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The Accidental Legal Historian: Herman Melville and the History of American Law

ALFRED S. KONEFSKY†

While Herman Melville has been variously described as an existentialist, a socialist, Marxist, democrat, social democrat, conservative, liberal, radical, reactionary, modernist, and postmodernist,¹ he has not to my knowledge

† University at Buffalo Distinguished Professor, School of Law, State University of New York at Buffalo. First, I thank Joyce Farrell for her care and patience with the manuscript and, in particular, her ability to convince recalcitrant computer spell-check programs that the words Melville used actually existed and were also really spelled that way. Second, I thank a number of years of students in my Melville and the Law seminar for constantly bringing fresh ideas to the course, a tribute both to them and Melville. Finally, I thank a number of helpful and perceptive readers of the manuscript for their assistance: James B. Atleson, Guyora Binder, Barry Cushman, David Engel, Rebecca French, Robert Gordon, Frank Munger, Edward A. Purcell, Jr., John Henry Schlegel, Avi Soifer, Robert Steinfeld, Chris Tomlins, G. Edward White, Edwin M. Yoder, Jr., the participants in the University of Virginia Law School Legal History Workshop, and especially Dianne Avery, for her interest, thoroughness, and thoughtfulness. The usual disclaimer as to final responsibility applies.

1. Since he is Melville, of course, he simultaneously fits all of these descriptions and none of them. Elizabeth Hardwick has recently commented that “so much about Melville is *seems to be, may have been, and perhaps. . .* Melville’s pages are the object of wild overinterpretation, even if it must be said that his genius is of such peculiarity, such insistence, discursiveness—or prolixity if the manner doesn’t please—that it lends itself to flights of meaning.” ELIZABETH HARDWICK, *HERMAN MELVILLE* 141, 157 (2000). For example, “[a] generation and more of contentious political readings hang like the smoke of pitched battle over the contested text of *Billy Budd*; and the resulting murk is of the greatest interest to anyone seeking to draw out the legal lessons that Melville expected his readers to carry away from the story.” Edwin M. Yoder, Jr., *Melville’s Billy Budd and the Trials of Captain Vere*, 45 ST. LOUIS U. L.J. 1109, 1111 (2001). For an excellent example of how each generation may rediscover Melville in its own image, see Geraldine Murphy, *The Politics of Reading Billy Budd*, 1 AM. LITERARY HIST. 361 (1989) (tracking competing views

been characterized as a legal historian. His work, however, offers us a unique lens into his time—a way of understanding how law actually functioned to shape or constrain social relations and to resolve moral dilemmas. Melville's view of how law worked seems to contrast starkly with the prevailing understanding offered by modern legal historians: that changing legal rules sustained an expansion of liberty. He repeatedly drew portraits of an American culture in which hierarchy predominated, power and authority were abused, and justice was compromised with terrible consequences for American society and for individual Americans. A world of free and independent actors was a legally constructed world—a world Herman Melville apparently did not believe actually existed. His fiction challenges the claim of modern legal historians that freedom was expanding in most facets of nineteenth-century American life.

Among other things, Melville reveals a sophisticated understanding of the state of nineteenth-century American law, often—because it is Melville—without explicitly or directly talking about law. Melville was the quintessential observer of the multiplicity of life's experiences, particularly America's experiences. His genius lies in creating for each of us as readers the capability of providing our own meaning, our own interpretation, of what we are convinced he wants us to see or comprehend. He is not quite resigned, not quite optimistic, not quite agnostic about what he is forcing us to confront. If he has a point, it seems to be, advertently or inadvertently, consciously or unconsciously, to make us uncomfortable, to make us face in our everyday lives what we so often take for granted as individuals and as a society.

This article explores three of Melville's short stories—*Benito Cereno*, *Bartleby*, and *Billy Budd*—for evidence of his views about the nature of law. By examining these stories, I hope to demonstrate how Melville portrayed law as situated in social relations. Measured against the template of the modern legal historiography about the nineteenth century, these three short stories offer new interpretations of the trajectory of freedom in American law.

of the story through changes in mid-twentieth-century American politics). See also GEORGE COTKIN, *EXISTENTIAL AMERICA* 17-19 (2003).

I. MELVILLE, THE SOCIAL FUNCTION OF LAW, AND MODERN AMERICAN LEGAL HISTORIOGRAPHY

In just three paragraphs near the end of the first chapter of *Moby Dick*, Ishmael's reflections on his own status capture Melville's assumptions about the relationship between law and society, assumptions that will become apparent in *Benito Cereno*, *Bartleby*, and *Billy Budd*. Without once mentioning law, Ishmael suggests the elements in Melville's complex understanding of how law governs social relationships, through a legally sanctioned and reinforced regime of hierarchy, obedience, and dependence.

First, is the ubiquity of hierarchical relations, the inescapable pull of hierarchy, as well as its arbitrary deployment. Ishmael begins:

No, when I go to sea, I go as a simple sailor, right before the mast, plumb down into the fore-castle, aloft there to the royal mast-head. True, they rather order me about some, and make me jump from spar to spar, like a grasshopper in a May meadow. And at first, this sort of thing is unpleasant enough. It touches one's sense of honor, particularly if you come of an old established family in the land, the Van Rensselaers, or Randolphs, or Hardicanutes. And more than all, if just previous to putting your hand into the tar-pot, you have been lording it as a country schoolmaster, making the tallest boys stand in awe of you. The transition is a keen one, I assure you, from a schoolmaster to a sailor, and requires a strong decoction of Seneca and the Stoics to enable you to grin and bear it. But even this wears off in time.²

Melville is, of course, reflecting in some sense his own autobiographical experiences. He is aware that he comes from "an old established family," but his family is a struggling, decaying, dying one, no longer on top, feeling the strains and slights of lost status. He also remembers his own school teaching experience, when he, though deprived of social status, was able to resume a hierarchy, in "lording" it over his young students. But the primary social observation is that hierarchy is pervasive, and that eventually everyone grows accustomed to it.

Second, what follows from hierarchy, Melville then tells us, seems to be dependence, a social culture of obedience

2. HERMAN MELVILLE, *MOBY-DICK OR THE WHALE*, in 6 *THE WRITINGS OF HERMAN MELVILLE: MOBY-DICK* 3, 5-6 (Harrison Hayford et al. eds., 1988).

and command. Those on top control those on the bottom. Ishmael continues:

What of it, if some old hunks of a sea-captain orders me to get a broom and sweep down the decks? What does that indignity amount to, weighed, I mean, in the scales of the New Testament? Do you think the archangel Gabriel thinks anything the less of me, because I promptly and respectfully obey that old hunks in that particular instance? Who aint a slave? Tell me that. Well, then, however the old sea-captains may order me about—however they may thump and punch me about, I have the satisfaction of knowing that it is all right; that everybody else is one way or other served in much the same way—either in a physical or metaphysical point of view, that is; and so the universal thump is passed around, and all hands should rub each other's shoulder-blades, and be content.³

“Who aint a slave?” No matter how formally free we may be, that is, even if we voluntarily enter into a social or legal relationship, we are constrained by a convention of obedience, which results in or reinforces deeply rooted dependence. Ironically, “everybody else is in one way or other served.” Even those individuals who serve masters in particular legal or social relationships have the opportunity in other situations and relationships to command obedience from subordinates. Thus, “the universal thump is passed around,” and, over time, everybody is both master and servant, in myriad shifting relationships of authority and dependence.

Finally, in opposition to the reality of hierarchy, Melville poses the promise or aspiration of democratic equality. Ishmael concludes:

I always go to sea as a sailor, because of the wholesome exercise and pure air of the fore-castle deck. For as in this world, head winds are far more prevalent than winds from astern (that is, if you never violate the Pythagorean maxim), so for the most part the Commodore on the quarter-deck gets his atmosphere at second hand from the sailors on the fore-castle. He thinks he breathes it first; but not so. In much the same way do the commonalty lead their leaders in many other things, at the same time that the leaders little suspect it.⁴

3. *Id.* at 6.

4. *Id.* at 6-7.

The officers believe they are first, but in reality the common sailors breathe the head winds first. The sailors, endowed with natural dignity and ability, in fact lead; the officers follow. In the process of emphasizing the gap between apprehension and reality, Melville employs his characteristic strategy of inversion, turning the world upside down. The world may bear witness to a formal hierarchical organization, but it is in the face of a natural assertion of equality.

So, for Melville, law's dominion takes place against the backdrop of decaying aristocracies clinging to illegitimate hierarchy through a socially constructed structure of obedience. Law's function should be to level hierarchical pretension and replace it, by fulfilling the promise of equality in which the most deserving—not the least deserving—prosper. Privilege should be punctured; status should not govern social relationships.

Law as the command of a sovereign requiring obedience is, of course, an age-old problem of political theory. Melville translates the question of political theory into a critique about how legal rules writ large have an impact on social relations that govern the vast array of everyday social interactions—master/servant, master/slave, officer/sailor, husband/wife, parent/child, landlord/tenant. Melville seems uncomfortable with the fact that most ordinary people are trapped for reasons of status into owing obedience to others, even if the relationship was voluntarily assumed. Old attitudes about hierarchy leading to dependence permeate these relationships. Melville believes these attitudes distort social relationships in a democracy.

Melville identified a problem that Blackstone, perhaps influenced by Hobbes, addressed on the eve of the American Revolution. Blackstone asserted, no doubt with an eye on the increasingly recalcitrant American colonists, that "law is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey."⁵ For Blackstone, "a law always supposes some superior who is to make it."⁶ Seeking to justify the source of law in civil society in order

5. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38 (1765).

6. *Id.* at 43.

to distinguish it from a state of nature, Blackstone stressed the obligation owed to superiors as a means of binding otherwise unobligated individuals to a common good. The American Revolution fundamentally changed that form of fealty to obligation, as the locus of sovereignty shifted from a monarchy to a republic.

James Wilson captured republican antipathy to Blackstone in his law lectures immediately after the revolution when he identified Blackstone's maxim about the superior's prerogative to prescribe law with despotism and the divine right of kings.⁷ Wilson, focused on demolishing the pretension of the command of the sovereign, did not disagree with Blackstone's description of a general duty to obey the dictates of law. Concerned with the shift in the theory of political sovereignty from a monarch to the people, Wilson now derived an obligation to obey law in a republic from the freely entered consent of its citizens.

Now that the will of a superiour is discarded, as an improper principle of obligation in human laws, it is natural to ask—What principle shall be introduced in its place? In its place I introduce—the consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation of human laws.⁸

Though the locus of sovereignty had shifted in society, the obligation to obey the law or the commands of a reconstituted sovereign remained. If anything, obedience was now doubly required because it emanated from the presumed private consent of the governed and was owed to the people.

In Melville's view, the combination of hierarchy, command, and dependence formed a social system that did not measure up to equality. The source of that combination derived from law and its requirement of obedience. Relationships like master/servant, master/slave, master/sailor, landlord/tenant, parent/child, husband/wife, were predicated on the larger superstructure of the state's ability to command obligation to its legal rules. The pattern of social relationships replicated the wider political world at large,

7. See 1 THE WORKS OF JAMES WILSON 103, 121 (Robert Green McCloskey ed., 1967).

8. *Id.* at 121.

or to put it another way, the social relationships were "little commonwealths," the state writ small.⁹

In that sense, Melville anticipated modern social commentary that law may be interpreted "as a constitutive societal force shaping social relations, constructing meaning, and defining categories of behavior."¹⁰ Law is not just about dispute resolution, or adjudication, or rights.

9. See JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* (1970). See also EDMUND S. MORGAN, *THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* (rev. ed. 1966).

For the relationship between principles of political sovereignty and social organization in the worlds of colonial and postrevolutionary America, compare the following:

For the colonial period:

[T]he colonists transplanted the monarchical household ruler onto New World soil, albeit with certain modifications. . . . Much as monarchical sovereignty could not be divided between a king and subject without destroying kingship and the English constitution, so British Americans painstakingly preserved an undivided baronial sovereignty within families. In the eyes of the law, women could hope at best to function not as coheads, possessed of their own sovereignty and lawmaking authority, but as junior partners to whom men might grant limited rights and privileges. Married women's primary obligations in the polity lay not with political governors, but with domestic governors, who made law for households.

SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 18 (2001).

For the postrevolutionary era:

When American revolutionaries challenged laws governing the relations between male subjects and the king, reconstituting men as individuals free of patriarchal constraint, they left intact the system of the old English law of domestic relations. This system of law was among the many elements of English common law that were quietly absorbed into American legal practice in order to save the trouble of restating what seemed obvious. Some of this system was written into statutes, some kept alive as unwritten precedent that courts respected and could be counted upon to sustain.

Long before constitutions were constructed as new social contracts, there were marriage contracts and the complex system of subordination and authority which they were understood to embody.

LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 11 (1998).

10. Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J. L. & HUM.* 95, 97 (2001).

A constitutive view of law sees legal discourse, categories, and procedures as a framework through which individuals in society come to apprehend reality. Thus, law is not merely a coercive force operating externally to affect behavior and social relations; it is also a lens through which we view the world and actually conduct social relations. . . . [A] constitutive vision of law . . . therefore . . . treat[s] law as (1) a belief system that helps to define the roles of individuals within society; (2) a system of organization that determines societal roles; and (3) a language for conceptualizing reality, mediating social relations, and defining behavior.¹¹

What Melville offers by explicating the relationships of everyday life in painstaking detail, is a demonstration of how “[l]aw is the art of composing society.”¹²

A clue to Melville’s attitudes about law resides in his views on the illegitimacy of hierarchy in a democratic society pledged in theory to equality. “It is easy to forget that the Founding Fathers envisioned nothing less than the righting of all of the wrongs of old Europe, the establishment of a new, citizen-centered order to replace the old one that was hierarchy bound.”¹³ Melville scholars have noted his “detestation of oppressive hierarchy.”¹⁴ In fact, he saw hierarchy where others actually saw signs of equality, or chose to ignore inequality. As America presumably abandoned and rejected earlier political and legal arrangements, Melville was not sure he saw progress. As he grew older, he became “a man disenchanted with the prevailing faith in humanity’s so-called progress, . . . who believed instead that human nature is essentially the same from age to age, regardless of superficial changes such as modern inventions and other supposed improvements.”¹⁵ Melville seemed to place changes in law in the category of “superficial change.”

11. *Id.* at 109-10. Berman distills these ideas from his summary and critique of the mainstream scholarship of the most recent generation of the law and society movement, a generation heavily indebted to Clifford Geertz for its inspiration.

12. Guyora Binder, *The Poetics of the Pragmatic: What Literary Criticisms of Law Offers Posner*, 53 STAN. L. REV. 1509, 1511 (2001).

13. STANTON GARNER, *THE CIVIL WAR WORLD OF HERMAN MELVILLE* 26 (1993).

14. Barbara Foley, *From Wall Street to Astor Place: Historicizing Melville’s Bartleby*, 72 AM. LITERATURE 87, 107 (2000).

15. MERTON M. SEALTS, JR., *BEYOND THE CLASSROOM: ESSAYS ON AMERICAN AUTHORS* 48-49 (1996).

Like democracy, American law promised to eliminate hierarchy and to provide equality. Instead, when Melville looked carefully at the crucial institutions of law and society, all he saw were relationships of dependency. The legal forms may have changed but the content did not change. Yet to appreciate more fully Melville's insights into nineteenth-century American law, we need to take a detour into modern legal historiography. Only then can we begin to understand how contrarian was Melville's thought about law and how much he may have to offer by way of a different trajectory.

What if Melville's obsession with the corrosive effect of hierarchy in a democracy were to force us to reconsider our contemporary understanding of nineteenth-century American legal history? What if reading Melville's fictional accounts, which frequently featured his perception of how law functioned in his society, made us rethink our assumptions about how we have analyzed the legal institutions with which he lived? Perhaps he has some insight to offer as to how systems of hierarchy and dependence predominated in legal relations, despite both modern historiographical depictions of evolution or progress and the views of Melville's own contemporaries as to the beneficial, transformative effects of law.

The argument over the shape of nineteenth-century American law remains contested about issues of historical methodology, causation, and evidence; impact, consequences, and interpretation; and emphasis and significance.¹⁶ Yet most recent historians of nineteenth-century

16. Some of the leading examples of the prevailing paradigm of change include: MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975). These influential accounts were written before the full impact of scholarship on republicanism and economic liberalism found its way into legal historical studies. It is interesting, however, to note that the standard explanation for nineteenth-century legal change has nevertheless infiltrated into political and social history reflecting more recent work on republicanism and liberalism, in effect becoming part of the conventional wisdom. See, e.g., JOYCE APPLEBY, *INHERITING THE REVOLUTION: THE FIRST GENERATION OF AMERICANS* 50-51, 55 (2000) (arguing that though common law changes occurred they had little impact on the employment relationship); ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN*

American law, particularly antebellum law, have painted a portrait of a legal system that evolved in an unfolding pattern of expanding freedom and liberty. Tethered to the political ideas of the American Revolution, legal doctrine, as well as legal ideology, rejected prerevolutionary hierarchical relationships rooted in abandoned feudal practices and reformed itself, for better or worse, in the image of both republicanism and economic liberalism.

There have been significant challenges to assumptions about whether market or premarket attitudes or behaviors existed prior to the nineteenth century in colonial America.¹⁷ Some debate exists about whether "modern" markets functioned in a premodern, precapitalist, pristine, communitarian American idyll. It is probably more accurate to say that markets were simply differently constituted. Nevertheless, the expansion of economic and political freedom has been the most prominent explanatory theory, even in the face of the considerable constraints on liberty imposed on blacks, women, labor, and native Americans.

The modern trope of freedom asserts that legal relations in nineteenth-century America essentially were voluntary, that is, individuals or business organizations deciding their own fate (a logical extension of self-government), acting independently, all equal in the eyes of the law, and free to act in their own self-interest. Within this model, contractualism permeated most aspects of society. Indeed, the most powerful evidence for this paradigm is drawn from the world of private and public economic activity that incorporates the realms of contract and property relationships that are assumed to govern most social relationships.¹⁸ There is

THOUGHT AND CULTURE, 1760-1800, at 119-25, 182 (1990) (citing Horwitz and Nelson).

17. For challenges to the prevailing orthodoxy on timing and modernization, see CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639-1789* (1995); BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987). For a summary of the outline of the historiographical dispute, see Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 *YALE L.J.* 1303, 1305-10 (2001).

18. See, e.g., HORWITZ, *supra* note 16, at 31-62, 160-210. Horwitz, of course, has not gone without his critics. See, e.g., A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 *U. CHI. L. REV.* 533 (1979). There has been a virtual cottage industry in Horwitz studies poring over nearly every claim in his book—an industry too extensive to document here.

a sense of the common weal but, increasingly over the century, the public welfare or interest is defined as no more than the aggregate of individuals deciding for themselves how to better their own individual lot in the belief that those decisions eventually will redound to the benefit of the public good.¹⁹ And the public good is discounted for the fact that any individual's expression of freedom in the marketplace might very well undermine or restrain someone else's prior or contemporaneous entitlement to or assertion of freedom, a kind of creative destruction.

The emerging system of private, autonomous legal relations gradually replaced what was assumed to be a predominantly paternalistic set of legal and social relations. This primary English political model of sovereignty was patterned after the king's or queen's theoretical relationships to his/her subjects. The relationship of hierarchy and dependence contained a series of reciprocal obligations between the parties. Social relations in society were created in the image of the dominant form of political organization.

"It was difficult for men and women of the premodern world to conceive of equality. In the hierarchical structure which sustained the social order, one human being was of necessity almost always subject to another—child to parent, servant to master, subject to ruler."²⁰

As Robert Steinfeld observed:

In the legal relationships of dependence (master and servant, husband and wife, parent and child) of this period, the head of household was responsible for the maintenance, care and protection of all his dependents. They could bring a variety of legal actions to enforce the duty of support which he owed them. But in return, he was given, in varying degrees, legal jurisdiction or control over them. This jurisdiction included rights to their services, and even, in certain cases, rights to chastise or confine

19. For an argument asserting the dominance of a concept of a public interest in law making as an expression of a well-regulated society in contrast to an historiographic emphasis on private, autonomous activity, see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). For an important view identifying an historical social foundation and function of property rights in American law, see GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997).

20. LAUREL THATCHER ULRICH, *GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750*, at 8 (1982).

them. The structure of these legal household relationships of dependence closely resembled the structure of other relationships of dependence common in this period. On the one hand, the law imposed on heads of household duties to support and protect their dependents. On the other hand, it extended to them varying degrees of control over their persons and energies.²¹

The form of these dependencies tended to permeate all relationships in society from the voluntary to the involuntary: for example, town and pauper, landlord and tenant, master and apprentice, master and slave.

The face of voluntarism was different, particularly when interpreted against the backdrop of dependent relationships. Gordon Wood has noted:

Traditionally contracts did not mean what they were coming to mean in the commercialized eighteenth century. In the past contracts had often been used in patriarchal relationships—between husbands and wives, masters and apprentices, or masters and servants—and they were not thought to be incompatible with hierarchy and inequality. These contracts were regarded as evidence that the parties to the relationship, however unequal, had mutual rights and obligations established in custom. Such patriarchal contracts did not create these rights and obligations; they merely recognized their existence. Often the contracts were informal and not written out, as befitting their entanglement in

21. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 344-45 (1989) (footnote omitted). An example of the survival of these ideas in some quarters well into the nineteenth century can be found in the proslavery views of Samuel F. B. Morse:

As Morse explained, the key to understanding slavery as an essential feature of divine governance is The Fall. Man was created in the image of God, partaking of the Divine Nature, but by his first Disobedience assumed the image of Satan. To help restore man to his original state, God arranged society as a “*system of restraints*” on man’s proud will. He instituted four relationships: civil government, marriage, parenthood, and servility. Each relation consists of a superior and an inferior party: ruler and ruled, husband and wife, parent and child, master and slave. All four share “the one great central idea in Man’s Redemption, to wit, *Obedience*, the natural antidote to *Disobedience*.” The enslavement of blacks is no less legitimate or moral than marriage, a system of divinely decreed educational and disciplinary restraint: “God, in his wisdom and far-sighted benevolence, has ordained that despised and vilified *relation* as the means of bringing that race home to himself. This is the Bible theory.”

KENNETH SILVERMAN, LIGHTNING MAN: THE ACCURSED LIFE OF SAMUEL F. B. MORSE 399 (2003) (footnote omitted).

the meshwork of society. The rights and obligations of the contracts were not necessarily the result of deliberate acts of will, nor did the parties even have to consent mutually to the contracts for them to be binding. Such contacts defined relationships between people rather than specific promises of action.²²

The traditional understanding on the eve of the American Revolution was perhaps best expressed by John Adams, voicing both the dominant sense of reality and widespread anxiety about impending change. In March of 1776, Abigail Adams wrote to Adams that “she long[ed] to hear that you have declared an independancy—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies”²³ Concerned with the “unlimited power” granted to husbands, Abigail observed, “Remember all Men would be tyrants if they could.”²⁴

John Adams had two sets of responses. One directly to Abigail, though somewhat dismissive and sarcastic, revealed the legal categories and social understanding prominent in the discourse of the time:

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient—that schools and Colledges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerfull than all the rest were grown discontented.—This is rather too coarse a Compliment but you are so saucy, I won't blot it out.

Depend upon it. We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would completely subject Us to the Despotism of the Peticcoat, I hope General Washington, and all our brave Heroes would fight. I am sure every good Politician would plot, as

22. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 162 (1992).

23. Letter from Abigail Adams to John Adams (March 31, 1776), in 1 *ADAMS FAMILY CORRESPONDENCE* 369, 370 (L.H. Butterfield et al. eds., 1963).

