosophical and social assumptions of common and contract law, assumptions that define and control what legal actors are and can "really want to do."

¹⁵³ *Ibid.*

¹⁵⁴ See Schwartz, *supra*, note 2 at 462.

¹⁵⁵ *Ibid.* at 462.

¹⁵⁶ *Ibid.* at 471.

¹⁵⁷ *Ibid.* at 469.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

As we have already observed, Schwartz embarked on his “meditation” on “Bartleby” to present a picture of a reformed or, at least, reformable lawyer. This was an unfortunate choice. Far from attaining any new insights, realizing that his and the common law’s epistemology is flawed, and discovering redemption in the heart of the prison yard, Bartleby’s Lawyer remains unchanged. Not even the memory of the events (or, for that matter, his long lost youth) give rise to a “sentimental” tear.¹⁶⁰ There is no transformation or betterment of this Lawyer, as Marx and Schwartz believe. Perhaps more importantly, there is no evidence that the Lawyer would even understand what they are getting at. His reaction to Schwartz’s question about whether or not a prisoner remains during the course of his or her incarceration the same person is unimaginable. Far from repeating Schwartz’s interesting argument that the “intellectual resources of middle kingdom life are not up to the questions that life in the middle kingdom raises,”¹⁶¹ the Lawyer would answer with an unequivocal “Yes.” Given what one has seen about his conception of evidence and biography, it simply would not occur to him that a prisoner or anyone else could be defined differently than by the written documents in possession of the authorities.

¹⁶⁰ See Melville, *supra*, note 1 at 103.

¹⁶¹ See Schwartz, *supra*, note 2 at 471.