24. *Id.*

long as he would against Despotism, Empire, Monarchy, Aristocracy, Oligarchy, or Ochlocracy.²⁵

Adams places together all those groups traditionally in dependent legal categories—children, apprentices, students, Indians, blacks as slaves or servants, women. The world is organized that way, legally or socially. In the process of answering Abigail, John was forced to confront the fact that the hierarchy existed. He chose to deflect the charge of tyranny (a charge leveled by the colonists against the crown) by seeking to turn it around—"We [men] are the subjects." In the process, he reveals that he sees the world as master/subject writ large.

Adams's second response was to his friend James Sullivan, to whom he demonstrated that he took the implications of Abigail's ideas very seriously. The logical extension of her thought would be that in a free republic those traditionally viewed as dependent might seek to vote, especially as self-government might include within it the right of each individual to be represented, or to give voice to their views. Adams was concerned:

It is certain in Theory, that the only moral Foundation of Government is the Consent of the People. But to what an Extent Shall We carry this Principle? Shall We Say, that every Individual of the Community, old and young, male and female, as well as rich and poor, must consent, expressly to every Act of Legislation? . . .

. . . .

Depend upon it, sir, it is dangerous to open so fruitfull a Source of Controversy and Altercation; as would be opened by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell.²⁶

Here then was the heart of the problem. Though republican self-government replaced monarchy, though the colonists would overthrow the dependent relationship of

25. Letter from John Adams to Abigail Adams (April 14, 1776), in 1 ADAMS FAMILY CORRESPONDENCE, *supra* note 23, at 382.

26. Letter from John Adams to James Sullivan (May 26, 1776), in 4 PAPERS OF JOHN ADAMS 208, 208, 211-12 (Robert J. Taylor et al. eds., 1979).

subject to king, there was danger in transforming the social relationships upon which the foundation of the society rested. In the eyes of men like Adams, the obligations or rights in these relationships should not be altered, primarily because the relationships themselves were not to change. And if they did not change, that meant the vast mass of people in dependencies and hierarchies could not be sufficiently trusted to exercise their own will and judgment because they were trapped into expressing the will of others upon whom they were dependent. They could not be trusted to govern because they represented somebody else's interests and not their own.

Gordon Wood and others have argued that the American Revolution set in motion events, intellectual or otherwise, that doomed John Adams's way of thinking, that the ideas associated with the revolution were destined to reform all of American society in its wake.

Women and children no doubt remained largely dependent on their husbands and fathers, but the revolutionary attack on patriarchal monarchy made all other dependencies in the society suspect. Indeed, once the revolutionaries collapsed all the different distinctions and dependencies of a monarchical society into either freemen or slaves, white males found it increasingly impossible to accept any dependent status whatsoever. Servitude of any sort suddenly became anomalous and anachronistic.²⁷

So the historical lesson generally seems to be that dependent/hierarchical relations were gradually replaced by free, equal relations in which independent legal actors flourished by asserting their individual rights unrestrained by abuses of authority and power. Melville, however, seemed to believe either that legally dependent relationships still dominated American life, or that the assertions of individual freedoms provided a mask for a dependency devoid of bonds of mutual obligation. In other words, individual rights could be used to reinforce subordination.

In his 1852 novel *Pierre*, for instance, Melville paused to describe the consequences of a world of dependent legal and social relationships: the antirent agitations in the New York of the 1840s.

27. WOOD, *supra* note 22, at 184.

[C]onsider those most ancient and magnificent Dutch Manors at the North, whose perches are miles—whose meadows overspread adjacent counties—and whose haughty rent-deeds are held by their thousand farmer tenants, so long as grass grows and water runs; which hints of a surprising eternity for a deed, and seems to make lawyer's ink unobliterable as the sea. Some of those manors are two centuries old; and their present patroons or lords will show you stakes and stones on their estates put there—the stones at least—before Nell Gwynne the Duke-mother was born, and genealogies which, like their own river, Hudson, flow somewhat farther and straighter than the Serpentine brooklet in Hyde Park. . . .

. . . .

. . . But our lords, the Patroons, appeal not to the past, but they point to the present. One will show you that the public census of a county, is but part of the roll of his tenants. Ranges of mountains, high as Ben Nevis or Snowdon, are their walls; and regular armies, with staffs of officers, crossing rivers with artillery, and marching through primeval woods, and threading vast rocky defiles, have been sent out to distrain upon three thousand farmer-tenants of one landlord, at a blow. . . .

But whatever one may think of the existence of such mighty lordships in the heart of a republic, and however we may wonder at their thus surviving, like Indian mounds, the Revolutionary flood; yet survive and exist they do, and are now owned by their present proprietors, by as good nominal title as any peasant owns his father's old hat, or any duke his great-uncle's old coronet.²⁸

"Regular armies . . . sent out to distrain upon . . . farmer-tenants," and the spectre of "mighty lordships in the heart of a republic" are not the measure of equality and freedom. Distraigned tenants are examples of citizens victimized by hierarchies sanctioned by law, hierarchies that suggest not progress but ancient and feudal decay.²⁹ In

28. HERMAN MELVILLE, *PIERRE OR THE AMBIGUITIES*, in 7 *THE WRITINGS OF HERMAN MELVILLE* 3, 10-11 (Harrison Hayford et al. eds., 1971).

29. Brook Thomas comments that the

allusion to the antirent movement in upstate New York draws attention to the power that lawyer's ink has to hold citizens in almost feudal bondage and the threat to social order that occurred when the tenants disregarded the lawyer's contracts Melville's allusion to the antirent movement is particularly telling, for it suggests that the North is as capable as the South of using a legal code to maintain oppressive social relations[,] . . . a wage economy based on a legal contract between employer and employee[,] . . . a perfect example of

the process of revealing this vision, Melville presents a series of dilemmas, without necessarily suggesting how to resolve them. Nevertheless, Melville places law and legal institutions at the core of many of these moral dilemmas. In explicating law's role, he offers his insights about how the organizing ideas of legal culture functioned historically.

The question then remains: how do we assess Melville as a legal historian? How would he have described his perspective? Was he looking backward? Or forward? Or was he simply and realistically assessing the world around him? In capturing, in fiction, discrete moments in nineteenth-century history, was he describing a static world? If so, was it such a dark and desultory world that it necessarily had within it the seeds of its own destruction? Was Melville describing the end of an old set of legal relationships or decrying the fact that they still existed and seemed powerful enough to perpetuate themselves far into the future? At the very least, and from a safe and secure historical distance, it is possible to say that Melville seemed skeptical that America's aspirations and promises were being fulfilled in political theory and law. He invited us to share his skepticism. Perhaps, to employ a favorite Melville technique of role reversal, fiction is closer to truth. To begin to appreciate Melville as an "accidental" legal historian, we need to explore the text and context of his fiction.

This then is an essay about how law is embedded in literature. If you look carefully enough, you can find it as a powerful motif. Just as law can be decoded to reveal wider cultural meanings, so literature can be decoded to reveal

how America's democratic institutions did not bring about the revolution hoped for by some and feared by others.

BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE* 146 (1987). Melville asked somewhat rhetorically, "With no chartered aristocracy, and no law of entail, how can any family in America imposingly perpetuate itself?" MELVILLE, *PIERRE*, *supra* note 28, at 8. Melville's questions are "suggestive of the discrepancy between democratic ideals and political expediencies and the complicity between governmental forces and the private financial interests of the upper class." NANCY FREDRICKS, *MELVILLE'S ART OF DEMOCRACY* 110 (1995). For an exceptional treatment of the complex legal and political events of the antirent movement, see CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* (2001). See also REEVE HUSTON, *LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK* (2000).

law.³⁰ The primary examples of Melville's insights into American law can be gleaned from three of his works, *Benito Cereno*, *Bartleby*, and *Billy Budd*, as he examines aspects of the legal relations of slavery, and capitalism, and ultimately explores the nature of justice.

II. *BENITO CERENO*³¹

A. *Fiction*

Published in 1855, *Benito Cereno* is set in the year 1799. Captain Amasa Delano, a New England sea captain, "command[s] a large sealer," which "lay at anchor" off the coast of Chile. Delano is described as a "person of a singularly undistrustful good nature, not liable, except on extraordinary and repeated incentives, and hardly then, to indulge in personal alarms, any way involving the imputation of malign evil in man." He has "a benevolent heart," but whether or not he has "more than ordinary quickness and accuracy of intellectual perception, may be left to the wise to determine" (47).

30. Along these lines, G. Edward White has recently written about "interpretive techniques that might permit a closer and more faithful rendering of the social and intellectual context in which [historical actors like John Marshall] lived and worked." White believes that modern interpretive techniques show particular promise. G. Edward White, *Reassessing John Marshall*, 58 WM. & MARY Q. 673, 677 (2001) (book review). I am suggesting, of course, that a "closer and more faithful rendering of the social and intellectual context" of literature will in certain instances reveal or include law. For a sophisticated analysis of modern legal historiographical approaches, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997). I do not wish to embroil myself in literary criticism debates about theory, meaning, context, and text, signifier and signified. I subscribe to what I like to refer to as the Nike Theory of literary criticism (I realize this has theoretical implications): "Just read it." For a useful examination of some of these issues, see GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000). See also KIERAN DOLIN, *FICTION AND THE LAW: LEGAL DISCOURSE IN VICTORIAN AND MODERNIST LITERATURE* 1-20 (1999).

31. All citations to passages from *Benito Cereno* are from HERMAN MELVILLE, *Benito Cereno*, in 9 THE WRITINGS OF HERMAN MELVILLE: THE PIAZZA TALES AND OTHER PROSE PIECES, 1839-1860, at 46 (Harrison Hayford et al. eds., 1987). The page citations immediately follow the quotations in the body of the text itself.

Delano's crew alerts him that "a strange sail was coming into the bay . . . the stranger . . . showed no colors." "Everything" is "gray"—"[t]he sky seemed a gray surtout," with "[f]lights of troubled gray fowl" and "troubled gray vapors." And most ominously: "shadows present, foreshadowing deeper shadows to come" (46).

Delano decides to board the strange ship, bringing provisions with him because he assumes the ship is in distress. He discovers the ship is a Spanish slaver. The ship itself is in disarray, slaves and crew mixing and moving unattended on board. The Spanish captain, Benito Cereno, is described as passive, dreary, unhappy and spiritless. He is attended by "a black of small stature" (51), Babo, who follows him around the ship faithfully, seeming to attend to all of Cereno's needs as Delano expects a slave would do.

At first Delano is convinced that the Spanish captain is a potential threat to him and his ship. Delano invokes a series of stereotypes about the slaves and the Spanish to interpret a variety of strange events he witnesses on board. The stereotypes serve to mask reality. What Delano has come across is a ship that has been seized by a violent, ruthless slave mutiny. The slaves are now in charge, engaged in an elaborate charade to make it appear as if the white crew is still in control. Delano does not figure out what has transpired until he makes ready to return to his vessel, when Benito Cereno jumps into Delano's whaleboat to escape. Babo follows them both into the boat. Only then does Delano experience "a flash of revelation," as the "scales dropped from his eyes" (99). The slave is disarmed and the three soon return to Delano's ship. Delano authorizes his crew to return to Cereno's ship, to suppress and capture the slaves, and to seize the ship. His men succeed after a bloody fight.

Melville then reproduces Benito Cereno's deposition, filed before the court in Peru designated to try Babo for the mutiny and murders. The tribunal does not seek the testimony of Babo and the surviving slaves. Babo is convicted and executed, and "for many days, the head, that hive of subtlety, fixed on a pole in the Plaza, met unabashed, the gaze of the whites . . ." (116). Benito Cereno—demoralized, distraught, and drained from his experience—dies a few months later in a monastery.

B. *History*

It is tempting to try to establish the particular historical matters that may have influenced or prompted Melville and to mine the sources for his inspiration. Some insightful, very good work has been done by Robert Cover and Brook Thomas, relating Melville's work generally to legal and jurisprudential issues. But Melville, like Shakespeare, also wrote about universal problems that engage us still. Though historical context is useful (finding the spur, in a way), it is not necessarily determinative of anything significant. Still it helps to know, for example, that the Chief Justice of Massachusetts, Lemuel Shaw, was Melville's father-in-law and that Melville may have observed closely as Shaw wrestled with issues involving slavery, the industrial revolution, and the criminal law. For instance, Shaw directly faced difficult problems concerning fugitive slaves and, as an avowed antislavery advocate, experienced the dilemma of enforcing laws that arguably ran counter to his personal moral beliefs.

Melville's great gift resides, in part, in taking us beyond the particular to the broader implications that historical actors such as Shaw may not have seen, or for that matter, that we ourselves may not discern at first.³² Melville may have developed Shaw's experience into a more general example of a societal and jurisprudential plight for *Benito Cereno*. Nevertheless, Melville apparently derived *Benito Cereno* from a particular source—a book by a real-life sea captain named Amasa Delano published in Boston in 1817: *A Narrative of Voyages and Travels in the Northern and Southern Hemispheres . . .* Chapter 18 of the book details Delano's capture of the Spanish slave ship *Tryal* after a slave mutiny had occurred. Melville made a significant number of changes, symbolic and otherwise, to Delano's account, including changing the name of the ship and the date of the event.³³

32. See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); THOMAS, *supra* note 29. For Shaw, see generally LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

33. For an exhaustive list of the factual distinctions between Delano's story and Melville's version, see LEA BERTANI VOZAR NEWMAN, *A READER'S GUIDE TO THE SHORT STORIES OF HERMAN MELVILLE* 98-100 (1986). Scholars, of course,

In changing the name of Benito Cereno's ship from the *Tryal* to the *San Dominick*, Melville gave to Babo's slave revolt a specific character that has often been identified. Haiti, known as San Domingo (Saint-Domingue) before declaring its final independence from France in 1804 and adopting a native name, remained a strategic point of reference in debates over slavery in the United States. In altering the date of Amasa Delano's encounter with Benito Cereno from 1805 to 1799, moreover, Melville accentuated the fact that his tale belonged to the Age of Revolution, in particular the period of violent struggle leading to Haitian independence presided over by the heroic black general Toussaint L'Ouverture, which prompted Jefferson to remark in 1797 that "the revolutionary storm, now sweeping the globe," shall, if nothing prevents it, make us, "the murderers of our own children."³⁴

Though Delano's narrative may have been the proximate source, it seems likely that Melville may have been influenced in addition by a number of other historical events, particularly the shipboard slave mutiny cases of the *Amistad* and the *Creole*.

The legality and morality of the slave trade, and of course the entire slave system that the trade supported, were brought into stark relief by the events of the *Amistad*. In 1839, a United States revenue cutter seized the *Amistad*, a Spanish slave ship, off the coast of Long Island.³⁵ The American boarding party discovered a group of African slaves, led by a charismatic leader, Cinque, in charge of the ship. The slaves had seized control of the ship in a revolt while it was being sailed from one Cuban port to another. The mutiny resulted in the death of the ship's captain as well as the slaves' owner. The rebellious slaves ordered the surviving crew members to return the ship to Africa, but the crew altered course at night to bring the ship closer to American shores where they might be discovered and

have commented on the importance of the differences. See, e.g., Carolyn L. Karcher, *The Riddle of the Sphinx: Melville's Benito Cereno and the Amistad Case*, in CRITICAL ESSAYS ON HERMAN MELVILLE'S *BENITO CERENO* 211-12 (Robert E. Burkholder ed., 1992); 2 HERSHEL PARKER, *HERMAN MELVILLE: A BIOGRAPHY, 1851-1891*, at 235-42 (2002); SUSAN WEINER, *LAW IN ART: MELVILLE'S MAJOR FICTION AND NINETEENTH-CENTURY AMERICAN LAW* 128-32 (1992).

34. ERIC J. SUNDQUIST, *TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE* 140 (1993).

35. For a thorough treatment of the events surrounding the voyage of the *Amistad*, see HOWARD JONES, *MUTINY ON THE AMISTAD* (2d ed. 1997).

rescued. The story seized the imagination of the American public and was extensively covered by the popular press.³⁶

The fate of the *Amistad* mutineers was not determined until several years of litigation ensued involving struggles between various Spanish and American private and governmental interests. The Africans, imprisoned during part of this period, contended for their freedom with the assistance of American antislavery groups. Their lawyers argued that the Spanish slave traders had captured and enslaved them in defiance of Spanish law, which by 1839 had banned the slave trade. The Africans, therefore, had simply freed themselves from the effects of an illegal act. In an eloquent argument before the United States Supreme Court, John Quincy Adams made the powerful rhetorical point that

I know of no law, . . . no law, statute or constitution, no code, no treaty, . . . except that law (pointing to the copy of the Declaration of Independence, hanging against one of the pillars of the court room) that law, two copies of which are ever before the eyes of your Honors. I know of no other law that reaches the case of my clients, but the law of Nature and of Nature's God on which our fathers placed our own national existence.³⁷

In directing the Supreme Court to what he thought the source of its legal as well as moral authority to be, Adams also reminded the justices that, in the not too distant past, John Marshall had proclaimed in the *Antelope* case:

That [the slave trade was] contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.³⁸

36. For a comprehensive examination of the popular newspaper coverage of the *Amistad*, see MAGGIE MONTESINOS SALE, *THE SLUMBERING VOLCANO: AMERICAN SLAVE SHIP REVOLTS AND THE PRODUCTION OF REBELLIOUS MASCULINITY* 66-96 (1997).

37. JOHN QUINCY ADAMS, *ARGUMENT OF JOHN QUINCY ADAMS BEFORE THE SUPREME COURT OF THE UNITED STATES* (1841), *reprinted in* ARGUMENT OF JOHN QUINCY ADAMS BEFORE THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF THE UNITED STATES, APPELLANTS, VS. CINQUE AND OTHERS, AFRICANS, CAPTURED IN THE SCHOONER AMISTAD, BY LIEUT. GEDNEY 8-9 (Negro Universities Press 1969) (1841).

38. *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825).

Marshall, however, had concluded that if the positive law of a nation authorized the slave trade, such natural law must give way. In effect, then, the slave trading of any particular country thus would be sanctioned by the law of nations.³⁹

Adams spent a considerable portion of his *Amistad* argument trying to demonstrate to the Court that the reasoning in the *Antelope* case meant freedom for the Africans.⁴⁰ In a narrowly crafted opinion by Justice Story, the Supreme Court agreed. The Court rejected the Spanish claim to the slaves as property, asserted under a treaty with the United States; because the Africans were enslaved illegally under Spanish law, they could not qualify as property subject to protection under the treaty. Because positive law did not recognize the Spanish claims, Story concluded that "the eternal principles of justice" must govern.⁴¹ Because the Africans had been kidnapped, in other words, they had the right to free themselves, to engage in a mutiny. "We may lament," Story said, "the dreadful acts, by which they asserted their liberty, and took possession of the *Amistad*, and endeavoured to regain their native country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself"⁴²

These events were reinforced in the immediate aftermath of the decision in *The Amistad* by the case of the *Creole* in the fall of 1841. The *Creole* contained a cargo of slaves being shipped from Virginia to New Orleans. Unlike the Africans on board the *Amistad*, the slaves on the *Creole* clearly were legally slaves under American law. Led by a slave named Madison Washington, the slaves successfully mounted a mutiny, killed a slave owner, and directed the ship to Nassau in the Bahamas, where slavery had been abolished. The United States tried to get the slaves

39. See *id.* at 122-23. For an excellent account of the *Antelope* case, see JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977).

40. See ADAMS, *supra* note 37, at 123-34. For a discussion of Adams's roles in the *Antelope* and *Amistad* cases, see Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1 (2000).

41. *United States v. The Amistad*, 40 U.S. (15 Peters) 518, 595 (1841).

42. *Id.* at 593-94. See also COVER, *supra* note 32, at 105-12.

returned to their owners, but the British officials refused. In the face of a revolt on the high seas, under international law the slave owners and crew were powerless to enforce their "rights."⁴³ Freedom governed, and both cases raised fears in the South—a South living in fear of Gabriel Prosser, Denmark Vesey, and Nat Turner—that revolt or insurrection might become rampant. Melville took events on board a slave ship and metaphorically transformed such details to describe a broader society he thought ought to be seriously questioning itself.⁴⁴

C. Law

Why didn't Captain Delano see or understand that a mutiny had occurred on the slave ship? And what were the perils in not recognizing that a revolt had taken place? The answer surely lies in the fact that Delano, as well as many Americans, was the prisoner of conventional racial stereotypes that kept him from apprehending social reality or the truth—in the case of *Benito Cereno* from grasping that the slaves were in charge.⁴⁵ Throughout the story, Melville focuses our attention on this problem with a series of metaphors describing slavery as the "slumbering

43. See generally WILLIAM E. CHANNING, *THE DUTY OF THE FREE STATES, OR REMARKS SUGGESTED BY THE CASE OF THE CREOLE* (1842); SALE, *supra* note 36, at 120-45; 5 CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64*, at 197-99 (1974).

44. See COVER, *supra* note 32, at 108. For the view that the *Amistad* events influenced Melville's rendering of *Benito Cereno*, see KARCHER, *supra* note 33; MICHAEL PAUL ROGIN, *SUBVERSIVE GENEALOGY: THE POLITICS AND ART OF HERMAN MELVILLE* 212-13 (1983); THOMAS, *supra* note 29, at 102-04. For discussion of the influence of both the *Amistad* and *Creole* mutinies, see SUNDQUIST, *supra* note 34, at 176-79. For examination of the incidence of slave shipboard revolts, see Antonio T. Bly, *Crossing the Lake of Fire: Slave Resistance During the Middle Passage, 1720-1842*, 83 *J. Negro Hist.* 178 (1998); David Richardson, *Shipboard Revolts, African Authority, and the Atlantic Slave Trade*, 58 *WM. & MARY Q.* 69 (2001). For an account of fears of slave insurrections more generally, see Eugene D. Genovese, *FROM REBELLION TO REVOLUTION: AFRO-AMERICAN SLAVE REVOLTS IN THE MAKING OF THE MODERN WORLD* (1979).

45. For an evaluation of these stereotypes as well as critics' views of them, see CAROLYN KARCHER, *SHADOW OVER THE PROMISED LAND: SLAVERY, RACE AND VIOLENCE IN MELVILLE'S AMERICA* 129-42 (1980). See also SUSAN M. RYAN, *THE GRAMMAR OF GOOD INTENTIONS: RACE AND THE ANTEBELLUM CULTURE OF BENEVOLENCE* 69-74 (2003); SUNDQUIST, *supra* note 34, at 152-54.

volcano," which might "suddenly let loose energies now hid" (68). Or as padlock and key: "The slave there carries the padlock, but master here carries the key" (63). (Of course in the context of the story, this was literally not true, but also not recognized by Delano as being untrue since normally it is the master who holds the key to freedom.) Or as a Gordian knot: " 'What are you knotting there, my man?' 'The knot,' was the brief reply, without looking up. 'So it seems; but what is it for?' 'For someone else to undo' . . . 'Undo it, cut it, quick' " (76). (In the heart of the story, this has a double meaning of trying to get Delano to cut the knot to see that the mutiny has taken place, but also in a larger sense suggesting that the knot of slavery both needs to be recognized as the intricate "entanglement" of American life and that it needs to be cut to release freedom.) Or as simply the "shadow" (116) cast across the bright promise of America. At the end of the story, when the ever-optimistic American, Delano, pleads with Captain Cereno to abandon his despair after experiencing the horror of the mutiny, Delano implores Benito Cereno: " 'You are saved,' cried Captain Delano, more and more astonished and pained; 'you are saved: what has cast such a shadow upon you?' Cereno simply responded, 'The negro' " (116). Until the United States resolved the question of freedom, Melville seems to suggest, slavery would perpetually cast a shadow.⁴⁶

Melville clearly was an antislavery advocate. "Those of us who always abhorred slavery as an atheistical iniquity, gladly we join in the exulting chorus of humanity over its downfall."⁴⁷ Even discounting for patriotic pro-Union Civil War fervor, Melville believed that slavery inevitably compromises any meaningful notion of freedom. This, of course, does not necessarily mean he was an abolitionist⁴⁸ or that he did not employ in his work the conventional racist stereotypes of his time. But Melville, like Thomas Jefferson (who did harbor racist sentiments), seems to have under-

46. See generally KARCHER, *supra* note 45. Delano's "refusal to understand the 'shadow' that has descended upon Benito Cereno is itself a psychologically and politically repressive act that replicates the ideology of America's crisis over slavery." SUNDQUIST, *supra* note 34, at 149.

47. THE BATTLE-PIECES OF HERMAN MELVILLE 200 (Hennig Cohen ed., 1963).

48. See KARCHER, *supra* note 45, at 15-18.

stood slavery as a profound social problem. Jefferson perceptively observed:

There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us. The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal. . . . The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to the worst of passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities. The man must be a prodigy who can retain his manners and morals undepraved by such circumstances.⁴⁹

The stereotypes that particularly restrict Delano's vision grow out of the social effects associated with slavery. Those social relations, one could argue, likewise proceed from a series of consequences determined by law. In other words, legal relations are social relations.⁵⁰ The legal regime of control sets up the parameters within which a social field of control flourishes. A slave who bargains or negotiates for a small plot to tend a garden, for the opportunity to earn wages, or for time off for himself or his family is bargaining in a world infused with law.⁵¹ There were limits, possibili-

49. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162 (William Peden ed., 1955) (footnote omitted).

50. See the essays in *Part Three—Rules of Law: Legal Relations as Social Relations*, in THE MANY LEGALITIES OF EARLY AMERICA 215-332 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

51. There is a considerable literature across a number of ideological perspectives devoted to asserting that market relations or various forms of bargaining were inserted into social, economic, and legal relationships traditionally directly associated with power and exploitation, thereby leveling the playing field in some manner. For example, in landlord-tenant relations, see SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK: MANORIAL SOCIETY, 1664-1775 (1978). For slavery, see IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 2 (1998) (“[S]lavery, though imposed and maintained by violence, was a negotiated relationship.”); Ira Berlin & Philip D. Morgan, *Labor and the Shaping of Slave Life in the Americas*, in CULTIVATION AND CULTURE: LABOR AND THE SHAPING OF SLAVE LIFE IN THE AMERICAS 1 (Ira Berlin & Philip D. Morgan eds., 1993). For indentured servitude, see Alexa Silver Cawley, *A Passionate Affair: The Master-Servant Relationship in Seventeenth-Century Maryland*, 61 HISTORIAN 751, 752 (1999) (“As recent studies of slavery have shown that slaves were able to carve out a certain degree of autonomy in their relationships with their masters,

ties and opportunities, and perhaps the recognition of market power and a rational appeal to an owner's economic self-interest. The social practices allow a master to relinquish some of the prerogatives of power bestowed by law in the master-slave relationship. But the escape of a runaway slave, a slave shipboard mutiny, or a slave revolt or insurrection, is simultaneously an escape from a master and an escape from law.

Delano repeatedly seems incapable of understanding that the slaves have seized their freedom. Everywhere he looks he finds reaffirmation of his view of the world. As designated by law, slaves are subservient; owners are in charge and free to exercise power and control. It is Jefferson's world. The stereotypes that encumber Delano's vision are variations linked directly to hierarchy and dependence.⁵²

As Delano boards the ship, he is "at once surrounded by a clamorous throng of whites and blacks, but the latter outnumbering the former more than could have been expected . . ." (49). He soon observes "four elderly grizzled negroes . . . couched sphynx-like . . . picking . . . oakum" and "six other blacks" polishing hatchets, "intent upon their task . . . with the peculiar love in negroes of uniting industry with pastime" (50). Perhaps this scene "might have seemed unusual" (50), slaves mingled with whites on deck, not chained or manacled as might have been the custom, working on hatchets, which are possible weapons. But Delano instead assumes that the slaves are under the control and supervision of the owners, crew, or traders, and that nothing was amiss.

His initial reaction is immediately reinforced by his first confrontation with Benito Cereno and Babo, the slave turned mutineer. Without any alarm yet, Delano seeks the ship's commander. He finds the Spanish captain "casting a

indentured servants also negotiated with their masters to improve their position in colonial society using a variety of methods available to them."); Christine Daniels, "Liberty to Complaine:" *Servant Petitions in Maryland, 1652-1797*, in *THE MANY LEGALITIES OF EARLY AMERICA*, *supra* note 50, at 219-49.

52. "Delano is the representative American of a position traditionalist in its support of patriarchal structures, not excluding their racist forms . . ." BERNHARD RADLOFF, *COSMOPOLIS AND TRUTH: MELVILLE'S CRITIQUE OF MODERNITY* 184 (1996). On Delano and American national character, see also 2 PARKER, *supra* note 33, at 237-38.

dreary, spiritless look" upon the slaves, and "an unhappy glance" toward Delano (51). Yet Delano seems placated by the fact that "[b]y his side stood a black of small stature, in whose rude face, as occasionally, like a shepherd's dog, he mutely turned it up into the Spaniard's, sorrow and affection were equally blended" (51). Babo thus gives off signs of loyalty and obedience, looking up like a dog gazing at the dominant partner. Babo, in other words, knows what to expect of Delano's view of the world, indeed, he repeatedly plays and counts on it.⁵³

Two problems perturb Delano, however. The lack of general order on the ship is traceable, first, to the harrowing circumstances of disease and death, described in the shipboard account by black and white survivors alike, and, second, to the quirks of the Spanish captain's personality. Delano observes that the "scarcity of water and provisions," for example, "have brought out the less good-natured qualities of the negroes, besides, at the same time, impairing the Spaniard's authority over them . . ." (51). "[N]othing more relaxes good order than misery" (51-52), but the exercise of authority should be taken for granted Delano insists. As for Benito Cereno himself, "Captain Delano was not without the idea, that had [Cereno] been a man of greater energy, misrule would hardly have come to the present pass" (52).

Delano finds Cereno suffering from a "debility," he is "a prey to settled dejection," "unstrung," afflicted with a "distempered spirit" and "with nervous suffering" (52). Cereno is almost literally supported by his slave, Babo, who, of course, will not leave Benito's side. But Babo also knows that Delano expects Babo to act the role of the faithful slave, and he does so.

53.

The master's domination slides into slavery when he understands his parasitic dependence on his slave; the slave's subservience slides into mastery when he understands that his very consciousness of freedom is a mode of liberation. . . . Granting Babo a true mastery that has simply been reconfigured as the artifice of bondage, however, Melville takes this one step further. Babo's power . . . is exercised less in the violence of revolt . . . than in his uncanny manipulation of the revolt's linguistic and visual *narrative* In Babo's case it takes the form of a masquerade that humiliates the masters

SUNDQUIST, *supra* note 34, at 156 (emphasis in original).

No wonder that, as in this state he tottered about, his private servant apprehensively followed him. Sometimes the negro gave his master his arm, or took his handkerchief out of his pocket for him; performing these and similar offices with that affectionate zeal which transmutes into something filial or fraternal acts in themselves, but menial; and which has gained for the negro the repute of making the most pleasing body servant in the world; one, too, whom a master need be on no stiffly superior terms with, but may treat with familiar trust; less a servant than a devoted companion.

Marking the noisy indocility of the blacks in general, as well as what seemed the sullen inefficiency of the whites, it was not without humane satisfaction that Captain Delano witnessed the steady good conduct of Babo (52).

Babo understands that Delano expects obedience even if Benito cannot command it. The form of the relationship is enough to dictate behavior that Delano will construe as reassuring and nonthreatening.

Though Delano is bothered by the way in which Benito exercises power, Delano insists that he is not misled by the results:

This splenetic disrelish of [Cereno's] place was evinced in almost every function pertaining to it. Proud as he was moody, he condescended to no personal mandate. Whatever special orders were necessary, their delivery was delegated to his body-servant, who in turn transferred them to their ultimate destination, through runners, alert Spanish boys or slave boys, like pages or pilot-fish within easy call continually hovering round Don Benito. So that to have beheld this undemonstrative invalid gliding about, apathetic and mute, no landsman could have dreamed that in him was lodged a dictatorship beyond which, while at sea, there was no earthly appeal (53).

He had only the "appearance of slumbering dominion" (54).

Cereno seems aware that Delano may be suspicious. He tries to quiet whatever fears may have arisen by relying on a picture he paints of complacent, compliant slaves who know their place in the hierarchy.

"But throughout these calamities," huskily continued Don Benito, painfully turning in the half embrace of his servant, "I have to thank those negroes you see, who, though to your inexperienced eyes appearing unruly, have, indeed, conducted themselves with less of restlessness than even their owner could have thought possible under such circumstances."

Here he again fell faintly back. Again his mind wandered: but he rallied, and less obscurely proceeded.

"Yes, their owner was quite right in assuring me that no fetters would be needed with his blacks; so that while, as is wont in this transportation, those negroes have always remained upon deck—not thrust below, as in the Guinea-men—they have, also, from the beginning, been freely permitted to range within given bounds at their pleasure" (56-57).

Babo, according to Benito, has been instrumental in maintaining order.

"Ah, master," sighed the black, bowing his face, "don't speak of me; Babo is nothing; what Babo has done was but duty."

"Faithful fellow!" cried Capt. Delano. "Don Benito, I envy you such a friend; slave I cannot call him."

As master and man stood before him, the black upholding the white, Captain Delano could not but bethink him of the beauty of that relationship which could present such a spectacle of fidelity on the one hand and confidence on the other (57).

The social relationship, therefore, is drawn out of the legal relationship. The slave "upholds" the master in multiple meanings including providing the work that creates the wealth at the foundation of the slave society. Fidelity, loyalty, obligation, and obedience are hallmarks of a relationship of domination, not reciprocity. Delano mistakes it for beauty.

"Ha, Don Benito, your black here seems high in your trust; a sort of privy-counselor, in fact."

Upon this, the servant looked up with a good-natured grin, but the master started as from a venomous bite. It was a moment or two before the Spaniard sufficiently recovered himself to reply; which he did, at last, with cold constraint:— "Yes, Senor, I have trust in Babo."

Here Babo, changing his previous grin of mere animal humor into an intelligent smile, not ungratefully eyed his master (67).⁵⁴

54.

By forcing Don Benito to play the part of master, Babo has forced him to mistrust the patriarchal, domestic relations which had constituted his identity. By overthrowing slavery and then staging it as a play, Babo has conventionalized the supposedly natural relations of master and slave. He has turned familial intimacy from a stable barrier against marketplace fluctuations into a confidence game. *Benito Cereno*

When Delano witnesses what he thinks is an act of insubordination on board (a slave attacking a white), he finds it incomprehensible that Benito seems reluctant to enforce discipline. It is his right as a ship's captain (not unlike a master with his slave). Delano critically observes: "Is it . . . that this hapless man is one of those paper captains I've known, who by policy wink at what by power they cannot put down? I know no sadder sight than a commander who has little of command but the name" (59). Power or dominion over others is a fact of everyday life, but it is useless or worse if not exercised.

In order to play out the full "charade," Babo enlists his slave co-conspirator, Atufal, to help create the impression that the captain in reality is in command. Babo has Atufal placed in chains and paraded before Delano to give him evidence of what he expects to find in a slave's conduct. "An iron collar was about his neck, from which depended a chain, thrice wound round his body; the terminating links padlocked together at a broad band of iron, his girdle" (61). As Babo expects, Delano falls for the ruse.

This is some mulish mutineer, thought Captain Delano, surveying, not without a mixture of admiration, the colossal form of the Negro.

"See, he waits your question, master," said the servant.

Thus reminded, Don Benito, nervously averting his glance, as if shunning, by anticipation, some rebellious response, in a disconcerted voice, thus spoke:—

"Atufal, will you ask my pardon, now?"

The black was silent.

suggests that instead of protecting the master's self, domestic patriarchy opens his boundaries to invasion

[Don Benito] is a marionette, manipulated by his slave. The captain is forced to speak the lines that once seemed his by nature. Babo tortures him with an exaggerated fidelity that mocks the paternalism of master and slave

Against an ideology that saw slavery as the most organic of social relations, Melville conventionalized, as stage props, the symbols of authority which slaveowners insisted were theirs by nature

"Again, master," murmured the servant, with bitter upbraiding eyeing his countryman, "Again, master; he will bend to master yet."

"Answer," said Don Benito, still averting his glance, "say but the one word *pardon*, and your chains shall be off."

Upon this, the black, slowly raising both arms, let them lifelessly fall, his links clanking, his head bowed; as much as to say, "no, I am content."

"Go," said Don Benito, with inkept and unknown emotion.

Deliberately as he had come, the black obeyed.

"Excuse me, Don Benito," said Captain Delano, "but this scene surprises me; what means it, pray?"

"It means that that negro alone, of all the band, has given me peculiar cause of offense, I have put him in chains; I—"

Here he paused, his hand to his head, as if there were a swimming there, or a sudden bewilderment of memory had come over him; but meeting his servant's kindly glance seemed reassured, and proceeded:—

"I could not scourge such a form. But I told him he must ask my pardon. As yet he has not. At my command, every two hours he stands before me."

"And how long has this been?"

"Some sixty days."

"And obedient in all else? And respectful?"

"Yes" (62).

Delano is satisfied as long as the forms of slavery are vindicated.

Indeed, at one point Delano is so engaged by the placid operation of slavery that he seeks to participate in it personally by smilingly offering to buy Babo from Benito. Moved by Babo's attentions to Benito, Delano

[c]ould not avoid again congratulating his host upon possessing such a servant, who, though perhaps a little too forward now and then, must upon the whole be invaluable to one in the invalid's situation.

"Tell me, Don Benito," he added, with a smile—"I should like to have your man here, myself—what will you take for him? Would fifty doubloons be any object?"

"Master wouldn't part with Babo for a thousand doubloons," murmured the black, overhearing the offer, and taking it in earnest, and, with the strange vanity of a faithful slave, appreciated by his master, scorning to hear so paltry a valuation put upon him by a stranger (70-71).

Far from questioning the morality of slavery, Delano views it as natural enough so that he flirts with participating in it without grasping that it might compromise his own soul. To tolerate slavery means to risk becoming intensely complicit in it.

As a northerner, Delano may not have been unfamiliar at all with the operation of the institution of slavery. Moreover, in 1799 when Melville dated the story, slavery was still commonplace in many postrevolutionary northern states, so it is not necessarily surprising that Delano might be tempted himself to traffic in the trade.⁵⁵ Delano is comfortable, perhaps even complacent, readily accepting slavery as one of the basic indicia of everyday life, because he shares stereotypical assumptions about the appropriate roles and abilities dictated by the social relationship.⁵⁶ Delano surmises,

55. Ira Berlin notes:

[T]he demise of slavery was a slow, tortuous process. Often it was propelled more by atrophy of the slave population—owing to high mortality, low fertility, the close of the transatlantic slave trade, and the southward exportation of slaves for profit—than by the growth of liberty among blacks. In 1810 there were still 27,000 slaves in "free" states. For most northern slaves, more than a generation passed before they were able to exit chattel bondage, and more than two generations were required to extricate themselves from the various snares—legal, extralegal, and occasionally illegal—that allowed former owners and other white people to control their labor and their lives.

BERLIN, *supra* note 51, at 228. See also GRAHAM RUSSELL HODGES, *SLAVERY AND FREEDOM IN THE RURAL NORTH: AFRICAN AMERICANS IN MONMOUTH COUNTY, NEW JERSEY, 1665-1865* (1997); JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780-1860* (1998); GARY B. NASH & JEAN R. SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH* (1991); SHANE WHITE, *SOMEWHAT MORE INDEPENDENT: THE END OF SLAVERY IN NEW YORK CITY, 1770-1810* (1991).

56. Brook Thomas comments that "Captain Delano, a good, honest man serving on a merchant ship, aids—unconsciously, I do not doubt—in the exploitation of human beings for commercial reasons, thereby helping to make the new democracy of the United States, as exploitative as the feudal system it replaced." THOMAS, *supra* note 29, at 109.

Was it from foreseeing some possible interference like this, that Don Benito had, beforehand, given such a bad character of his sailors, while praising the negroes; though, indeed, the former seemed as docile as the latter the contrary? The whites, too, by nature, were the shrewder race . . . But if the whites had dark secrets concerning Don Benito, could then Don Benito be any way in complicity with the blacks? But they were too stupid (75).

Delano employs the full range of attitudes about the social status of slaves or servants.

There is something in the negro which, in a peculiar way, fits him for avocations about one's person. Most negroes are natural valets and hair-dressers; taking to the comb and brush congenially as to the castinets, and flourishing them apparently with almost equal satisfaction. There is, too, a smooth tact about them in this employment, with a marvelous, noiseless, gliding briskness, not ungraceful in its way, singularly pleasing to behold, and still more so to be the manipulated subject of. And above all is the great gift of good humor. Not the mere grin or laugh is here meant. Those were unsuitable. But a certain easy cheerfulness, harmonious in every glance and gesture; as though God had set the whole negro to some pleasant tune.

When to all this is added the docility arising from the unambitious contentment of a limited mind, and that susceptibility of blind attachment sometimes inhering in indisputable inferiors, one readily perceives why those hypochondriacs, Johnson and Byron—it may be, something like the hypochondriac, Benito Cereno—took to their hearts, almost to the exclusion of the entire white race, their serving men, the negroes, Barber and Fletcher (83-84).

“Docility” by slaves is presumed to follow from a realistic conditioning to an inferior social position or place in society. It stems from subordination.

Delano's restricted ability to discern who actually is in charge causes him to misapprehend reality in the most compelling moment in the story, the famous shaving scene. Babo shaves Benito:

Setting down his basin, the negro searched among the razors, as for the sharpest, and having found it, gave it an additional edge by expertly strapping it on the firm, smooth, oily skin of his open palm; he then made a gesture as if to begin, but midway stood suspended for an instant, one hand elevating the razor, the other professionally dabbling among the bubbling suds on the Spaniard's lank neck. Not unaffected by the close sight of the gleaming steel, Don Benito nervously shuddered; his usual ghastliness was heightened by the lather, which lather, again, was intensified in

its hue by the contrasting sootiness of the negro's body. Altogether the scene was somewhat peculiar, at least to Captain Delano, nor, as he saw the two thus postured, could he resist the vagary, that in the black he saw a headsman, and in the white a man at the block. But this was one of those antic conceits, appearing and vanishing in a breath, from which, perhaps, the best regulated mind is not always free.

....

"You must not shake so, master.—See, Don Amasa, master always shakes when I shave him. And yet master knows I never yet have drawn blood, though it's true, if master will shake so, I may some of these times. Now master," he continued. "And now, Don Amasa, please go on with your talk about the gale, and all that, master can hear, and between times master can answer."

....

Here an involuntary expression came over the Spaniard, similar to that just before on the deck, and whether it was the start he gave, or a sudden gawky roll of the hull in the calm, or a momentary unsteadiness of the servant's hand, however it was, just then the razor drew blood, spots of which stained the creamy lather under the throat; immediately the black barber drew back his steel, and, remaining in his professional attitude, back to Captain Delano, and face to Don Benito, held up the trickling razor, saying, with a sort of half humorous sorrow, "See, master—you shook so—here's Babo's first blood."

No sword drawn before James the First of England, no assassination in that timid King's presence, could have produced a more terrified aspect than was now presented by Don Benito.

Poor fellow, thought Captain Delano, so nervous he can't even bear the sight of barber's blood; and this unstrung, sick man, is it credible that I should have imagined he meant to spill all my blood, who can't endure the sight of one little drop of his own? Surely, Amasa Delano, you have been beside yourself this day. Tell it not when you get home, sappy Amasa. Well, well, he looks like a murderer, doesn't he? More like as if himself were to be done for. Well, well, this day's experience shall be a good lesson (84-86).

The world has been turned upside down. Hierarchy has been reversed, but Delano cannot see it.⁵⁷ Just to emphasize

57. Former slaves completely understood the concept of role reversal. During the Civil War, "[b]lack troops flaunted their contempt for symbols of bondage, and relished the opportunity to exert authority over Southern whites. . . . [One soldier] recognizing his former master among a group of military prisoners, exclaimed: 'Hello massa: bottom rail top distime!'" ERIC

his dominion, Babo cuts Cereno in order to remind him who is in charge lest Benito be tempted to tip off Delano. The thought that the slave might be in control (literally with the razor at the neck of the white master) occurs to Delano, but he quickly represses the image.⁵⁸ It is simply unthinkable to him.

Babo capitalizes on Delano's inability to puzzle out the real story, and cements it by cleverly nicking himself to indicate that he is bleeding because Benito has punished him for the negligent shaving job.

"Ah, when will master get better from his sickness; only the sour heart that sour sickness breeds made him serve Babo so; cutting Babo with the razor, because, only by accident, Babo had given master one little scratch; and for the first time in so many a day, too. Ah, ah, ah," holding his hand to his face.

Is it possible, thought Captain Delano; was it to wreak in private his Spanish spite against this poor friend of his, that Don Benito, by his sullen manner, impelled me to withdraw? Ah, this slavery breeds ugly passions in man. —Poor fellow! (88).

With deep irony, Melville has it that Delano ruminates about how "slavery breeds ugly passions." But he does not question it. Babo has restored the ordinary contours of the relationship with one nick of the razor creating the impression that he has been cruelly punished by his master—an act that Delano can fully comprehend. Power, control, domination have been revived. The legal dominion of master over slave has been resumed; the threat of a slave wielding a razor at the neck of a white man, figuratively or

FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 9 (1988).

58.

The "antic conceit" of decapitation—uniting Jacobin terror, the Inquisition, and slave vengeance—has more actuality here than the literal barbering that is taking place. To begin with, it exposes the rebellious potential within every slave. As Thomas Wentworth Higginson said in an 1858 address to the American Anti-Slavery Society: "I have wondered in times past, when I have been so weak-minded as to submit my chin to the razor of a coloured brother, as sharp steel grazed my skin, at the patience of the Negro shaving the white man for many years, yet [keeping] the razor outside of the throat." The American slave might soon act on his own, Higginson warned. "We forget the heroes of San Domingo."

SUNDQUIST, *supra* note 34, at 159.

literally, has been eliminated.⁵⁹ Comprehensible order reigns again.

Yet there is a warning, unrecognized by Delano, because it is cleverly concealed by Babo. Society is at considerable risk if it insists on maintaining slavery as a legal relationship. The inevitable attempt to end the domination inherent in slavery is likely to be violent and bloody. Melville suggests it is time to think about the problem, because the consequences of continuing this way of life are simply not acceptable.

The legal system seems as incapable as any other social institution of coping with the problem of slavery. Babo is ultimately tried and convicted of murder and mutiny. It may be law, but is it justice? The legal system formally intrudes when part of Benito Cereno's deposition is reproduced at the end of the story. His testimony will obviously play an important role in leading to Babo's conviction, and he tells a terrifying and bloody tale of mayhem, murder, and violence. There are at least three reasons for Melville to have appended the deposition, though it seems awkward to have done so.

First, he is perhaps suggesting that the horrific tale will be repeated unless the world of domination expressed by slavery is remedied. In that sense, *Benito Cereno* is a cautionary tale. There are other Babos out there who know the meaning of bondage and freedom, and are prepared to act on it.

Second, Melville tells us that "[s]ome disclosures" in the deposition "were, at the time, held dubious for both learned and natural reasons. The tribunal inclined to the opinion

59.

Both the law of slavery and the proslavery ideology on which it was founded (in the North as well as the South) were so permeated with notions of nature's hierarchy—the distribution of sentiments and powers according to an imagined set of "natural" or divine ordinances—that no other conclusion seemed possible. . . . Although Babo acts according to the laws both of nature and of the revolutionary fathers, Delano cannot conceive of such action in black slaves. . . . [T]he "natural" relationship of master and slave defined by the fathers, despite their inclusive dream of freedom, remained a disguise and a delusion.

Id. at 178.

that the deponent, not undisturbed in his mind by recent events, raved of some things which could never have happened" (103). Corroborating testimony confirmed Benito's account, however. Why the concern with the trustworthiness of Benito? Perhaps there is a sense that the violent acts were so horrible that it was unlikely that they took place. But it seems more likely that the judges were concerned because they could not believe that slaves could have engineered such a compelling, successful deception. That is, the slaves were incapable of the subtlety, intelligence, rationality, and planning that went into the mutiny, as well as not having the ability to manipulate and deceive white men sophisticated in the ways of the world.

Maybe that was the most terrifying thought of all: at any moment, slaves might be in control, or about to assert control, and those who have for so long reflexively occupied the master's position might not even recognize the possibility. Delano, in one of his crises of confidence (concerned more at the time with the threat of Benito than with Babo), observes: "If Don Benito's story was throughout an invention, then every soul on board . . . was his carefully drilled recruit in the plot: an incredible inference" (69). Inferiors simply were not capable of behaving this way; to do so violated fundamental legal and social expectations and norms.

The deposition, then, reflects law's triumph. Lest we misunderstand law's function, it is made manifest at the end of the story. Law becomes the social instrument for restoring order and resolving "gray" into black and white. The deposition is a human voice that has been absorbed by and transmitted from the legal system, as opposed to the narrator's voice or the voices (unmediated) of his characters. Law controls everything at the end, even the telling of the story.⁶⁰

60.

In its extreme act of countersubversion, the deposition overthrows the suspended irony that momentarily makes master slave and slave master, undoes roles and scenes in which rebellious metaphors have come dangerously close to becoming literal, restores the good weather and smooth sailing of a racially hierarchical "natural" world, and retrospectively suppresses the revolt of Melville's fictional version of

Finally, there is the question of Babo's silence. Upon capturing Babo, Delano places him "below out of view" (100) on board his own ship (perhaps society's preferred place for slavery) because Benito refuses to board until Babo is removed from sight. Though Benito and various sailors testify for the tribunal, Babo does not. After capture, "[s]eeing all was over, he uttered no sound, and could not be forced to. His aspect seemed to say, since I cannot do deeds, I will not speak words" (116). After conviction, "the black met his voiceless end" (116). The slave's voice in a legal relationship of hierarchy and dependence is not heard.⁶¹ Effectively silenced, he has no way to shape his destiny other than to revolt. The cost of silencing those on the bottom may be fatal to us all. As Melville put it on another occasion, "we should remember that emancipation was accomplished not by deliberate legislation; only through agonized violence could so mighty a result be effected."⁶² Babo, silenced, certainly is not an example of an individual exercising his

Delano's history. The law of slavery, Melville seems to say, is the law of history.

Id. at 180.

61. Babo's silence has been analogized to the silencing of alleged fugitive slaves under the Fugitive Slave Act of 1850, the terms of which did not permit the accused to testify at all. The condemnation of this aspect of the law was powerfully made by Frederick Douglass: "Let it be thundered around the world, that, in tyrant-killing, king-hating, people-loving, democratic, Christian America, the seats of justice are filled with judges, who . . . are bound, in deciding in the case of a man's liberty, to hear only his accusers." FREDERICK DOUGLASS, *What to the Slave Is the Fourth of July?: An Address Delivered in Rochester, New York, On 5 July 1852*, in 2 THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 1847-1854, at 359, 376 (John W. Blassingame ed., 1982). The relevance of the Fugitive Slave Act to Babo's silencing has not been lost on modern critics:

Babo's silence is trebly appropriate: it expresses not only the intransigence of Negro rebels and voiceless black experience, but the status of black slaves in America. Legally, a black man's speech did not exist: his testimony stood inadmissible in court, his literacy forbidden by law, quite literally he stood mute.

Jean Fagan Yellin, *Black Masks: Melville's Benito Cereno*, 22 AM. Q. 678, 688 (1970). See also CHRISTINA ACCOMANDO, "THE REGULATION OF ROBBERS": LEGAL FICTIONS OF SLAVERY AND RESISTANCE 32-35 (2001); Maurice S. Lee, *Melville's Subversive Political Philosophy: Benito Cereno and the Fate of Speech*, 72 AM. LITERATURE 495, 511 (2000).

62. THE BATTLE-PIECES OF HERMAN MELVILLE, *supra* note 47, at 200.

freedom as a manifestation of equality in the eyes of the law.⁶³

When Delano tries to bring Benito back to his senses and to health, the American urges his Spanish counterpart to forget what has happened. "But the past is passed," says the cheerful, optimistic New Englander in the face of slavery, "why moralize upon it?" (116). His is not Shakespeare's past as prologue; it is not full of warnings or foreshadowing.⁶⁴ "Forget it," says Delano. "See, yon bright sun has forgotten it all, and the blue sea, and the blue sky; these have turned over new leaves" (116). But Benito replies, "Because they have no memory" (116). Delano would like to put the experience behind him or continue to live life as he expects it. He, after all, sent his crew to recapture the slave ship, liberate the slaveship's crew, and seize the remaining valuable property, the slave cargo. No questioning, no subversive messages, no lessons, no insight. The world goes on, everyone knows his place and is governed accordingly. Hierarchical relationships are the way society is and should be organized. Yet it is law that determines that structure; Melville seems to believe that law is as responsible for these abuses of power as are any of our social institutions, because law creates a way of ordering social relationships that verifies authority and is inimical to equality.⁶⁵

63.

In between rebellion and suppression, or between the creation of authority and its exercise of mastery and decay into enslaving conventions, lies silence. Frozen in indecision, the law derived from the *Creole* and *Amistad* cases, like the logic of the Fugitive Slave Law, was silent on the only issue that mattered to Babo. His silence, in turn, is the most powerful articulation of those unrecognized rights, no matter that they in turn may lead to the creation of a new racial hierarchy grounded in naked power.

SUNDQUIST, *supra* note 34, at 181.

64. For a perceptive observation on this point of comparison with Shakespeare's *The Tempest*, see Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 885 (1986).

65.

Babo will not speak within the language of a law that does not apply to him. As the paradoxical *Creole* and *Amistad* cases suggested, the rebels might legally *be slaves* by rule of law, according to the state code of chattelism that could be adduced in certain circumstances; but in truth they were, no matter, *not slaves*. The law of slavery, the law of "man" and "thing," was a pure tautology in which *is* and *is not*, mastery and

Perhaps slavery, however, is an anomaly, (even discounting for Delano's possible experience of it as it lingered in the North). But can slavery, even given its brutality and severe exploitiveness, be conceived of as existing along a continuum of hierarchical relationships, a particularly cruel and severe example of relationships, voluntary and involuntary, of dependency, not unlike, for instance, the way the world is organized for parent-child, husband-wife, town-pauper? Along these lines, Melville has given us *Bartleby* in which he probes another legal relationship, master-servant, one ostensibly central to the meaning of freedom in America. It is a paradigm of how one is expected to behave in the employment relationship.

III. *BARTLEBY*⁶⁶

A. *Fiction*

Most of the story of *Bartleby*, originally published in 1853, transpires in a Wall Street law office, in which resides a lawyer, who is "a rather elderly man" (13); two copyists or scriveners; and an office boy. The tale is narrated by the attorney, who describes himself as "one of those unambitious lawyers who never addresses a jury" (14), in other words, an office lawyer. He is an "eminently safe man," who at one time counted among his clients, 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" (14). The elderly lawyer became a master in chancery. As a result of his increased business, he needed additional help in the office. Moreover, his two copyists, Turkey and Nippers, alternated between bouts of drinking and indigestion respectively, which left each of them less than productive for a large part of the working day. In

bondage, were entangled in a spiraling dialectic. In such a world violence followed by silence was enough to count as freedom.

SUNDQUIST, *supra* note 34, at 182.

66. All citations to passages from *Bartleby* are from HERMAN MELVILLE, *Bartleby, the Scrivener*, in 9 THE WRITINGS OF HERMAN MELVILLE: THE PIAZZA TALES AND OTHER PROSE PIECES, 1839-1860, at 13 (Harrison Hayford et al. eds., 1987). The page citations immediately follow the quotations in the body of the text itself.

response to an advertisement for an additional scrivener, there appeared Bartleby, "pallidly neat, pitiably respectable, incurably forlorn!" (19).

"At first, Bartleby did an extraordinary quantity of writing" (19). But slowly Bartleby began to reject various tasks associated with his work, proclaiming simply and repeatedly—when asked to perform—"I would prefer not to" (20). The lawyer employs a series of strategies with Bartleby as he attempts to understand Bartleby's refusal to work. As Bartleby withdraws further and further from his work and social environment, the lawyer reasons with him, offers him benevolent assistance, is patient with him, and tries to fire him, all to no avail. Increasingly the lawyer's office routine is in turmoil. He even discovers eventually that Bartleby is living in the law offices at night.

The lawyer lives by a set of assumptions about how his office should operate. None of those assumptions coincides with Bartleby's preference not to participate in the life of the office, and so the lawyer becomes baffled, exasperated, frustrated, and distressed by Bartleby. Because the lawyer cannot get rid of Bartleby, he stages a kind of reverse eviction, abandoning his offices and leasing new quarters, leaving Bartleby behind to fend for himself. But Bartleby haunts the old building, prompting the lawyer's old landlord to appeal to the lawyer to find a way to remove Bartleby. Finally, the police take Bartleby from the office building and he is placed in the Tombs, the New York City prison. The lawyer visits him there, attempts to provide for his needs, but Bartleby dies shortly thereafter, presumably literally having starved himself to death, a symbol of complete alienation from all that surrounds him. Unable to account for Bartleby, the lawyer finds a possible clue in a rumor that Bartleby once worked in the Dead Letter Office in Washington.

B. *History*

What may have inspired Melville to write *Bartleby* is not as readily apparent as it was for *Benito Cereno*, or as, will be apparent, as we shall see, in *Billy Budd*. In the range of conjecture, we know Melville might have had a direct interest in Wall Street law offices because his brother Allan, with whom he lived from time to time, had his law

offices on Wall Street.⁶⁷ And if *Bartleby* is ultimately about work, we also know Melville visited factories occasionally.⁶⁸

On the other hand, there is a striking similarity between the beginning of *Bartleby* and a contemporaneous New York newspaper story from 1853, "The Lawyer's Story; Or the Wrongs of the Orphans By a Member of the Bar." The story begins: "In the summer of 1843, having an extraordinary quantity of deeds to copy, I engaged, temporarily, an extra copying clerk, who interested me considerably, in consequence of his modest, quiet, gentlemanly demeanor, and in his intense application to his duties."⁶⁹ As Dan McCall has said, "I think anyone who has read 'Bartleby' carefully will tremble a little when reading the first sentence of the newspaper story."⁷⁰ In addition, the clerk responded to the lawyer's questions by saying "I would prefer."⁷¹ This then must be the smoking gun. As McCall points out, however, there are "significant differences" between the two stories.⁷² McCall quickly turns his attention to two other possible sources: Biblical passages and Emerson's essay, "The Transcendentalist."⁷³ On the other hand, McCall spends some time refuting Michael Rogin's suggestion that Melville was moved by Thoreau's essay, "Civil Disobedience."⁷⁴

David Reynolds has suggested provocatively that Melville was developing ideas about Wall Street initially suggested by George Foster in his 1849 work, *New York in*

67. For Allan Melville, see NEWMAN, *supra* note 33, at 21-22.

68. For a factory visit, see CINDY WEINSTEIN, *THE LITERATURE OF LABOR AND THE LABORS OF LITERATURE: ALLEGORY IN NINETEENTH-CENTURY AMERICAN FICTION* 87 (1995).

69. Quoted in DAN MCCALL, *THE SILENCE OF BARTLEBY* 2 (1989). The newspaper article was discovered by Johannes Dietrich Bergmann. See Johannes Dietrich Bergmann, *Bartleby and The Lawyer's Story*, 47 *AM. LITERATURE* 432, 432-33 (1975). The newspaper excerpts appeared as an advertisement for James Maitland's novel *The Lawyer's Story*.

70. MCCALL, *supra* note 69, at 1.

71. *Id.* at 2.

72. *Id.*

73. See *id.* at 4-9.

74. See *id.* at 59-77. For Rogin's idea, see ROGIN, *supra* note 44, at 195.

Slices.⁷⁵ And Barbara Foley contends that *Bartleby* is Melville's ambiguous and ambivalent reaction to the Astor Place Riots that occurred in New York in 1849.⁷⁶ Role models have been suggested for both the lawyer narrator and Bartleby, ranging from friends, relatives, and acquaintances; Melville himself; Nathaniel Hawthorne; and, of course, the ubiquitous Lemuel Shaw.⁷⁷

There may not be any definitive source for *Bartleby*, any more than it is clear what Bartleby is actually about. My guess, from the variety of influences that have been suggested, is that *Bartleby* is a reflection of the way Melville observed, noted, and distilled a whole series of events and experiences from friends and acquaintances to reading to whatever. Yet Melville gave to it his own unique blend of imagination and passion. In the process, it seems to me, he also revealed something about law and how it operates in the context of the employment relationship.

C. Law

The employment relationship is voluntary, and Bartleby has decided for some reason to stop participating in it. He apparently has determined that the relationship itself does not work,⁷⁸ and has voluntarily withdrawn his

75. DAVID S. REYNOLDS, *BENEATH THE AMERICAN RENAISSANCE: THE SUBVERSIVE IMAGINATION IN THE AGE OF EMERSON AND MELVILLE* 295 (1989).

76. See Foley, *supra* note 14.

77. For a summary of the various attributions, see NEWMAN, *supra* note 33, at 22-23 (for friends); ROGIN, *supra* note 44, at 193-94 (for friends); MCCALL, *supra* note 69, at 91-94 (for an analysis of the literature on Melville as Bartleby); *id.* at 79-98 (for an analysis of the literature on Hawthorne as Bartleby); NEWMAN, *supra* note 33, at 21-22 (for Shaw).

78. Peter M. Blau's classic sociological study summarizes these understandings:

The employment contract into which the management of an organization enters with its members is a legal institution that obligates the members to furnish certain services and to follow managerial directives in exchange for a salary or wage. These obligations are reinforced by institutionalized norms in our culture according to which employers have a right to expect their employees to comply with their directives as well as to perform specified duties faithfully.

services. The question is what motivates him to behave in this way. The lawyer/narrator is confused because Bartleby, in exercising his freedom to exit the employment relationship, refuses to exit the workplace.

The clue may lie in the tension between the expectations of the employer and the experiences of the worker. Both parties bring expectations to the relationship. While both may appear to be participants in a regime of free labor with all that the concept implies, that regime operates as a system of hierarchy and dependence, which the employer takes for granted in *Bartleby* and the worker rejects. The master wants an explanation. The servant thinks his conduct speaks for itself and refuses to explain.

The legal standard as applied in the nineteenth century was simple. As Henry Williams, a delegate to the 1853 Massachusetts state constitutional convention, observed,

In a free government like ours, employment is simply a contract between parties having equal rights. The operative agrees to perform a certain amount of work in consideration of receiving a certain amount of money The employed is under no greater obligation to the employer than the employer is to the employed; and the one has no more right to dictate [outside of work] than the other. In the eye of the law, they are both freemen—citizens⁷⁹ having equal rights, and brethren having one common destiny.

Tocqueville, America's chronicler of equality in a democracy, presented a more nuanced and complicated description. In his observation of the social dimensions of the legal relationship, Tocqueville depicts a social reality quite different from Williams's summary.

The master and the workman have then here no similarity, and their differences increase every day. They are connected only like the two rings at the extremities of a long chain. Each of them fills the station which is made for him, and which he does not leave; the one is continually, closely, and necessarily dependent upon the other and seems as much born to obey as that other is to command. What is this but aristocracy?

....

PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 205 (1964) (footnote omitted).

79. 1 Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, at 550 (Boston 1853).

... Their relative position is not a permanent one; they are constantly drawn together or separated by their interests. The workman is generally dependent on the master, but not on any particular master; these two men meet in the factory, but do not know each other elsewhere; and while they come into contact on one point, they stand very far apart on all others. The manufacturer asks nothing of the workman but his labor; the workman expects nothing from him but his wages. The one contracts no obligation to protect nor the other to defend, and they are not permanently connected either by habit or by duty. . . .

The territorial aristocracy of former ages was either bound by law, or thought itself bound by usage, to come to the relief of its serving-men and to relieve their distresses. But the manufacturing aristocracy of our age first impoverishes and debases the men who serve it and then abandons them to be supported by the charity of the public. . . .

I am of the opinion, on the whole, that the manufacturing aristocracy which is growing up under our eyes is one of the harshest that ever existed in the world; but at the same time it is one of the most confined and least dangerous. Nevertheless, the friends of democracy should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrates into the world, it may be predicted that this is the gate by which they will enter.

....

It would not, then, be true to assert that in democratic society the relation of servants and masters is disorganized; it is organized on another footing; the rule is different, but there is a rule.⁸⁰

Though an abstract equality of individual rights is Williams's sentiment, Tocqueville casts doubt on that assumption. Melville subtly develops the gap through the character of *Bartleby*.⁸¹

80. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 159-61, 183 (Phillips Bradley ed., 1945).

81. There has been a remarkable explosion in the last decade or so in the field of American labor law history. In helping to understand *Bartleby*, I have found particularly suggestive Robert Steinfeld's important work which offers a sophisticated portrait of nineteenth-century freedoms significantly constrained by legally sanctioned categories of coercion in the employment relationship. See ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* (2001); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991). Karen Orren has asserted the remarkable

resilience and endurance into the nineteenth century of legal categories of master and servant that are feudal in origin. KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991). It is interesting to note that Joyce Appleby, whose scholarly career has been devoted in considerable measure to demonstrating how economic liberalism and capitalism have led to progress and opportunity, apparently exempts a significant portion of the population from her analysis: women and the increasingly industrial work force as it converted from agricultural labor. Perhaps influenced by Orren's work, Appleby has noted that

the growth of industry increased the number of wage-earners, which meant enlarging the domain of common law's master-servant strictures. The common law assured that submission in the private realm of work would continue even as the ambit of freedom for ordinary white men increased in the public sphere. . . .

. . . .

The democratization of American society supplied the passion, the issues, and the discourses necessary for detaching the country from its monarchical roots. The surviving common law, however, unobtrusively sustained the domination of the master in the home and the workplace.

APPLEBY, *supra* note 16, at 51, 55. See also CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

John Witt has observed that

the new histories of the employment contract contend that the nineteenth-century law of employment constructed a prescriptive status hierarchy through the judicial elaboration of implied doctrines of contractual construction [i.e. default rules]. . . .

A central contention of the new histories of the law of free labor is that the nineteenth-century law of the employment contract assigned the vast majority of American employees to the subordinate position in a workplace status hierarchy. The claim is not merely that legal coercion characterized the employment contracts of former slaves and the very poor under the Black Codes, the Freedmen's Bureau, and the vagrancy laws; nor is it the neo-Halean view that the law of property, contract, and tort allocated resources in such a way as to systematically disadvantage workers. Rather, it is that the law of the labor contract itself constructed a prescriptive status regime.

John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 *LAW & HIST. REV.* 627, 629, 631 (2000). Witt himself remains skeptical of the broader interpretive claims, and he

outlines the limits of the new histories' only explanation of the social consequences of default rules, namely that they had an ideological or norm-shaping effect. . . .

This is not to say, of course, that the default terms of the law of employment did not matter. The point here is that the new histories of the nineteenth-century employment contract do not have an adequate account of *why* they mattered.

Id. at 629-30.

Bartleby and another Melville short story written about the same time, *The Paradise of Bachelors and the Tartarus of Maids*,⁸² develop parallel themes on the subject of the employment relationship, themes that resonate with Tocqueville's insights about the status of workers in America. *Paradise of Bachelors* has two parts; it is a diptych with the facts of each part seemingly unrelated. The first is an account of a dinner gathering of a group of nine bachelor lawyers in London, an exercise in conspicuous consumption and conviviality removed from the cares of the world. "It was the very perfection of quiet absorption of good living, good drinking, good feeling, and good talk. We were a band of brothers. Comfort—fraternal, household comfort, was the grand trait of the affair" (322). Similarly, the lawyer in *Bartleby* seems to be a bachelor (we actually learn nothing about whether or not he has a family), and he "does a snug business among rich men's bonds, and mortgages, and title-deeds" (*Bartleby*, p. 14). But here it is Bartleby and not his employer who, at least at first, "gorges" himself on the lawyer's documents. And it also seems unlikely that it is an accident that Delano's ship in *Benito Cereno* (published almost contemporaneously with *The Paradise of Bachelors*) is named the "Bachelor's Delight," perhaps a symbol of Delano's unquestioning complacency.

The second part of the story contrasts the lives of the bachelors with those of the maids, and it evokes comparison to Bartleby himself. The maids are female factory operatives working in a paper manufactory in the Berkshires. As Bartleby mechanically copies documents, so the maids are controlled by the machines they tend.

Not a syllable was breathed. Nothing was heard but the low, steady overruling hum of the iron animals. The human voice was banished from the spot. Machinery—that vaunted slave of humanity—here stood menially served by human beings, who

82. All citations to passages from *The Paradise of Bachelors and the Tartarus of Maids* are from HERMAN MELVILLE, *The Paradise of Bachelors and the Tartarus of Maids*, in 9 THE WRITINGS OF HERMAN MELVILLE: THE PIAZZA TALES AND OTHER PROSE PIECES, 1839-1860, at 316 (Harrison Hayford et al. eds., 1987). The page citations immediately follow the quotations in the body of the text itself. *Bartleby* "was probably written in the summer of 1853"; *The Paradise of Bachelors* was written "probably during the fall and winter of 1853-54." NEWMAN, *supra* note 33, at 20, 283.

served mutely and cringingly as the slave serves the Sultan. The girls did not so much seem accessory wheels to the general machinery as mere cogs to the wheel (328).

The effect on the girls is striking. They are "like so many mares haltered to the rack" (329), and like *Bartleby*, they are "pallid." ("The yet more pallid faces of all the pallid girls" (334)).⁸³

The women's dependency is highlighted by a direct inquiry about their status.

"The girls," echoed I, glancing round at their silent forms. "Why is it, sir, that in most factories, female operatives, of whatever age, are indiscriminately called girls, never women?"

"Oh! As to that—why, I suppose, the fact of their being generally unmarried—that's the reason, I should think. But it never struck me before. For our factory here, we will not have married women; they are apt to be off-and-on too much. We want none but steady workers: twelve hours to the day, day after day, through the three hundred and sixty-five days, excepting Sundays, Thanksgiving, and Fast-days. That's our rule. And so, having no married women, what females we have are rightly enough called girls" (334).

Unmarried women are preferred because the assumption is that they will not be deflected from work; they can be relied on and their sole responsibility is to the machine, the factory, and the owner. No one else competes for their energies and time. They are free, but subservient, women, now "girls." Their voices are "banished"; they stand

83.

As the title suggests, this is a diptych made up of two contrasting, complementary parts, evenly divided and inversely matching. On one side, there is convivial ambience, culinary delight, and carefree association, a world occupied exclusively by men. On the other side, there is a brutal environment, regimented labor, and physical misery, a world occupied monotonously by women.

Given this complementary structure—this antithesis of privilege and oppression—it is hardly surprising that the men should happen to be bachelors. For bachelorhood, here and elsewhere in Melville, is a species of manhood singled out for its privilege . . .

WAI CHEE DIMOCK, *RESIDUES OF JUSTICE: LITERATURE, LAW, PHILOSOPHY* 80 (1996). Nancy Fredricks has commented that more than a contrast is suggested: "The diptych structure here implies that the extravagant lifestyle of the lawyer bachelors is linked—even depends upon—the deprivation of the oppressed maids at work in the paper factory." FREDRICKS, *supra* note 29, at 118.

"mutely" before those, who like Bartleby, prefer not to hear them.⁸⁴

In *Bartleby*, clues to the lawyer's attitudes about the employment relationship are revealed through his interactions with and evaluations of the two other scriveners, Turkey and Nippers. Turkey, is about sixty years old, "a short, pousy Englishman" (15). He is described by the lawyer, as having "natural civility and deference, as a dependent Englishman" (17). Turkey constantly addresses the lawyer by first saying, "With submission, sir" (16). He is steady, reliable, and knows his place, perhaps reflecting some traditional English understanding of the master/servant relationship.⁸⁵ Yet Turkey is only reliable in the

84.

[The story] segregates the sexes to reverse their stereotypical occupations. The lawyers, unengaged in productive work, fail to leave their mark on the world. All they do is eat in Paradise, parodying consumption in the home. The daughters who had done household work on the farm now "undertake rough laborer's work" in the factory. Deprived of a domestic family circle, these celibate maids find their home in the mill.

The new mills appropriated both the women's work of household manufacture, and the women who engaged in it. As the factories drew work out of the home, their defenders justified them in familial terms. Factories, it was said, replaced domestic paternal supervision. They would instill in the mill girls "habits of order, regularity and industry, which lay a broad and deep foundation of public and private future usefulness."

ROGIN, *supra* note 44, at 202-03.

85.

[T]he narrator's paternalistic attitude . . . seems more appropriate to the antiquated, vaguely feudal world of masters and servants than to the actual working conditions emerging in mid-nineteenth-century America. . . . In keeping with the hierarchical structure of master-servant relations, he wants his subordinates to know their own place as well as to show respect to him; . . . he has high praise for Turkey's "natural civility and deference, as a dependent Englishman."

. . . .

The lawyer . . . formed his economic views in an earlier stage of capitalist development; in certain respects he literally does belong to the world of masters and servants, or at least master and apprentices

. . . .

MICHAEL T. GILMORE, *AMERICAN ROMANTICISM AND THE MARKETPLACE* 133 (1985).

morning until his noon dinnertime, when he drinks, or imbibes in "red ink" (17). He returns unsteady, cranky, unproductive. Indeed, he sometimes returns "slightly rash with his tongue, in fact, insolent" (16).

Nippers, on the other hand, is always irritable and testy in the morning because of indigestion. He calms down in the afternoon and becomes productive. Before noon he constantly tries to adjust his writing desk because his back is uncomfortable. This prompts the lawyer to observe, "[T]he truth of the matter was, Nippers knew not what he wanted. Or, if he wanted any thing, it was to be rid of a scrivener's table altogether" (17). So between the two scriveners, the lawyer gets only one full day's worth of work. Yet he never questions why the drinking or indigestion occurs; he does not associate it with dissatisfaction with work or working conditions. He simply attempts to accommodate his schedule to his employees' idiosyncrasies.

When Bartleby appears, the lawyer is glad to see him due to the burden of increased business and the episodic habits of his overworked staff. Everything is fine:

Bartleby did an extraordinary quantity of writing. As if long famishing for something to copy, he seemed to gorge himself on my documents. There was no pause for digestion. He ran a day and night line, copying by sun-light and by candle-light. I should have been quite delighted with his application, had he been cheerfully industrious. But he wrote on silently, palely, mechanically (19-20).

The work environment the lawyer provides for Bartleby, however, may be part of the problem. Bartleby's desk faces a window that "commanded at present no view at all . . . within three feet of the panes was a wall" (19). This isolation is compounded by the fact that inside the room where Bartleby works in proximity to the lawyer, "I procured a high green folding screen, which might entirely isolate Bartleby from my sight, though not remove him from my voice. And thus, in a manner, privacy and society were conjoined" (19). Bartleby, therefore, is literally both walled in (as if a prisoner) and walled out and off. There is as little connection between master and servant as possible; this is not master and journeyman within an artisanal economy, working and living together under the same roof. Isolation is the preferred norm.

But then one day the lawyer commands or summons Bartleby to appear from behind the screen, to help with a

simple office chore, and the world changes forever. For in response Bartleby simply announces that "I would prefer not to" (20).

The lawyer is uncomprehending:

I sat awhile in perfect silence, rallying my stunned faculties. Immediately it occurred to me that my ears had deceived me, or Bartleby had entirely misunderstood my meaning. I repeated my request in the clearest tone I could assume. But in quite as clear a one came the previous reply, "I would prefer not to."

"Prefer not to," echoed I, rising in high excitement, and crossing the room with a stride. "What do you mean? Are you moon-struck? I want you to help me compare this sheet here—take it," and I thrust it towards him.

"I would prefer not to," said he.

I looked at him steadfastly. His face was leanly composed; his gray eye dimly calm. Not a wrinkle of agitation rippled him. Had there been the least uneasiness, anger, impatience or impertinence in his manner; in other words, had there been any thing ordinarily human about him, doubtless I should have violently dismissed him from the premises (20-21).

Notice the lawyer is prepared to fire his employee if Bartleby displays any attitudes that violate the lawyer's understanding of how the relationship should function. "Impertinence" will not be tolerated. It is not acceptable in a hierarchical workplace; deference "with submission, sir," is expected.

The lawyer finds the interlude "strange," but because his "business hurried [him]," he decided "to forget the matter for the present" (21). Having accommodated Turkey and Nippers, perhaps the lawyer now was prepared to do the same for Bartleby, or at least to suspend judgment for the "present." The lawyer, after all, proclaims "a profound conviction that the easiest way of life is the best" (14). He did not have to wait long for the episode to repeat itself however. After Bartleby had "concluded four lengthy documents," the lawyer gathered the staff together to engage in the laborious process of proofreading. When summoned to participate in the proofing of his work, Bartleby refuses: "I would prefer not to." The lawyer, as any lawyer might do, "began to reason with" (21) Bartleby, but Bartleby will not listen to reason.

It is not clear why Bartleby is refusing to read proofs or to do small chores. Perhaps he does not want to be deflected from the more significant responsibility of copying because he chooses to do it and is not just acting at the behest of the lawyer. Perhaps he doesn't think those tasks fall within his job description, that his compensation does not cover those additional responsibilities, or perhaps he wishes to readjust the wage bargain; perhaps he is only asserting his individuality in the face of the wooden and mechanical job of copying. But then why copy at all? Whatever Bartleby's motivation, however, it seems clear that his target is the employment relationship itself, that he is directly subverting the relations of superior to inferior, just as Babo did so dramatically in *Benito Cereno*. But Bartleby is using precisely the opposite strategy: total passivity rather than bloody violence.

The lawyer's first appeal is to the logic of the wage bargain, the job. Proofing is included with copying. "It is labor saving to you . . . It is common usage. Every copyist is bound to help examine his copy. Is it not so? Will you not speak? Answer!" (22). And again, "You are decided, then, not to comply with my request—request made according to common usage and common sense?" (22). It is as if the attorney is appealing to the common law ("usage" and "sense") to vindicate his right to have his worker do his job under the contract of employment. Bartleby will not respond to the invocation of contract, however. Not surprisingly, the other scriveners understand what is at stake. Nippers grouses that this was "the last time he would do another man's business without pay" (23).

In desperation, the lawyer briefly abandons the contractual appeal for recourse to an earlier model for organizing work. Will not Bartleby "come forth and do [his] duty?" (22). Perhaps the lawyer's strategy is that "duty" in a dependent relationship will strike a responsive chord in Bartleby if the requirements of a market bargain will not. But Bartleby "vouchsafed no reply" (22).

The lawyer is perplexed. He is "aggravat[ed]" by what he describes as a "passive resistance" (23). Part of his response is to act "charitably," with patience, forbearance, or understanding. His next response is quite admirable in its own way, though perhaps a little frustrating, and it is also calculated:

Poor fellow! thought I, he means no mischief; it is plain he intends no insolence; his aspect sufficiently evinces that his eccentricities are involuntary. He is useful to me. I can get along with him. If I turn him away, the chances are he will fall in with some less indulgent employer, and then he will be rudely treated, and perhaps driven forth miserably to starve. Yes. Here I can cheaply purchase a delicious self-approval. To befriend Bartleby; to humor him in his strange willfulness, will cost me little or nothing, while I lay up in my soul what will eventually prove a sweet morsel for my conscience (23-24).

The cost/benefit analysis of the lawyer's charity is striking, but so is the fact that the lawyer is treating Bartleby less as if they were equals bargaining in the marketplace and more as if he had a particular obligation toward a dependent of his. He convinces himself, however, that it is in his best interest to perform this obligation.⁸⁶ Whatever the model—a false and not a real equality, or a real hierarchy and dependency and a sense of reciprocal obligation—Bartleby seems to resent the lawyer's initiative, and will not participate any longer in the relationship.

A number of further episodes test the limits—jobs, errands, tasks. All requested; all refused. One could construe Bartleby's refusals as the ultimate job action, or the complete assertion of worker's control, except that the worker does not apparently want to seize control in order to produce work more efficiently, better, or humanely. Instead, he appears to deny the necessity of work at all, at least as currently organized.

The effect of this denial is to turn the traditional relationship of master and servant on its head. The lawyer seems to believe that the wage bargain confers on him the right to expect a certain set of responses from his employees, as if he has purchased their deference and submission. Hierarchy is assumed because he is paying the wages. He is not hasty or abusive, just insistent. Thus, Bartleby asserts control by simply refusing to participate according to the usual assumptions inherent in the relationship. For Bartleby, consent does not alter the fact of dependence, just,

86. "The lawyer's paternalism simply precludes any acknowledgement of his employees' autonomy. His act of charity is symptomatic of his shortcomings. [Charity has] the virtue of a personal gesture, but unlike higher wages, which are earned, it assumes a dynamic of dependency and indebtedness." *Id.* at 134-35.

as Tocqueville might suggest, its nature or structure. Suddenly, the lawyer “burned to be rebelled against again” (24). He attempts to provoke Bartleby. “Was there any other thing in which I could procure myself to be ignominiously repulsed by this lean, penniless wight? —my hired clerk? What added thing is there, perfectly reasonable, that he will be sure to refuse to do?” (25).

In a sense, Bartleby has rewritten the agreement between the two of them. The master has been forced to adapt to the requirements or preferences of the servant.⁸⁷

87.

The employer-employee relationship, as the dominant social relationship in the workplace, was relatively new for the United States, where many people had been independent farmers and self-employed craftsmen. With the growth of the factory system and expanded commerce and banking, more and more people ceased to be able to act on their preferences in the workplace. In their new status as hired hands, their time was not their own. They were subordinates expected to obey orders from their employer. When Bartleby refused to play his assigned role in this context, the narrator says he felt himself “ignominiously repulsed by this lean, penniless wight . . . my hired clerk,” making it clear that although all men may have been “created equal,” that equality has been destroyed in the employer-employee relationship.

Irving Adler, *Equity, Law and Bartleby*, 51 *SCI. & SOC'Y* 468, 470 (1988).

Law's role in this process has, of course, not gone unnoticed. As Christopher Tomlins observed:

It is equally important to an understanding of the nineteenth-century employment relationship, however, to realize that in important respects its legal realities no more comported to the “liberal illusion” of formal equality than its economic realities. Like monetary asymmetry, legal asymmetries meant that the parties to an employment relationship coexisted under conditions of structured inequality.

....

The relationship itself appears as a realm in which inequality of power is a routine incident, consequential upon the additional rights of control imputed in legal descriptions of employment to inhere in the employer. The operative's decision to enter employment is thus also a decision to become subject to the employer's power. Indeed, to many nineteenth-century writers and courts the existence of a condition of subjection to authority was conclusive in determining whether a relationship of employment in fact existed between two parties.

....

The presumption that the act of entering employment was simultaneously an accession by the employee to the exercise of

The lawyer acknowledges as much when he observes that, though he occasionally gets angry at Bartleby, "it was exceeding difficult to bear in mind all the time those strange peculiarities, privileges, and unheard of exemptions, forming the tacit stipulations on Bartleby's part under which he remained in my office" (26). Slowly Bartleby retrains the lawyer, for "every added repulse of this sort which I received only tended to lessen the probability of my repeating the inadvertence"(26).

The reversal of roles is recognized when the lawyer inadvertently discovers that Bartleby is living in the law office. After stopping at the office on a Sunday morning, the lawyer is told by Bartleby from behind the locked door to return later before he will be admitted. "I slunk away from my own door" (27). He confesses "sundry twinges of impotent rebellion against the mild effrontery of this unaccountable scrivener" (27). He is used to dictating to his employees, not being dictated to. He concedes "that one, for the time, is a sort of unmanned when he tranquilly permits his hired clerk to dictate to him, and order him away from his own premises" (27). Ironically, Bartleby is now living in his workplace, as employers and employees once did together, though the employer is now gone, almost entirely separated from both his place of work and his workers.⁸⁸ At night,

authority and control by the employer echoes throughout the case law of the first half of the nineteenth century. Conceiving employment as a relation of legal subordination, however, sat oddly with the courts' simultaneous commitment to an ideology of free contract, which represented employment as a relationship whose design was arrived at in a process of mutual bargaining sufficiently free of power disparities that the employee might reasonably be held responsible for the consequences of her own decision to enter.

Christopher L. Tomlins, *Law and Power in the Employment Relationship*, in *LABOR LAW IN AMERICA* 71, 72, 73, 88 (Christopher L. Tomlins & Andrew J. King eds., 1992).

88. For the tracing of this phenomena in one community, see PAUL E. JOHNSON, *A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837*, at 43-55 (1978).

Under the household regime, workmen regularly labored in their own homes or the homes of their masters as servants or apprentices, and the workplace was in fact hallowed by "humanizing domestic associations." Bartleby stirs up these ideas for the narrator not only

alone, Bartleby has the office to himself. He asserts his domain; he is his own master.

Quickly the lawyer returns to reassert his control, searching Bartleby's desk. His justification for doing so is purely legal, after all "the desk is mine, and its contents too, so I will make bold to look within" (28). In Bartleby's absence, he can demonstrate that he has the right to readjust the hierarchy to suit his needs.

Still, the lawyer is overwhelmed by Bartleby's lonely plight, his "solitude" (27). And despite his inherent sense of hierarchy, he has a glimmering, an insight about the "common humanity" he shares with Bartleby. It is not just a formal connection born out of a dependent status or an arms-length bargain. "The bond of a common humanity now drew me irresistibly to gloom. A fraternal melancholy! For both I and Bartleby were sons of Adam" (28).

Once again, the lawyer reveals that he has been disconcerted by the apparent reversal of roles:

I remembered a certain unconscious air of pallid—how shall I call it?—of pallid haughtiness, say, or rather an austere reserve about him, which had positively awed me into my tame compliance with his eccentricities, when I had feared to ask him to do the slightest incidental thing for me . . . (28-29).

But the lawyer reluctantly recurs to his metaphor of charity growing out of a felt obligation. He concludes that "I might give alms to his body; but his body did not pain him; it was his soul that suffered, and his soul I could not reach" (29). The lawyer simply does not understand (do any of us?) what ails Bartleby.

The lawyer decides to make one last attempt to reach Bartleby. If Bartleby proves unresponsive, the lawyer will dismiss him from the office after providing him with severance pay of twenty dollars. Bartleby prefers not to respond, and the lawyer condemns him for being "ungrateful, considering the undeniable good usage and indulgence he had received from me" (30). Bartleby is, in short, "ungrateful" in the way a dependent would be ungrateful in rejecting the kindnesses of a patron. In addition, in refusing "to comply

because he defies the rational procedures of the law office but also because he insists upon living there as if it were "a private residence."

as far as may be with the usages of the office" (30), Bartleby fails to fulfill the requirements of the job at the command of the employer.

The situation becomes even more intolerable for the attorney when he realizes that he and the scriveners have unconsciously started to use the phrase "prefer" on a regular basis. Bartleby has so insinuated himself into the office, so dominated its presence by his withdrawal from work, that he has affected the culture of the workplace. They are all beginning to sound like him. Bartleby sets the example, not his employer.

Finally, Bartleby announces that he will do "no more writing" (31). When the lawyer asks him why, Bartleby simply answers, "Do you not see the reason for yourself?" (32). The attorney thinks Bartleby's eyes have been affected by copying documents in a dim light, a kind of occupational injury,⁸⁹ but Bartleby declines to do any chore at all in the office. All he says is that " 'I have given up copying' " (32). Has he resigned? Retired? Breached his contract?

Finding Bartleby a "millstone . . . useless . . . afflictive to bear" (32), the lawyer finally resolves to act. He renews his previous severance pay idea, since he now views Bartleby as a drain on his law practice, and unproductive. "[N]ecessities connected with my business tyrannized over all other considerations" (32). Practicality overcomes charity, and he gives Bartleby six days notice to leave. Yet, at the expiration of the six days, Bartleby is still there, because he prefers not to leave.

Because he assumes that Bartleby will take the money offered and depart, the attorney at first believes Bartleby has vacated the premises. The lawyer congratulates himself for his "masterly management in getting rid of Bartleby. Masterly I call it" (33). But he soon discovers the limitations of being the "master" of Bartleby. The rational, reasoned approach fails, and the lawyer concludes that "[t]he great point was, not whether I had assumed that he would quit me, but whether he would prefer so to do. He was more a man of preferences than assumptions" (34).

89. For an argument that Bartleby may in fact be a victim of a workplace injury, see Robin West, *Invisible Victims: A Comparison of Susan Glaspell's Jury of Her Peers and Herman Melville's Bartleby the Scrivener*, 8 CARDOZO STUD. L. & LITERATURE 203, 213-19 (1996).

The lawyer had made the mistake of assuming that a workplace functioned in a predictable, ordered way. Bartleby apparently prefers not to believe that the office ought to function in any particular way. As a result, the lawyer is forced to concede Bartleby's success in reversing the traditional hierarchy and dependence: he is now aware that he is once "again obeying that wondrous ascendancy which the inscrutable scrivener had over me, and from which ascendancy, for all my chafing, I could not completely escape" (35).

To restore the balance Bartleby has upset, the lawyer appeals to law. At different stages, the lawyer thinks of varying legal strategies or possibilities: He can argue or reason with Bartleby again, or call in the police to have him forcibly removed. Yet, as a further symbol of role reversal, when he pleads with Bartleby to quit, Bartleby persists, "I would prefer *not* to quit you" (35). In desperation, the lawyer summons up legal argument, "What earthly right have you to stay here? Do you pay any rent? Do you pay my taxes? Or is this property yours?" (35). All to no avail.⁹⁰

At last the lawyer admits that Bartleby is "denying my authority"(38).⁹¹ But fearful that Bartleby may "in the end perhaps outlive me and claim possession of my office by right of his perpetual occupancy" (38), the lawyer gives Bartleby his final notice. Imagining an adverse possession claim that might be imposed against someone (just precisely against whom is not exactly clear)—in other words, fearing the law will be used against him—the lawyer presses on, though he is concerned once again about what will happen if Bartleby does not withdraw voluntarily. A forcible eviction? "Bribes"? Bartleby rejects the proffered severance pay, which "he leaves under [the lawyer's] own paper-weight" (38).

Then something severe, something unusual must be done. What! surely you will not have him collared by a constable, and commit

90. "At this moment the narrator stands firmly on his prerogatives as a laissez-faire capitalist, disclaiming any obligation to his workers save the payment of their wages." GILMORE, *supra* note 85, at 136.

91. The lawyer "abdicates authority to the walls on the outside and to Bartleby within. Bartleby forces him to behold his institution by withdrawing even further from it. The lawyer's lack of authority makes him long for Bartleby's approval." ROGIN, *supra* note 44, at 199.

his innocent pallor to the common jail? And upon what ground could you procure such a thing to be done?—a vagrant, is he? What! he a vagrant, a wanderer, who refuses to budge? It is because he will *not* be a vagrant, then, that you seek to count him as a vagrant. That is too absurd. No visible means of support: there I have him. Wrong again: for indubitably he *does* support himself, and that is the only unanswerable proof that any man can show of his possessing the means so to do. No more, then. Since he will not quit me, I must quit him. I will change my offices; I will move elsewhere; and give him fair notice, that if I find him on my new premises I will then proceed against him as a common trespasser (38-39).⁹²

92. The lawyer's internal dialogue about his dilemma recalls Foucault's observations about aspects of the mid-nineteenth-century French criminal justice system.

All the illegalities that the court defined as offences the accused reformulated as the affirmation of a living force: the lack of a home as vagabondage, the lack of a master as independence, the lack of work as freedom, the lack of a time-table as the fullness of days and nights. This confrontation of illegality with the discipline-penalty-delinquency system was perceived by contemporaries or rather by the journalist who happened to be there as the comic effect of the criminal law at grips with the petty details of indiscipline. And it was true: the affair itself and the verdict that followed represented the heart of the problem of legal punishment in the nineteenth century. The irony with which the judge tried to envelop indiscipline in the majesty of the law and the insolence with which the accused reinscribed indiscipline among the fundamental rights represent for penalty an exemplary scene.

MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 290 (1977). Foucault illustrates his point by quoting an 1840 newspaper transcript of a judicial proceeding: "The judge: One must sleep at home.—[The accused] Have I got a home?—[The judge] You live in perpetual vagabondage.—[The accused] I work to earn my living. [The judge] What is your station in life?" *Id.* Mingling his own analysis with contemporaneous newspaper commentary, Foucault asks:

"What is your station? This question is the simplest expression of the established order in society; such vagabondage is repugnant to it, disturbs it; one must have a stable, continuous long-term station, thoughts of the future, of a secure future, in order to reassure it against all attacks." In short, one should have a master, be caught up and situated within a hierarchy; one exists only when fixed in definite relations of domination: "Who do you work with? That is to say, since you are not a master, you must be a servant, whatever your station; it is not a question of your satisfactoriness as an individual; it is a question of order to be maintained." Confronted with discipline on the face of the law, there is illegality, which puts itself forward as a right;

Because none of the legal solutions seems feasible, and because law is failing as Bartleby seems immune from its intelligible categories and flaunts traditional legal understandings—or will not recognize the authority of law—then the lawyer is driven from his offices to engage in his own reverse eviction. He will leave if he cannot throw Bartleby out. Bartleby has succeeded in turning the world upside down.

Even after the lawyer moves into his new offices, he is afraid that Bartleby will reappear. He “kept the door locked, and started at every footfall in the passages” (39). Not surprisingly, his respite is only brief. He receives a visitor from his old building who reports that Bartleby is still occupying the old rooms.

“Then, sir,” said the stranger, who proved a lawyer, “you are responsible for the man you left there. He refuses to do any copying; he refuses to do anything; he says he prefers not to; and he refuses to quit the premises.”

“I am very sorry, sir,” said I, with assumed tranquility, but an inward tremor, “but, really, the man you allude to is nothing to me—he is no relation or apprentice of mine, that you should hold me responsible for him.”

“In mercy’s name, who is he?”

“I certainly cannot inform you. I know nothing about him. Formerly I employed him as a copyist; but he has done nothing for me now for some time past” (39-40).

In the lawyer’s new offices, his visitor uses the metaphors of the old dependent master/servant relationship to make his appeal: moral responsibility for your employees. But Bartleby’s employer will have nothing of it—“he is nothing to me”—no relation or apprentice for whom I might be legally responsible or to whom I might owe a legally cognizable duty.⁹³ “Formally I employed him,” that’s all. He

it is indiscipline, rather than the criminal offence, that causes the rupture.

Id. at 291.

93.

The lawyer’s title, Master in Chancery, evokes the personal ties of dependence between master and apprentice. It recalls a time when apprentices, slowly learning the skills of their trade, looked forward to becoming masters in turn.

is independent of me and on his own. I do not control him or bear any responsibility for him. Bartleby's response might have been: If you have no responsibility for me, then why do you exercise authority over me, command me, and order me around. If I'm independent and free, and just as equal as you, why do you assume a hierarchy over and above me? How did it feel when you began to think I was in charge, and not you.⁹⁴

Bartleby is evicted from the old rooms and "persists in haunting the building generally, sitting upon the banisters of the stairs by day, and sleeping in the entry by night" (40), in effect, homeless. On being informed of Bartleby's plight, the lawyer decides to go visit him though he insists "that Bartleby was nothing to me—no more than to any one else" (40). What follows is one of the funniest scenes in all of Melville, though it is also terribly poignant. It begins with the lawyer scolding Bartleby the way a parent might chastise a child (in a dependent relationship), "Bartleby . . . are

....

Bartleby's employer does not preside over apprentices, bound to him by learning a craft. He is master over a refractory slave, who first copies him "mechanically" and then withdraws his labor. Bartleby could imitate the lawyer forever without acquiring either his employer's competence or his status. The "degraded . . . drill" of the unskilled worker, the drill in which Bartleby engages, is "sealed off from experience; practice counts for nothing there." Bartleby's "I have given up copying" speaks to the changing character of work, the growing distance between master and employee, and the chasm separating imitation from maturity.

ROGIN, *supra* note 44, at 194-95.

94.

If an individual has much power over others, which means that they are obligated to and dependent on him for greatly needed benefits, they will be eager to do his bidding and anticipate his wishes in order to maintain his good will, particularly if there are still others who compete for the benefits he supplies them. If an individual has little power over others, however, they will be less concerned with pleasing him, and he may even have to remind them that they owe it to him to follow his requests. Such reminders demonstrate to them that he really needs the services they render him, just as they need his services, which implies that the relation between him and them is not one of unequal power but one of egalitarian exchange.

BLAU, *supra* note 78, at 134-35 (footnote omitted).

you aware that you are the cause of great tribulation to me . . . ?” (40).

“Now one of two things must take place. Either you must do something, or something must be done to you. Now what sort of business would you like to engage in? Would you like to re-engage in copying for some one?”

“No; I would prefer not to make any change.”

“Would you like a clerkship in a dry-goods store?”

“There is too much confinement about that. No, I would not like a clerkship; but I am not particular.”

“Too much confinement,” I cried, “why you keep yourself confined all the time!”

“I would prefer not to take a clerkship,” he rejoined, as if to settle that little item at once.

“How would a bar-tender’s business suit you? There is no trying of the eye-sight in that.”

“I would not like it at all; though, as I said before, I am not particular.”

His unwonted wordiness inspirited me. I returned to the charge.

“Well, then, would you like to travel through the country collecting bills for the merchants? That would improve your health.”

“No, I would prefer to be doing something else.”

“How, then, would going as a companion to Europe, to entertain some young gentleman with your conversation,—how would that suit you?”

“Not at all. It does not strike me that there is anything definite about that. I like to be stationary. But I am not particular” (41).

Rarely in literature have two people so thoroughly failed to connect on any level, or has one person, earnestly well intentioned, so failed to understand another. To suggest that *Bartleby* might be a suitable candidate for companionship or conversation because he has been so loquacious and disarming until now, borders on the antic. And yet the lack of understanding runs deeper. What *Bartleby* seems to be trying to say is that it is not the type of any particular form of work that he objects to, but the nature of the employment relationship itself as presently

constituted.⁹⁵ Unless it is differently organized, says Bartleby, I'm not particular. I just prefer not to do it. Do not deny my equality, individuality, and independence while you are in the process of assuring me we are all on the same footing.⁹⁶

The lawyer's final gesture is to ask Bartleby to come home with him, one more heartfelt act of benevolence and charity. Though the lawyer is not technically "responsible" for Bartleby, though he is not even employing him any more, he feels that he must care for him. So his offer is to renew the old ties that might have followed from living together under one roof as masters and servants once generally did. No longer bound together with Bartleby, ironically, the lawyer now seeks to take Bartleby into his home; while once he employed him, he had no idea at first that Bartleby was actually living or making his home in the

95. Or as Kuebrich puts it:

Bartleby declines all of these offers and so his complaint seems to be more fundamental than mere personal preference. Three times Bartleby simply states: "I am not particular." Melville spins a pun on the adjective. On the one hand, Bartleby is saying that he is not particular, or "choosey," about the work he does; his dissatisfaction is not with the work environment or the nature of the work but with the employer-employee relationship. In terms of the inherent inequality of the workplace, his experience in the law office is typical; he would be no happier in any other job that also relegated him to a position of servitude. On the other hand, by stressing that he is not "particular," Bartleby is also asserting that he is not "unique" but a member of a class: dependent, wage-earning employees. Thus his dissatisfaction is not directed specifically at the lawyer and would not be resolved by his personally finding a more comfortable position.

David Kuebrich, *Melville's Doctrine of Assumptions: The Hidden Ideology of Capitalist Production in Bartleby*, 69 *NEW ENG. Q.* 381, 400 (1996).

96.

The lawyer is also blind to the fact that the hierarchical distribution of labor in his office, which relegates the clerks to copying his documents and promptly performing his behests, is a social construct deriving from an economic system that invests employers with virtually unlimited power over their wage-dependent employees. Instead, he identifies his authority with the natural order; thus Bartleby's refusals strike him not as acts of resistance to an unjust and humiliating subordination but as "violently unreasonable," whereas his own behavior is "perfectly reasonable."

Id. at 393 (footnotes omitted).

workplace. Bartleby, of course, prefers not to go home with the lawyer. Frustrated, the lawyer leaves.

A short time later, the lawyer learns that the landlord and tenants in the old building had Bartleby removed by the police and taken to prison at the Tombs.⁹⁷ The lawyer almost immediately goes to visit Bartleby in prison. He prevails upon a prison official to let Bartleby have “as indulgent confinement as possible” (42) because it is obvious that he is no threat. He finds that Bartleby had been “permitted . . . freely to wander about the prison” (43), and the lawyer seems unaware of the anomaly of allowing a prisoner to be free to wander, while he had been walled in, and in a sense, imprisoned in an office that he voluntarily entered. In a final act of charity, the lawyer arranges and pays for Bartleby to have his prison food supplemented by a grub-man. The grub-man, on being introduced to Bartleby, addresses Bartleby as “[y]our sarvant, sir, your sarvant,” (44), ironically reflecting years of status and place. Submissive by custom, the grub-man makes “a low salutation behind his apron” (44). The lawyer does not seem to notice that he was providing extra rations for a man starving in more than one way.

Bartleby is not pleased to see the lawyer. “‘I want nothing to say to you’” (43). He says he knows “‘where I am’” (43), and the lawyer reacts, perhaps out of guilt, as if Bartleby holds him responsible for his current plight. When

97. Bartleby's removal is made possible by his status as a propertyless person and is reminiscent of Robert Hale's analysis of the coercion inherent in economic relationships. Hale's statement of the problem highlights Bartleby's plight and his susceptibility to legal process:

Unless . . . the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property. And this again will not be likely to be lifted unless he already has money. That way of escape from the law-made dilemma of starvation or obedience is closed to him.

Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473 (1923). Bartleby, of course, will shortly choose to starve.

the lawyer returns to visit a few days later, he finds Bartleby in the prison yard, dead, curled up in a fetal position, probably having starved to death.

The lawyer ends his narration by repeating a rumor, perhaps to provide some clues to the mysterious life of Bartleby—a snippet of biography and context. “The report was this: 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” (45). On one level losing a job is emblematic of the feature of equality in the employment relationship—one can be fired at any time, particularly from a political position. No guarantees—free to enter, free to leave, or to be removed. A measure of equality, as well as a form of dependency—on your job and on those who have power to dismiss you. But there is also a deeper symbol involved in the Dead Letters themselves—“[a] pallid hopelessness” (45) in the spectre of undelivered letters. A world of communications and relationships not connecting, and forever unfulfilled, akin to a job that is unpromising and empty. The Dead Letter Office stands as a metaphor for alienation, something that has seized Bartleby’s work, his employment relationship, and his soul.

Bartleby will not accept that the form of his employment status is free, voluntary or natural, while its content or substance is imposed and hierarchical. He implicitly denies, indeed defies, the authority of law to recognize, or validate a hierarchy that particularly lends itself to a dependency without mutual obligation. And so the story ends with one of the most famous concluding lines in American literature—one of despair—“Ah, Bartleby! Ah humanity!” (45)—a recognition that at the core we are all tied together despite the fact that so many of our social practices, including work, tend to pull us apart and differentiate each of us from each other. The lawyer, perhaps even unwittingly having contributed to the silencing of Bartleby, voices Bartleby’s lament without knowing it.

Both Bartleby and Babo demonstrate the power of the subordinate over the master. They differ, however, in their method of defiance: Bartleby is passive and withdrawn; Babo is active and violent. The master in both stories is permanently changed by the act of defiance, but in *Bartleby* the master’s enduring link to the subordinate is compas-

sion; in *Benito Cereno*, it is horror. Both stories end with the law manifesting itself powerfully: Bartleby evicted, arrested, and incarcerated; Babo tried, convicted, and executed. The law restores order over ambiguity and mystery, and the defiant subordinate dies at the culmination of the legal process. Melville returns to these themes decades later in *Billy Budd*.

IV. *BILLY BUDD*⁹⁸

A. Fiction

"Welkin-eyed" Billy Budd is the young "Handsome Sailor" (44), charismatic and blessed with "natural regality." He was impressed in 1797 from the English merchant ship the *Rights-of-Man* into the British Navy and placed aboard a warship, the *Bellipotent*. Billy immediately becomes proficient in his new position as a foretopman, is well-liked by the crew—a simple, illiterate, somewhat naïve noble figure with only one apparent "defect," a propensity to stutter when agitated.

Billy's fate, however, resides in the hands of the two other main protagonists in the story. First, Claggart, the vessel's master-at-arms, possessed with a strange attraction for Billy, and described by Melville as having a "mania of an evil nature" (76). Claggart sets out to destroy Billy by creating false evidence to make it appear that Billy is planning to participate in a mutiny. Shortly after an unsuccessful chase of an enemy vessel, Claggart approaches the other major character in the story, Captain Vere, to present Vere with his accusation against Billy's loyalty.

Captain Vere was "a bachelor of forty or thereabouts" who "always acquit[ed] himself as an officer mindful of the welfare of his men, but never tolerating an infraction of discipline" (60). He is brave, thoroughly professional, pedantic and bookish, modest, aristocratic, with a propensity for "a certain dreaminess of mood," for which he was known as

98. All citations to passages from *Billy Budd* are from HERMAN MELVILLE, *BILLY BUDD, SAILOR (AN INSIDE NARRATIVE)* (Harrison Hayford & Merton M. Sealts, Jr. eds., Univ. of Chi. Press 1962). The page citations immediately follow the quotations in the body of the text itself.

"Starry Vere" (61). Vere's instinct upon hearing Claggart's charges against Billy is to be dismissive. He is incredulous and thinks the claim absurd. In fact, Vere seems quite angry at Claggart. Yet Vere is also aware that the charge is serious in light of the recent British naval mutiny experiences at Spithead and Nore. In an excess of caution, therefore, he has Billy summoned so that Claggart will be forced to confront Billy in private, and Billy can defend himself. When Claggart accuses Billy, however, Billy is so outraged that his stuttering prevents him from answering the charge verbally. Instead he reflexively strikes out, hitting Claggart on the forehead and killing him. Shortly thereafter, Vere declares: " 'Struck dead by an angel of God! Yet the angel must hang!' " (101). He then convenes a drumhead court-martial to try Billy not for mutiny, but for the capital offense of striking a superior officer.

During the court martial, Vere fulfills a variety of roles arguably in conflict: witness, prosecutor, judge, and—often overlooked—defense counsel. Some ship's officers, serving as members of the drumhead court, are reluctant to convict and are willing to entertain thoughts of mitigating the sentence. Vere, sensing their sympathy for Billy and his plight, argues for the full measure of the law. The court ultimately follows Vere's advice. Billy is hanged. His final words are "God bless Captain Vere!" (123). Vere has the crew return to their routine immediately. He is fearful that, disgruntled by Billy's execution, they might become disobedient. The ship is then engaged in battle and Vere is wounded, dying shortly thereafter. His final words are "Billy Budd, Billy Budd" (129). The official naval account of the episode casts Claggart as the hero and victim, and Billy as the mutinous, depraved criminal.

B. *History*

Melville had been working on the manuscript of *Billy Budd* for a number of years prior to his death in 1891. (The story was not published until 1924.) The late 1880s witnessed renewed interest in an event nearly a half-century old that resonated deeply within the Melville family. In 1888 and 1889, two articles in the new popular magazines of the era raised issues surrounding the so-

called *Somers* mutiny of 1842,⁹⁹ a case in which one of the most prominent figures was Guert Gansevoort, Melville's first cousin.

Alexander Slidell Mackenzie commanded the United States Navy brig *Somers*, and he presided over the hanging at sea of three members of his crew for allegedly plotting a mutiny. One of those executed was an eighteen-year-old midshipman, Philip Spencer, who also was the son of John C. Spencer, Secretary of War in President Tyler's cabinet. Contemporary reaction to the summary exercise of military justice at sea while close to port and to civilian notice was widespread, animated, ideological, and political. MacKenzie was attacked and defended, and Spencer attempted to have the captain tried for the murder of his son.

Guert Gansevoort had been a first lieutenant under MacKenzie's command. It was to Guert that the original apprehension of a possible mutiny had been reported, a report he promptly relayed to MacKenzie. MacKenzie had Guert watch Spencer for any suspicious activity and finally directed Guert and fellow officers to convene a drumhead court-martial. Guert participated in the gathering and evaluation of testimony and in the guilty verdict—a verdict MacKenzie apparently was anxious to receive. Whether Spencer was a bored or spoiled adolescent, engaging in pirate fantasies—in other words, whether the “alleged” mutiny was hardly imminent; or whether MacKenzie acted precipitously in peacetime without due regard for appropriate procedure; or whether he prejudged the outcome, were all issues widely, publicly aired. Indeed, Charles Sumner wrote in MacKenzie's defense; James Fenimore Cooper criticized his conduct.¹⁰⁰

99. ROGIN, *supra* note 44, at 295; SEALTS, *supra* note 15, at 50.

100. For a summary and treatment of the events, primarily through the reproduction of the historical documents, see PROCEEDINGS OF THE NAVAL COURT MARTIAL IN THE CASE OF ALEXANDER SLIDELL MACKENZIE (1844) 3-9 (Hugh Egan ed., 1992); THE SOMERS MUTINY AFFAIR (Harrison Hayford ed., 1959). See also BUCKNER F. MELTON, A HANGING OFFENSE: THE STRANGE AFFAIR OF THE WARSHIP *SOMERS* (2003). For the exact circumstance when Melville first learned of the event in 1843, see LAURIE ROBERTSON-LORANT, MELVILLE: A BIOGRAPHY 120-21 (1996); 1 HERSHEL PARKER, HERMAN MELVILLE: A BIOGRAPHY, 1819-1851, at 241-42 (1996). Many scholars have commented on the possible impact of the *Somers* on the writing of *Billy Budd*. See, e.g., ROGIN, *supra* note 44, at 294-316; THOMAS, *supra* note 29, at 206-14.

It is not certain that Melville directly used the *Somers* affair as a model for *Billy Budd*.¹⁰¹ Nevertheless, Melville invites us to speculate about the impact the *Somers* events had on him. Not once, but twice, in his fiction he recurs directly to the *Somers*. In 1850 in *White Jacket*, Melville suggested that "[t]he letter of the [law] was not altogether observed," when "[t]hree men in time of peace, were . . . hung . . . merely because, in the Captain's judgment, it became necessary to hang them. To this day the question of their complete guilt is socially discussed."¹⁰² Nearly half a century after *White Jacket*, the most direct comparison to the *Somers* comes in *Billy Budd* upon conclusion of the court-martial deliberations:

Not unlikely they were brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war *Somers* to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out though in a time of peace and within not many days' sail of home. An act vindicated by a naval court of inquiry subsequently convened ashore. History, and here cited without comment. True, the circumstances on board the *Somers* were different from those on board the *Bellipotent*. But the urgency felt, well-warranted or otherwise, was much the same (113-14).

The impact of the *Somers* incident on Guert, however, was immediate and palpable. He began to develop a serious drinking problem that led to controversial and unfortunate

101. For the discussion of the evidence and a skeptical evaluation, see SEALTS, *supra* note 15, at 27-30, 181-83. Laurie Robertson-Lorant describes *Billy Budd* as

a novella loosely based on the *Somers* mutiny.

. . . .

The novella is not "about" the *Somers* mutiny, however. It springs from profound meditations on moral and philosophical issues occasioned by historical events. Its main characters are nothing like the actual participants in the incident; they are representative figures in the struggle between good and evil which Melville has given "a local habitation and a name."

ROBERTSON-LORANT, *supra* note 100, at 585.

102. HERMAN MELVILLE, *White Jacket or the World in a Man-of-War*, in 5 THE WRITINGS OF HERMAN MELVILLE 3, 303 (Harrison Hayford et al. eds., 1970).

naval commands, for which he underwent courts-martial of his own.¹⁰³ Guert apparently was haunted until his death by his role in the *Somers* proceedings.

In addition to the *Somers* incident, some scholars have suggested that the themes examined in *Billy Budd* also may have been triggered by a particular contemporary episode, the Haymarket affair in Chicago in 1886, and the subsequent legal proceedings.¹⁰⁴ Others have argued that late-nineteenth-century debates about capital punishment are reflected in the story.¹⁰⁵ Finally, again we ought not to forget the figure of Lemuel Shaw, looming over Melville's shoulder (or perhaps, more accurately, vice versa).¹⁰⁶ Could Melville be commenting on Shaw's handling of the fugitive slave cases? Is *Billy Budd* a reaction to, or an insight into, the moral dilemmas of judging? Or is it about the positions that judges are placed in by a demanding society, a society that requires that law, perhaps occasionally on behalf of society, address, if not remedy, its most pressing and perplexing problems? Whatever the sources, Melville made the tale uniquely his own.

C. Law

Billy Budd's fate is altered from the moment he is seized from the "homeward-bound English merchantmen," *Rights-of-Man*,¹⁰⁷ and impressed into the British navy on

103. On his drinking, see 1 PARKER, *supra* note 100, at 297. On his subsequent naval career, see ROGIN, *supra* note 44, at 297.

104. See Robert K. Wallace, *Billy Budd and the Haymarket Hangings*, 47 AM. LITERATURE 108 (1975); WEINSTEIN, *supra* note 68, at 117-18.

105. For a perceptive reading along those lines, see H. Bruce Franklin, *Billy Budd and Capital Punishment: A Tale of Three Centuries*, 69 AM. LITERATURE 337 (1997).

106. See generally COVER, *supra* note 32. See also THOMAS, *supra* note 29, at 201-06.

107. We tend to forget how significant a factor in economic development was the eighteenth-century Anglo-American mercantile trade economy and that sailors were a type of precursor to an industrial, free labor force. See MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750*, at 8 (1987). Indeed, "[t]he seaman was central to the changing history and political economy of the North Atlantic world." *Id.* at 10. The legal relations of the merchant seaman, as well as the naval world, mattered.

the warship, the *Bellipotent*.¹⁰⁸ Billy, the "Handsome Sailor," and clearly the best choice from the merchant ship's crew, "made no demur," indeed his captain notes his "uncomplaining acquiescence, all but cheerful" (44-45).

As Billy is being transferred to the *Bellipotent* from the merchant ship, "the new recruit jumped up" and made "a salutation as to the ship herself, 'And good-bye to you too, old *Rights-of-Man*'" (49). Melville's metaphor for the loss of freedom, of course, is unmistakable, from Billy's salute to the rights of man generally, to Melville's recognition that Billy is losing those rights, to Melville's acknowledgment of Thomas Paine's book of the same title (a "rejoinder to Burke's arraignment of the French Revolution") (48).

The lieutenant seizing Billy reacts: " 'Down sir!' " he "roared . . . instantly assuming all the rigor of his rank," for he "rather took [Billy's salutation] as meant to convey a covert sally on the new recruit's part, a sly slur at impressment in general . . ." (49). It quickly becomes apparent, however, that Billy, "though happily endowed with the gaiety of high health, youth, and a free heart, was yet by no means of a satirical turn. The will to it and the sinister dexterity were alike wanting. To deal in double meanings and insinuations of any sort was quite foreign to his nature"

108.

[I]mpressment may be described as a principle of compulsion. It functions as a constraining force in the service of a ruling power, providing the means whereby a dominant group implements its sovereignty From this perspective, the object of impressment is the production of obedient and disciplined subjects.

. . . .

The legal justifications for impressment stressed the precedence of either royal prerogative or public good over private right. So while Englishmen generally celebrated the liberality of their nation, the freedom of which was in some ways based on the absence of a standing army, proponents of the press gang pointed to that absence as a legitimating factor in support of impressment. In a land that prided itself in its liberal freedom, gangs of recruiters roved the streets of every town, tricking and kidnapping, plying with wine and imprisoning, punching and compelling whole groups of unwilling men to serve in His Majesty's navy.

Jeff Westover, *The Impressments of Billy Budd*, 39 MASS. REV. 361, 362, 363 (Autumn 1998).

(49). All he meant to do was actually say goodbye to his friends and ship.

And "as to his enforced enlistment, that he seemed to take pretty much as he was want to take any vicissitude of weather. Like the animals, though no philosopher, he was, without knowing it, practically a fatalist" (49).¹⁰⁹ Though Billy may have "rather liked this adventurous turn in his affairs" (49), he also may have accepted it willingly because in some ways it really was not a change in his position or status. He was simply being moved from one ship to another, from one command structure to another, from one readily recognized hierarchical situation to another. On the surface it did not seem to matter, and he apparently was resigned to it. But Melville reminds us that not all accept their new service. Though Billy "was soon at home in the service," he thus stood "in marked contrast to certain other individuals included like himself among the impressed portion of the ship's company; for these when not actively employed were sometimes, and more particularly in the last dogwatch . . . apt to fall into a saddish mood which in some partook of sullenness" (49-50).

In a short compass, Melville has effectively set the scene against which this story will be played. In part, the central themes have to do with the ambiguity of freedom and revolution. Impressed sailors in 1797 have lost their liberty, certainly they were no longer in voluntary service, ostensibly because their country needs them to defend itself against a foreign power animated by the French Revolution, a power that threatens to spread its ideas and actions to inhibit and perhaps overthrow England's own concept of freedom. Social and political chaos may result.

There is also, however, an internal risk in the Navy because of the "sullenness" of those impressed. England in April and May of 1797 witnessed two naval mutinies at Spithead and Nore, caused in part by the reactions of men impressed into service. "It was indeed," Melville tells us, "a demonstration more menacing to England than the contemporary manifestoes and conquering and proselyting armies of the French Directory. To the British Empire the

109. "In part Billy represents the willing consent that defines hegemony." ROBERT SHULMAN, *SOCIAL CRITICISM & NINETEENTH-CENTURY AMERICAN FICTIONS* 75 (1987). Of course, *Bartleby*, by contrast, seems the mirror image.

Nore Mutiny was what a strike in the fire brigade would be to London threatened by general arson" (54). And so, Billy was put on board a ship whose officers were keenly aware of recent history and current risks. Everyone, except perhaps Billy, has a certain nervous apprehension or "anxiety."

Billy integrates himself successfully with his new crewmates, "well received in the top and on the gun decks" (50). He was, however, an abandoned orphan, "a foundling, a presumable by-blow, and, evidently, no ignoble one. Noble descent was as evident in him as in a blood horse" (52). Though illiterate, "he possessed that kind and degree of intelligence going along with the unconventional rectitude of a sound human creature, one to whom not yet has been proffered the questionable apple of knowledge" (52). He was "in many respects . . . little more than a sort of upright barbarian, much such perhaps as Adam presumably might have been ere the urbane Serpent wriggled himself into his company" (52). Billy had "just one thing amiss in him," a tendency to stutter when "under sudden provocation of strong heart-feeling" (53). All in all not a portrait of a sailor likely to participate in a mutiny.

In any event, one of Billy's shipmates, the master-at-arms, John Claggart, did not share the crew's reception of the "Handsome Sailor." Claggart, whose origin and life remained mysterious, apparently had a shady past, overlooked by a navy anxious for able-bodied hands. His enlistment was an example of the navy's official "sanctioned irregularities" policy (66). His rise to a position of authority stemmed from "[t]he superior capacity he immediately evinced, his constitutional sobriety, an ingratiating deference to superiors . . ." (67). As a result, Claggart commanded a police force on board, his "immediate subordinates, and compliant ones," the ears and eyes of the ship (67).

Early in his warship's service, Billy saw the consequences of a failure to comply with official duty, "[t]he first formal gangway-punishment he had ever witnessed" (68).¹¹⁰

110. Melville often witnessed flogging during his own sea duty. "The mindless cruelty of navy discipline enraged him, and he began to see flogging as an apt metaphor for the relationship between tyrannical abuse of power and the rights of the common man." ROBERTSON-LORANT, *supra* note 100, at 119. In *White Jacket*, Melville made a particular point of emphasizing flogging practices

The flogging “horrified” him, and “he resolved that never through remissness would he make himself liable to such a visitation or do or omit aught that might merit even verbal reproof” (68).¹¹¹ He is somewhat perplexed, therefore, when he “found himself getting into petty trouble” (68), under the watchful eyes of Claggart’s police force. Billy seeks the counsel of an old and wise seaman, Dansker, who “in a vein of dry humor, or what not,” or “whether in freak of patriarchal irony touching Billy’s youth and athletic frame . . . from the first in addressing him he always substituted *Baby* for Billy . . .” (70). Sensing that Billy’s child-like innocence needs protecting, Dansker warns Billy that Claggart bears Billy a certain animosity. At first Billy rejects Dansker’s admonition, but he soon becomes disturbed by it. As for

in the navy as the epitome of the injustice of hierarchical relations, an injustice that might justify mutiny.

If there are any three things opposed to the genius of the American Constitution, they are these: irresponsibility in a judge, unlimited discretionary authority in an executive, and the union of an irresponsible judge and an unlimited executive in one person.

....

Certainly the necessities of navies warrant a code for its government more stringent than the law that governs the land; but that code should conform to the spirit of the political institutions of the country that ordains it. It should not convert into slaves some of the citizens of a nation of freemen.

....

. . . [E]very American man-of-war’s-man would be morally justified in resisting the scourge to the uttermost; and, in so resisting, would be religiously justified in what would be judicially styled “the act of mutiny” itself.

MELVILLE, *supra* note 102, at 143, 144, 145. Michael Rogin makes the point that “Melville marked the chapter in *White-Jacket* titled ‘The Flogging’ while writing *Billy Budd*, for the scourge was a portent of Billy’s doom.” ROGIN, *supra* note 44, at 305.

111.

In fact, the narrator’s choice of the religious term *visitation* to describe this common naval punishment assimilates military to divine discipline, oddly or ironically “naturalizing” its perceived justice; Billy experiences such punishment as divinely sanctioned and therefore not open to question. The punishment *forges* its own legitimacy, not merely out of simple fear, but from the psychology it theatrically institutes: if such punishment is inflicted, the authority which inflicts it must not only be impressively potent but also unimpeachably legitimate.

Westover, *supra* note 108, at 373 (footnote omitted).

Dansker, "Years, and those experiences which befall certain shrewder men subordinated lifelong to the will of superiors, all this had developed" within him a "pithy guarded cynicism" (71). Billy may have been welcomed by the crew, but Dansker understands that, in the shipboard world of hierarchy and abuse of authority, Billy needs protection, because he will not get it from any of the officers.

Claggart immediately shows overt evidence of his animosity towards Billy in the soup spilling incident, an episode that Billy misinterprets despite Dansker's warning. Billy spills his soup during mess as Claggart walks by. Claggart "was proceeding on his way without comment . . . when he happened to observe who it was that had done the spilling" (72). He playfully "tap[s]" Billy "from behind with his rattan," and says, "'Handsomely done, my lad! And handsome is as handsome did it, too!'" (72). Billy does not notice the grimace "that accompanied Claggart's equivocal words" (72). The crew, however, "taking his remark as meant for humorous, and at which therefore as coming from a superior they were bound to laugh 'with counterfeited glee' acted accordingly" (72). Billy joins in the glee, not identifying Claggart's antipathy, and not understanding that his shipmates are laughing out of deference to an officer.

Claggart then transfers his rage to a drummer-boy "chancing to come into light collision with his person, . . . impetuously giving him a sharp cut with the rattan, . . . vehemently exclaim[ing], 'Look where you go!'" (73). Billy does not quite grasp what the shipmates with their false deferential "glee" express. The drummer boy, who painfully experiences instant discipline, understands: Billy is subject to the arbitrary will of a superior in a hierarchical relationship. Dansker knows it; Billy will have to learn its shape and content.

But, Melville asks us, "What was the matter with the master-at-arms?" (73). Melville suggests that Claggart suffers from a "Natural Depravity," defined by Plato as "a depravity according to nature" (75). This depravity

[p]artakes nothing of the sordid or sensual. It is serious, but free from acerbity. Though no flatterer of mankind it never speaks ill of it.

But the thing which in eminent instances signalizes so exceptional a nature is this: Though the man's even temper and discreet

bearing would seem to intimate a mind peculiarly subject to the law of reason, not the less in heart he would seem to riot in complete exemption from that law, having apparently little to do with reason further than to employ it as an ambidexter implement for effecting the irrational. That is to say: Toward the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane, he will direct a cool judgment sagacious and sound. These men are madmen, and of the most dangerous sort, for their lunacy is not continuous, but occasional, evoked by some special object; it is protectively secretive, which is as much as to say it is self-contained, so that when, moreover, most active it is to the average mind not distinguishable from sanity. . . (76).

Claggart's illness is thus dangerous because he is aware of it and attempts to keep it from public view and suspicion.

But what activates Claggart's "mania" about Billy? Melville suggests it is "envy" (77). Perhaps, it is homoerotic envy. Melville informs us that Claggart's envy "was no vulgar form of the passion," but "Claggart's envy struck deeper" (77-78).

If askance he eyed the good looks, cheery health, and frank enjoyment of young life in Billy Budd, it was because these went along with a nature that, as Claggart magnetically felt, had in its simplicity never willed malice or experienced the reactionary bite of that serpent. To him, the spirit lodged within Billy, and looking out from his welkin eyes as from windows, that ineffability it was which made the dimple in his dyed cheek, supplied his joints, and dancing in his yellow curls made him preeminently the Handsome Sailor. One person excepted, the master-at-arms was perhaps the only man in the ship intellectually capable of adequately appreciating the moral phenomenon presented in Billy Budd. And the insight but intensified his passion, which assuming various secret forms within him, at times assumed that of cynic disdain, disdain of innocence—to be nothing more than innocent! Yet in an aesthetic way he saw the charm of it, the courageous free-and-easy temper of it, and fain would have shared it, but he despaired of it (78).

Billy has what Claggart knows he does not and cannot ever have. Billy enjoys naturally won admiration of everyone with whom he comes in contact. Claggart is repelled by Billy's successful and superior fraternal position and grace, and so Claggart sets out, using his superior legal position of authority, to destroy Billy.

Claggart attempts to effect his plan by having his police corporals harass Billy in a petty fashion and inform on him.

His subordinates misrepresent and falsify information, particularly about what Billy supposedly is saying about Claggart. Not satisfied with this, Claggart apparently has a member of his staff attempt to recruit Billy into joining a fictitious mutiny. Billy is outraged, and cuts off the conversation. But he does not report it as he should have done. He does not want to be a "telltale" (85).

In certain matters, some sailors even in mature life remain unsophisticated enough. But a young seafarer of the disposition of our athletic foretopman is much of a child-man. And yet a child's utter innocence is but its blank ignorance, and the innocence more or less wanes as intelligence waxes. But in Billy Budd intelligence, such as it was, had advanced while yet his simple-mindedness remained for the most part unaffected (86).

Billy's childlike innocence leaves him vulnerable, and Claggart intuits that no one in authority will look after him.

Moreover, Billy's immersion into the customary life of a sailor leaves him unprepared for Claggart's machinations.

Yes, as a class, sailors are in character a juvenile race. Even their deviations are marked by juvenility, this more especially holding true with the sailors of Billy's time. Then too, certain things which apply to all sailors do more pointedly operate here and there upon the junior one. Every sailor, too, is accustomed to obey orders without debating them; his life afloat is externally ruled for him; he is not brought into the promiscuous commerce with mankind where unobstructed free agency on equal terms—equal superficially, at least—soon teaches one that unless upon occasion he exercise a distrust keen in proportion to the fairness of the appearance, some foul turn may be served him. A ruled undemonstrative distrustfulness is so habitual, not with businessmen so much as with men who know their kind in less shallow relations than business, namely, certain men of the world, that they come at last to employ it all but unconsciously; and some of them would very likely feel real surprise at being charged with it as one of their general characteristics (87).

Sailors "accustomed to obey orders" simply do what they are told. They are in an inferior position; there is no pretense to equality and fending for oneself in the marketplace. Perhaps in positions of dependency they should be protected; instead, Melville seems to suggest, they are likely to be abused.

Claggart is now ready to spring his trap. After an unsuccessful chase of an enemy vessel, Claggart approaches Captain Vere with evidence of what he has learned during

the pursuit, suspicion of a possible mutiny afoot. Vere is dry, pedantic, stern, experienced, courageous, formal, a disciplinarian, and bookish.

In this line of reading he found confirmation of his own more reserved thoughts—confirmation which he had vainly sought in social converse, so that as touching most fundamental topics, there had got to be established in him some positive convictions which he forefelt would abide in him essentially unmodified so long as his intelligent part remained unimpaired. In view of the troubled period in which his lot was cast, this was well for him. His settled convictions were as a dike against those invading waters of novel opinion social, political, and otherwise, which carried away as in a torrent no few minds in those days, minds by nature not inferior to his own. While other members of that aristocracy to which by birth he belonged were incensed at the innovators mainly because their theories were inimical to the privileged classes, Captain Vere disinterestedly opposed them not alone because they seemed to him insusceptible of embodiment in lasting institutions, but at war with the peace of the world and the true welfare of mankind (62-63).

Vere is a man of convictions, not unlike the lawyer in *Bartleby*, who was a man of assumptions.

Claggart, attempting artfully to play a role, “[w]ith the air of a subordinate grieved at the necessity of being a messenger of ill tidings,” slowly conveys his story (92). Vere “with some impatience interrupt[s] him” and orders him to “[b]e direct” (92). “Claggart made a gesture of subservience, and proceeded” (92). Claggart seems to count on Vere’s concerns about the Nore mutiny to engage his attention and to force Vere to take his report seriously. When Claggart finally reveals that Billy Budd is the focus of his suspicion, Vere reacts with “unfeigned astonishment” (94); he simply does not believe the information, even though he is sure in the abstract that “prompt action should be taken at the first palpable sign of recurring insubordination” (93).

Vere decides to summon Billy to face his accuser. Claggart repeats his allegations to Billy. “Not at first did Billy take it in. When he did, . . . [h]e stood like one impaled and gagged” (98). Vere tells Billy “‘Speak, man!’ . . . ‘Speak! Defend yourself!’” (98). Vere’s “appeal caused but a strange dumb gesturing and gurgling in Billy; amazement at such an accusation so suddenly sprung on inexperienced nonage” (98). His reaction results in “a convulsed tongue-tie” (98). Vere, “[t]hough at the time . . . quite ignorant of Billy’s li-

ability to vocal impediment, . . . now immediately divined it . . ." (99). He urges Billy to compose himself and take his time. "Contrary to the effect intended, these words so fatherly in tone, doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance" (99). Frustrated at his inability to express himself and refute the lie, Billy strikes out at Claggart, hitting him on the forehead, and killing him instantly. Vere whispers, " 'Fated boy' . . . 'what have you done!' " Immediately, Vere takes charge: "The father in him, manifested towards Billy thus far in the scene, was replaced by the military disciplinarian" (100). Billy, stripped of patriarchal protection (because of his youth and inexperience), and of his voice, now faces military justice—an outcome perhaps prejudged by Vere who exclaims to the ship's surgeon that Claggart was " 'struck dead by an angel of God! Yet the angel must hang!' " (101).¹¹²

Vere convenes a drumhead court-martial to try Billy for striking and killing Claggart, a superior officer. The surgeon expresses doubts to himself, as other officers do, about whether Vere is following an appropriate procedure for

112. The combination of Billy's stutter and illiteracy coalesce into a dependency that touches Vere momentarily as a parent or father might be moved to protect a child or son. "Billy Budd's more serious impediment strikes him dumb as an independent being . . . Billy is ultimately received by his aristocratic 'father' as sacrifice rather than heir." RADLOFF, *supra* note 52, at 212.

[But] Billy is a child of nature. He had independence on the merchant ship, *Rights-of-Man*, from which he was impressed. But Billy's desire to please Captain Vere deprives him of autonomy. The "fatherly" words from Vere bring a "crucifixion" to Billy's face; he stutters in anxiety to speak his innocence to the Captain. Billy is consciously submissive, but critics have heard in his stutter an unconscious hostility to authority. Billy stutters only when his loyalty is questioned, as if his tongue withholds assent and prevents him from dissembling. Does the stutter block anger he is not allowed to express? In American folk tales (long before Freud) obstructed speech leads to frontier violence. Like the proverbial backwoodsman, Billy chokes with rage and strikes his accuser.

Both Billy's stutter and the blow from his fist are involuntary, for Billy never even contemplates rebellion. . . . Billy's overidentification with Vere progressively infantilizes him. He is reduced from establishing order on the *Rights* to a stuttering protest of loyalty to Vere.

ROGIN *supra* note 44, at 306-07 (citation omitted).

trying Billy. Perhaps Billy should simply be confined, until the ship "should rejoin the squadron, and then refer it to the admiral" (101). The surgeon wonders whether Vere is "unhinged" (102), questioning professionally whether Vere's sanity and judgment have been affected by the events, and perhaps metaphorically whether his summary actions are "unhinged" from their legal foundation.

But assuming that he is [unhinged], it is not so susceptible of proof. What then can the surgeon do? No more trying situation, is conceivable than that of an officer subordinate under a captain whom he suspects to be not mad, indeed, but yet not quite unaffected in his intellects. To argue his order to him would be insolence. To resist him would be mutiny (102).

The surgeon's subordinate role leads him to stifle his intuition; his role takes precedence over his instinct that something quite wrong, perhaps unjust, is about to occur.

Vere proceeds to trial, but Melville highlights Vere's problem for us.

In the jugglery of circumstances preceding and attending the event on board the *Bellipotent*, and in the light of that martial code whereby it was formally to be judged, innocence and guilt personified in Claggart and Budd in effect changed places. In a legal view the apparent victim of the tragedy was he who had sought to victimize a man blameless; and the indisputable deed of the latter, navally regarded, constituted the most heinous of military crimes. Yet more. The essential right and wrong involved in the matter, the clearer that might be, so much the worse for the responsibility of a loyal sea commander, inasmuch as he was not authorized to determine the matter on that primitive basis (103).

The "jugglery of circumstances" has left Vere with a profound moral dilemma. The world has been turned upside down by the events precipitated by Claggart. Can Vere right it? Should he be trying a man who he believes is morally innocent, a man defending himself in the only way he believed available, from an accusation that Vere thinks is untrue? What justifies his prosecution? And how will Billy defend himself now in light of what we have just learned about his capacities?¹¹³

113. "Billy Budd rivets attention on a conflict: Captain Vere's obedience to formal rules and to his perceived duty contrasts sharply with the demands of actual justice." Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1954 (1987).

The court-martial begins. Vere's roles, other than in a summary military setting, obviously would be hopelessly in conflict. He is the ultimate judge, he picks the jury (the first lieutenant, the captain of marines, and the sailing master), he is a testifying eyewitness, he is the prosecutor, and Billy even appeals to him as defense counsel. Throughout Vere insists on "reserving to himself, as the one on whom the ultimate accountability would rest, the right of maintaining a supervision of it, or formally or informally interposing at need" (104). Vere does not intend to relinquish in any measure his hierarchical control. Melville symbolizes this for us when observing that even when appearing as a witness "and as such temporarily sinking his rank, though singularly maintaining it in a matter apparently trivial, namely, that he testified from the ship's weather side, with that object having caused the court to sit on the lee side" (105). The outcome has already been determined.

During the court-martial, Billy is asked a handful of questions after Vere finishes testifying as the eyewitness. The first lieutenant in effect asks Billy to corroborate Vere's testimony. Billy vouches for Vere: " 'Captain Vere tells the truth. It is just as Captain Vere says, but it is not as the master-at-arms said. I have eaten the King's bread and I am true to the King' " (106). Vere responds, " 'I believe you, my man,' . . . his voice indicating a suppressed emotion not otherwise betrayed" (106). When Billy is asked a final direct question about what would have motivated Claggart to lie and bear him malice, he has difficulty answering because it relates to "a spiritual sphere wholly obscure to Billy's thoughts" (107). He automatically turns to Vere for help, "deeming him his best helper and friend" (107). Vere's answer is the classic formalistic response.

"The question you put to him comes naturally enough. But how can he rightly answer it?—or anybody else, unless indeed it be he who lies within there," designating the compartment where lay the corpse. "But the prone one there will not rise to our summons. In effect, though, as it seems to me, the point you make is hardly material. Quite aside from any conceivable motive actuating the master-at-arms, and irrespective of the provocation to the blow, a martial court must needs in the present case confine its attention to the blow's consequence, which consequence justly is to be deemed not otherwise than as the striker's deed" (107).

The analysis does Billy no good, in fact harms him, as Vere insists that all the court need or even may consider is the

consequences of the act, the objective outcome. Any inquiry into the subjective morass of intent is to no avail. Billy's behavior, not Claggart's state of mind, is all that is at issue.

Billy would like to believe that he can depend on Vere for assistance, but he seems vaguely to understand that what he just heard does not qualify as aid from a "helper."

This utterance, the full significance of which it was not at all likely that Billy took in, nevertheless caused him to turn a wistful interrogative look toward the speaker, a look in its dumb expressiveness not unlike that which a dog of generous breed might turn upon his master, seeking in his face some elucidation of a previous gesture ambiguous to the canine intelligence (107-08).

The officers think that Vere's response indicates "a prejudgment on the speaker's part" (108). Given the relationship of captain and sailor, what should Billy (or the officers) expect? To be protected (as a child)? He looks to Vere to defend him, but Vere is caught in the duality of the hierarchical relationship. On the one hand, he must assert his hierarchical rank by prosecuting; on the other hand, he might wish to protect those who are dependent on him. His conflict, his divided role, comes from trying to work out the fact that hierarchy and dependence or subordination may pull him simultaneously in both ways in the relationship. As a dog looking to his master, Billy makes one final attempt to elicit Vere's aid. (We might remember that Delano in *Benito Cereno* naively compares the faithfulness of slaves to dogs.) He turns "another quick glance toward Captain Vere; then, as taking a hint from that aspect, a hint confirming his own instinct that silence was now best . . ." (108), he chooses silence. Vere thinks Billy's defense has lasted long enough. The court-martial concludes shortly after a line of questioning is truncated, "overrulingly instructed by a glance from Captain Vere" (108).

Vere assumes control of the deliberations once the proceedings have concluded. He states the legal and moral questions to focus the discussion:

"But your scruples: do they move as in a dusk? Challenge them. Make them advance and declare themselves. Come now; do they import something like this: If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a

capital crime whereof the penalty is a mortal one. But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. Though the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King's officers lies our duty in a sphere correspondingly natural?" (110).

Vere reminds the officers that they must obey commands, including the command of law, and he issues a passionate defense of role-differentiated morality:

"[I]n receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now. For suppose condemnation to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it" (110-11).

Vere also entertains and answers an officer's intelligent and probing questions, at all times directing them towards the result he approves.

"Can we not convict and yet mitigate the penalty?" asked the sailing master, here speaking, and falteringly, for the first.

"Gentlemen, were that clearly lawful for us under the circumstances, consider the consequences of such clemency" (112).

Finally, he plays his trump card—the necessity or policy defense of his proposed verdict.

"The people" (meaning the ship's company) "have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids—they, long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. *Why?* they will ruminare. You know what sailors

are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm—the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive. But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid” (112-13).¹¹⁴

Thus, in relationships of hierarchy and subordination, it is a mistake at critical moments to reveal any weakness. The sailors, the people, the masses (remember the specter of the French Revolution) would willingly overthrow the whole ordered set of social relationships with only a minimum of encouragement. They must be dealt with rigorously. The law helps us to support norms. Use it.

So Billy, innocent of mutiny, having engaged in an act of a type of self-defense, must die to vindicate the greater good. Otherwise, the threat to order is too great; the risk not worth taking. He is found guilty and sentenced to death. And Billy, of all people, seems to understand why he

114. It is important to see how authority is deployed.

One could . . . argue that Vere needs an atmosphere of crisis to sanction an authority structure natural to his own upper-class station. This is not to deny that there are genuinely threatening circumstances aboard the *Bellipotent*. It is only to say that these threats are entirely class-inflected. There is probably no single image in the story that more neatly captures these anxieties than the picture of the officers during battle standing “with drawn swords behind the men working the guns.”

SUSAN L. MIZRUCHI, *THE SCIENCE OF SACRIFICE: AMERICAN LITERATURE AND MODERN SOCIAL THEORY* 144 (1998). Rogin cements the point:

Authority repossessed instinct on the *Bellipotent*. Uniforms and rituals naturalized man-made institutions, placing them beyond human reach. Men regained their location in nature. But this was not the rights-granting nature of the Declaration of Independence, but a nature in which they were assimilated to beasts. Frozen into forms to protect against chaos, society conspired with nature in *Billy Budd* against a human ground.

ROGIN, *supra* note 44, at 315.

must be martyred. Vere "old enough to have been Billy's father, . . . the austere devotee of military duty, . . . may in end have caught Billy to his heart,¹¹⁵ even as Abraham may have caught young Isaac on the brink of resolutely offering him up in obedience to the exacting behest" (115).¹¹⁶ Billy responds and in an extraordinary gesture utters his final words just before hanging:

"God bless Captain Vere!" Syllables so unanticipated coming from one with the ignominious hemp about his neck—a conventional felon's benediction directed aft towards the quarters of honor; syllables too delivered in the clear melody of a singing bird on the point of launching from the twig—had a phenomenal effect, not unenhanced by the rare personal beauty of the young sailor, spiritualized now through late experiences so poignantly profound (123).

At that "penultimate moment" (123), Billy recognizes and repeats for all, particularly the crew, the legitimacy of Vere's superiority and authority.¹¹⁷ He accepts his rank and

115.

Paternalism predicates inferiority . . . The tender though sentimentalizing image of a child seeking adult protection both reveals the pathos of the seamen's plight and the apparently inherent union between administrative paternalism and proletarian illiteracy. Such language asserts the hierarchy that informs the military, but it does so by means of an ideology that posits military relations as familial; it thereby mystifies the real quality of the relations it constitutes. Hence Vere's paternal regard for Billy masks the fact that he acts from an idiosyncratic interpretation of military requirements.

Westover, *supra* note 108, at 379 (footnotes omitted).

116. For a perceptive treatment of patriarchy and sacrifice, see MIZRUCHI, *supra* note 114, at 179-80. "Captain Vere comes ultimately to represent the generation of the fathers in its willingness to sacrifice its sons to authoritarian patriarchal power." ROBERTSON-LORANT, *supra* note 100, at 589. "Instead of speaking out against Captain Vere, Billy lets the fatherlike captain speak for him. In doing so he entrusts his life to a man who sacrifices him in the name of the law." THOMAS, *supra* note 29, at 221.

117. In the *Somers* mutiny case, seaman Elisha Small, shortly before his hanging, reportedly uttered "God bless that flag." "Small's speech resonates for readers of *Billy Budd*, which Melville was working on when he died; there he used similar phrasing, which he labeled a conventional felon's benediction, indicating that similar last words were commonly used by condemned men." 1 PARKER, *supra* note 100, at 242. The meaning of the blessing is complicated. Is it true forgiveness? F. O. Matthiessen argued long ago that "Vere obeys the law, yet understands the deeper reality of the spirit. Billy instinctively accepts the captain's duty, and forgives him." F.O. MATTHIESSEN, *AMERICAN RENAISSANCE: ART AND EXPRESSION IN THE AGE OF EMERSON AND WHITMAN* 511 (1941). On the

its consequences. (Perhaps an earlier generation might see it as a classic example of false consciousness or at least the success of cultural hegemony). Vere at this tense moment is grateful for all the help he can get. Billy at the bottom rung of the ladder, having once sought Vere's assistance, now provides him with the ultimate gift, his life.

Vere is not alone in being a prisoner of this ritual of roles and subordination. Like the surgeon, the ship's chaplain has doubts.

Marvel not that having been made acquainted with the young sailor's essential innocence the worthy man lifted not a finger to avert the doom of such a martyr to martial discipline. So to do would not only have been as idle as invoking the desert, but would also have been an audacious transgression of the bounds of his function, one as exactly prescribed to him by military law as that of the boatswain or any other naval officer. Bluntly put, a chaplain is the minister of the Prince of Peace serving in the host of the God of War—Mars. As such, he is as incongruous as a musket would be on the altar at Christmas. Why, then, is he there? Because he indirectly subserves the purpose attested by the cannon; because too he lends the sanction of the religion of the meek to that which practically is the abrogation of everything but brute Force (121-22).

Billy's fate is sealed by those not accustomed to challenge their place in the world. The officers on board are trapped by deference to authority, and withdraw at crucial moments from exercising independent judgment. And so "God bless Captain Vere" is a tribute to and an expression of their state of mind.

Vere does have something to worry about. Like a Greek chorus, the crew had repeated Billy's benediction of the captain; but at the moment of Billy's execution, they fell silent. The silence then turned to a murmur:

other hand, "[s]acrifice is about compliance. An ideal victim understands the necessary equivalence between collective and individual propitiation. . . . From this perspective, Billy Budd's blessing, on the point of death, of the sacrificial beneficiary, Captain Vere, expresses neither acceptance nor irony. It merely confirms sacrificial procedure." MIZRUCHI, *supra* note 114, at 163. However, "[w]hat is conventional in [Billy's] benediction is opposed to sincere speech, and is the mark of that instinct of docility which is second nature to the sailor. Given that the naturally impassioned speech of Billy is a stutter, the clarity of these words . . . argues insincerity . . ." RADLOFF, *supra* note 52, at 227. Was Billy's sincerity or insincerity more or less consistent with his understanding of his legal or social standing aboard ship?

The seeming remoteness of its source was because of its murmurous indistinctness, since it came from close by, even from the men massed on the ship's open deck. Being inarticulate, it was dubious in significance further than it seemed to indicate some capricious revulsion of thought or feeling such as mobs ashore are liable to, in the present instance possibly implying a sullen revocation on the men's part of their involuntary echoing of Billy's benediction. But ere the murmur had time to wax into clamor it was met by a strategic command, the more telling that it came with abrupt unexpectedness: "Pipe down the starboard watch, Boatswain, and see that they go" (126).

A variation of this scene was repeated during Billy's burial at sea:

An uncertain movement began among them, in which some encroachment was made. It was tolerated but for a moment. For suddenly the drum beat to quarters, which familiar sound happening at least twice every day, had upon the present occasion a signal peremptoriness in it. True martial discipline long continued superinduces in average man a sort of impulse whose operation at the official word of command much resembles in its promptitude the effect of an instinct.

... All this occupied time, which in the present case was the object in beating to quarters at an hour prior to the customary one. That such variance from usage was authorized by an officer like Captain Vere, a martinet as some deemed him, was evidence of the necessity for unusual action implied in what he deemed to be temporarily the mood of his men: "With mankind," he would say, "forms, measured forms, are everything; and this is the import couched in the story of Orpheus with his lyre spellbinding the wild denizens of the wood." And this he once applied to the disruption of forms going on across the Channel and the consequences thereof (127-28).

In each instance, Vere counts on the effect of orders and command to restore the men to their appropriate and expected roles, to shake them out of their contemplation and evaluation of what has just transpired. The "measured forms" are derived from the legal and social relationships that govern the interactions between captain and crew. Part of those forms incorporate the expectation of obedience, duty, and service. Vere assumes that the "measured forms" will contain "the ragged edges" (128) of the truth.¹¹⁸

118.

The most spectacular scene of discipline in all of *Billy Budd* occurs

Shortly after Billy's execution, the *Bellipotent* falls into battle against a French line-of-battle ship renamed the *Atheist* in the aftermath of the French Revolution. Vere is wounded in battle; his dying words shortly thereafter are "Billy Budd, Billy Budd" (129). Though to all outward appearances he appeared accepting of the outcome of the trial, his last words leave the impression that he was haunted to his own grave by Billy's death. He knew justice had not been done. "War," like law, "looks but to the frontage, the appearance" (112), and, therefore, the officially authorized naval account of Billy ignores the truth with all its ragged edges. The published chronicle records that Claggart discovered "that some sort of plot was incipient among an inferior section of the ship's company," and while "arraigning" Billy, "the ringleader," before the captain, Claggart was stabbed to death by Billy (130). Billy is described as "no Englishman, but one of those aliens adopting English cognomens whom the present extraordinary necessities of the service have caused to be admitted into it in considerable numbers" (130) (in other words, a description of Claggart, not Billy). Claggart, by contrast, is described as "respectable and discreet" (130), what we would expect of a petty officer, the heart of the fleet. Billy is described as having "paid the penalty of his crime. The promptitude of the punishment has proved salutary. Nothing amiss is now apprehended aboard H.M.S. *Bellipotent*" (131). Lest we miss the lesson of the subjective and suspicious nature of official and objective historical accounts, as opposed to pure fiction, Melville tells us: "The above, appearing in a publication now long ago superannuated and forgotten, is all that hitherto has stood in human record to attest what manner of men respectively were John Claggart and Billy Budd" (131).

But Billy's legend grows among the sailors despite the official version of the events. He takes on a Christ-like quality as those who witnessed his death remember his

immediately after Billy's execution. Although the "ritual of power" embodied by Billy's public hanging fails to subdue Vere's men, the captain's recourse to rote regimen immediately after the hanging succeeds Captain Vere's calculated reliance on the signaling whistles and structured drumbeats of his officers exemplifies the martial production of subjects amenable to the commands of the state.

Westover, *supra* note 108, at 374-75 (footnote omitted).

benediction and blessing of his captain, almost as if he forgave him; his hanging when "Billy ascended; and, ascending, took the full rose of the dawn" (124); and the fact that

[t]he spar from which the foretopman was suspended was for some few years kept trace of by the bluejackets. Their knowledges followed it from ship to dockyard and again from dockyard to ship, still pursuing it even when at last reduced to a mere dockyard boom. To them a chip of it was as a piece of the Cross (131).

The sailors "instinctively" know that Billy was falsely accused, that he "was a sort of man as incapable of mutiny as of wilful murder" (131). They care not at all that "the penalty was somehow unavoidably inflicted from the naval point of view." And so one of the sailors of an "artless *poetic* temperament" (131) composes some lines in tribute to set the record straight: "Billy in the Darbies."¹¹⁹ Billy in preparing for death concludes, "But aren't it all a sham?" (132). The sham is in the affectation of due process in bringing Billy to his death.

As in the cases of Bartleby and Babo, law's voice and accompanying mechanism concludes the story. The subordinate dies or is killed. The power of the subordinate over the master, however, lives on in the underground version of the events. Unlike Babo's rebellion and Bartleby's passive withdrawal, however, Billy's power is expressed by his loyalty, submission, and saintliness. In fact, the common sailors remain loyal to Billy and not to Vere nor to the navy's version of the episode.

There has been substantial scholarly debate about whether Captain Vere followed appropriate naval procedure

119.

[T]he last word of Melville's book comes from a fictive subaltern. This suggests that the narrator of *Billy Budd* sympathetically adopts the perspective of that subordinate figure. The "ragged edges" of the poem, like those of the novella itself, offer a homely portrait of a low-ranking seaman with whom its audience of fellow sailors can readily identify. The "messmate" of the ballad extends a cup to the condemned man in a gesture of respect and solidarity. The ballad's final lines record a request: "Just ease these darbies at the wrist." The chains that bind the impressed man remain fixed even in death, but the poem envisions a humane exchange even as it sentimentalizes the sea burial it portrays.

Id. at 377 (footnote omitted).

in trying Billy in the manner, time, and place he did. Richard Weisberg argues that Vere committed a number of critical procedural errors that undermined the legitimacy of the verdict, heightening the sense that a grave injustice occurred.¹²⁰ Critics of varying political persuasions have been critical of this view, ranging from Richard Posner¹²¹ to Brook Thomas.¹²²

I do not wish to be drawn into this dispute other than to say it seems to me that whether Vere was entitled to use the procedures he did, or whether he had the discretion to act differently, is only part of the point of the story. An important question is what procedure derives from the legal relationship within which Billy is embedded with his commanding officer and the navy. Though it is a fair question to ask whether or not Billy got the process he was entitled to under whatever law governed, the more important question is what was the legal regime governing Billy designed to accomplish? Was it designed to vindicate the authority of command and the state in cases of necessity and peril (it is an interesting problem, as to who

120. See RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 147-59 (1984). See also C. B. Ives, *Billy Budd and the Articles of War*, 34 *AM. LITERATURE* 31 (1962).

121. See Richard Posner, *Comment on Richard Weisberg's Interpretation of Billy Budd*, 1 *CARDOZO STUD. L. & LITERATURE* 71, 73 (1989) ("Harsh, maybe horrible, maybe unusual (as hinted by the surgeon, one of the members of the court-martial)—yes. But illegal—no."); see also Richard Posner, *From Billy Budd to Buchenwald*, 96 *YALE L.J.* 1173, 1183 (1987) (reviewing WEISBERG, *supra* note 120).

122.

But the emphasis on procedural technicalities often diverts people from questioning the assumptions of the entire legal system. . . . To base criticism of the legal order on procedural errors is to risk explaining injustice as the acts of corrupt, or even just well-intentioned but confused individuals in positions of authority. It avoids questioning the order to which the legal system is intricately related. In fact, Weisberg's reading implicitly legitimizes the legal forms that Vere claims to uphold, since Vere's actions become illegitimate when they do not conform to them.

THOMAS, *supra* note 29, at 212. It is, of course, possible to interpret the story with a limited holding, the demands of "the rationale of military justice." See Yoder, *supra* note 1, at 1116. See also DOLIN, *supra* note 30, at 128-35. By contrast, I am suggesting that Melville was more generally focused on legal relationships and that the sailor and his superiors were simply another example that fit along a continuum of social dependence.

decides what is necessary and perilous, or do we have no choice at sea or in time of war, unlike landsmen)? Or are the statutes or codes designed to protect dependent seamen from the abuse of power? Or does the answer lie somewhere in between? Are larger issues of social order at stake that supersede any process that Billy is due? Should Billy understand (as perhaps he does) that he sacrifices his rights of man when entering this relationship? Is he on notice?

On the other hand, this is not a relationship Billy entered voluntarily. Melville's point seems to be that the relationship of subordination and domination is the problem. If we believe or feel an injustice took place, we are simultaneously questioning the nature of the basic legal relationship that created the predicament or that underlies the problematic outcome. We are supposed to think that something is wrong with a legal system that creates or verifies social relationships that elevate hierarchy over justice. The procedural posture has been manipulated or is called into question because it is in service of a specific set of legal relations. Billy is treated according to the conventions of that relationship. Vere is entitled to use the procedure he chooses because he is authorized to do so in the legal and social context of his dominion over Billy.¹²³ It may be law, but Vere understands it probably is not justice.

V. CONCLUSION

Men may seem detestable as joint stock-companies and nations; knaves, fools, and murderers there may be; men may have mean and meager faces; but man, in the ideal, is so noble and so sparkling, such a grand and glowing creature, that over any ignominious blemish in him all his fellows should run to throw their costliest robes. That immaculate manliness we feel within ourselves, so far within us, that it remains intact though all the outer character seem gone; bleeds with keenest anguish at the undraped spectacle of a valor-ruined man. Nor can piety itself, at such a shameful sight, completely stifle her upbraidings against the permitting stars. But this august dignity I treat of, is not the dignity of kings and robes, but that abounding dignity which has

123. "Thus the reader is left to confront the problem of how the categories of legal definition help the manipulators of the law uphold their power against those who might potentially pose a threat to it." WEINER, *supra* note 33, at 155.

no robed investiture. Thou shalt see it shining in the arm that wields a pick or drives a spike; that democratic dignity which, on all hands, radiates without end from God; Himself! The great God absolute! The centre and circumference of all democracy! His omnipresence, our divine equality!

If, then, to meanest mariners, and renegades and castaways, I shall hereafter ascribe high qualities, though dark; weave round them tragic graces; if even the most mournful, perchance the most abased, among them all, shall at times lift himself to the exalted mounts; if I shall touch that workman's arm with some ethereal light; if I shall spread a rainbow over his disastrous set of sun; then against all mortal critics bear me out in it, thou just Spirit of Equality, which hast spread one royal mantle of humanity over all my kind! Bear me out in it, thou great democratic God! Who didst not refuse to the swart convict, Bunyan, the pale, poetic pearl; Thou who didst clothe with doubly hammered leaves of finest gold, the stumped and paupered arm of old Cervantes; Thou who didst pick up Andrew Jackson from the pebbles; who didst hurl him upon a war-horse; who didst thunder him higher than a throne! Thou who, in all Thy mighty, earthly marchings, ever cullest Thy selectest champions from the kingly commons; bear me out in it, O God!¹²⁴

The dignity of man "noble" and "sparkling" drawn from the "kingly commons" exceeds the "dignity of kings and robes." The king and his subject is no longer the prevailing model of political relations in society. Rather, "the arm that wields a pick or drives a spike" not endowed with "robed investiture" represents the true royalty, because he "shall at times lift himself to the exalted mounts." "The meanest mariners" are elevated by the "just Spirit of Equality, which hast spread one royal mantle of humanity over all my kind!" We are all fit to be treated as kings, and so Melville has demolished the primacy of hierarchy and dependency, and substituted in its place God's will, equality in a democracy.¹²⁵

124. MELVILLE, *MOBY-DICK*, *supra* note 2, at 117.

125. In *Billy Budd*, Melville "stated explicitly once again that his was a democratic stage, and affirmed the universality of passion in common men as well as in kings." MATTHIESSEN, *supra* note 117, at 500. As evidence of this sentiment, Matthiessen cites the following passage from the story: "'Passion, and passion in its profoundest, is not a thing demanding a palatial stage whereon to play its part. Down among the groundlings, among the beggars and rakers of the garbage, profound passion is enacted.'" *Id.* at 500-01 (quoting MELVILLE, *BILLY BUDD*, *supra* note 98, at 78).

This then is the touchstone of Melville's view of law, the interpretive lens through which he filters law as well as other social artifacts in America. In this passage from *Moby Dick*, Melville articulates the heart of his critique of law. The soul of a democracy, the promise of a democracy, lies in its commitment to equality. If law, or the rule of law, is to remain a significant force in a democracy, and not a sham, it must respect the undeniable democratic impulse of equal rights. If a legal system, however, replicates or creates a series of dependent relationships, hierarchies with disparities in power, then it fails to fulfill its democratic mission. People should not be treated differently—slaves should not be in the thrall of owners, workers should be endowed with as much freedom as employers, sailors should be treated with dignity and not live in fear. For equality to prevail, dependency must be eliminated.

Though he wrote them over the course of nearly a half century, there are striking thematic parallels between Melville's three stories, *Benito Cereno*, *Bartleby*, and *Billy Budd*. All three deal with the consequences of hierarchical relationships and the failure to recognize the distortions in human relations produced by dependency. Melville seems to be telling us that these relationships, established or created in part by legal norms, are not natural. They are also dangerous because they hide reality and prevent us from attaining equality.

For instance, because Delano is a prisoner of social attitudes that presume hierarchy and dependency, he does not apprehend that the slaves on board Cereno's ship have seized their freedom and turned the world upside down. The slaves understand this, however, and delude Delano into believing that everything is normal, that the unthinkable has not occurred. The lawyer in *Bartleby* has difficulty coping with the fact that his scrivener will not behave according to the accepted norms of the employment relationship. He slowly begins to perceive that Bartleby, in the stance of not participating, has seized the upper hand, and the order in the world again has been inverted. Similarly, Billy Budd as a common sailor in the thrall of his captain, asserts his natural dignity in the face of accusations that he threatened to assault the hierarchy. He pays for it with his life, but the sailors elevate him in death, knowing full well that he overcomes the positive law with his martyrdom to social order and control. In the established "jugglery" of

things in which the falsely accused are convicted, and those falsely accusing are dispatched without benefit of law, the law prefers "measured forms" to the "ragged edges" of justice.

Melville also suggests that, as a result of the inexorable operation of the legal relationships, those on the bottom rung of the hierarchy have no voice or are silenced—an alarming problem in a democracy. Babo goes to the gallows in *Benito Cereno* without his testimony or his story being heard. He refuses to talk, intuiting that his voice will not be heard anyway. *Bartleby's* voice is not understood or listened to because, in the context of the understandings of the employment relationship, preferring not to work is not intelligible. His anguish goes unresolved until he starves to death. He prefers silence. *Billy Budd* is affected with a stutter that prevents him from defending himself. Powerless when accused by officers with rank, he involuntarily strikes out in the only way he knows with terrible consequences. Denied a voice, he seeks alternative expression.

The official voices in these stories, as opposed to the mostly silenced voices, are not truthful or reliable—each supporting the status quo. There are documents—legal or official—in *Benito Cereno* and *Billy Budd*, and rumors, and dead letters, as in *Bartleby*. In each case, the law intervenes—to hang Babo and *Billy Budd*, to imprison *Bartleby* and to superintend his death. *Benito Cereno's* deposition is only a partial shard of what happened, suggesting that law at best can only cope with, or be interested in, partial truths. The official naval account of *Billy's* acts inverts the truth; it is not even a partial truth, but a complete lie. In *Billy Budd* and *Benito Cereno*, the official accounts protect established authority from alternative narratives that threaten to undermine the accepted legal norms or hierarchies. Law's version of the "truth" reinforces hierarchy.

Likewise, all three tales contain a subversive message about the dangers associated with ignoring the promise of equality. Some sort of mutiny or revolt by the voiceless or powerless will occur because the hierarchies cannot be maintained forever. The hierarchies may be the law, but they cannot be justice.

In his extraordinary metaphorical meditation in *Moby Dick* on the function of law, Melville asked:

Is it not a saying in everyone's mouth, Possession is half of the law: that is, regardless of how the thing came into possession? But often possession is the whole of the law. What are the sinews and souls of Russian serfs and Republican slaves but Fast-Fish, whereof possession is the whole of the law? What to the rapacious landlord is the widow's last mite but a Fast-Fish? What is yonder undetected villain's marble mansion with a door-plate for a waif; what is that but a Fast-Fish?

....

What are the Rights of Man and the Liberties of the World but Loose-Fish?¹²⁶

In *Benito Cereno*, *Bartleby*, and *Billy Budd*, subordinates die for the sin of challenging the hierarchy that commands them. However, the strategies of subversion of each of the characters is different: For Babo, it is rebellion; for *Bartleby*, passivity and withdrawal; for Billy, loyalty, fidelity, and submission. Yet each in the process of dying asserts a mysterious power over his master, transforming or haunting him in his own way: Benito's tortured death, the lawyer's despair, Vere's dying words. In each instance, the law's role is to set the world on a straightened course; no reversal of roles is tolerated. The lesson may be that these tragedies will occur as long as the hierarchies persist in a democracy. The powerless or subordinate will seek to demonstrate their power over their masters until they attain equality. So an ongoing dialectical, perhaps paradoxical, relationship will exist between powerlessness and power, law and escape from law. Those silenced may ultimately be empowered by their voicelessness.

It's tempting to reduce the search for meaning in Melville's work to dualities or dichotomies. To varying degrees *Benito Cereno*, *Bartleby*, and *Billy Budd* might be about good versus evil, right versus wrong, guilt versus innocence, truth versus fiction, history versus fiction, reason versus intuition or emotion, head versus heart, slavery versus freedom, the universal rights of man and/or natural law versus positive law, the terror of the French Revolution versus the formalism of Anglo-American law, natural rights versus property rights, morality versus law, equality versus common law, nature versus order, the individual versus the state, equity versus hierarchy and dependence, and law

126. MELVILLE, *MOBY-DICK*, *supra* note 2, at 397, 398.

versus justice. The list is undoubtedly not exhaustive.¹²⁷ Nevertheless, part of Melville's strength is that he deals in universal themes that have been animated by specific historical contexts. Like Shakespeare, he excels in drawing out the general from the particular. Virtually everything he writes about could be analyzed by using some of the categories suggested in a variety of dual conceptualizations. As in all dialectical refrains the oppositional categories cannot exist, indeed make no sense, unless in relationship to each other. The play between them on all sorts of levels makes the story. The genius of Melville's art resides in allowing us as readers to discover in his stories the meanings that most

127. For instance, Carolyn Karcher in analyzing the "critical controversy" surrounding *Billy Budd*, describes

Melville himself . . . as deeply divided at heart as his critics among themselves; for the moral dilemma central to *Billy Budd*—the dilemma of the Sermon on the Mount versus the Articles of War, justice versus expediency, freedom and human dignity versus authority, rebellion versus conformity, social ferment versus despotism, son versus father, Jobian or Promethean man versus God, is none other than the conflict Melville had struggled unsuccessfully to resolve throughout his life.

KARCHER, *supra* note 45, at 294 n.55, 294. Merton Sealts, Jr. adds his own categories to an analysis of *Billy Budd*:

[Melville] places Vere as the pivotal point of the dialectic that runs throughout the story, whether one looks at its characterization—Billy versus Claggart—or its themes: not only good and evil, but also innocence and experience, frankness and concealment, nature and society, barbarism and civilization, heart and head, love and justice, what is right and what is legal, peacemaking and warmaking, the *Rights-of-Man* and the *Bellipotent*. For Melville and his art, as he himself acknowledged, such "unlike things must meet and mate."

SEALTS, *supra* note 15, at 60. For an interesting reading of the natural law/positive law transformation, see ROBERT FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 287-90 (1984).

In evaluating Vere's conduct, the surgeon asks whether or not Vere is "unhinged" (102). Melville then inquires "who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the first blindingly enter into the other. So with sanity and insanity" (102). As to the truth of sanity versus insanity, Vere's "degree of aberration, everyone must determine for himself" (102). Each perception by its very nature "blindingly enter[s] into the other" (102), defined by its oppositional referent. For an interesting analysis of the surgeon's role in the story, and the problem of indeterminacy, see Soifer, *supra* note 113, at 1955-57. Generally, "the blurring of explicit categories threatens the definitions imposed by law and calls into question the means by which legal decisions are reached within each boundary." WEINER, *supra* note 33, at 155.

deeply resonate in our experiences. He has something to say to all of us, even as historians of law.