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## Winterset and the Recrudescence of Ressentiment

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## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1863
II.	<i>WINTERSET</i> —THE PLAY ITSELF . . . . .	1865
III.	<i>WINTERSET</i> AND THE ABUSE OF LEGAL AUTHORITY . . . . .	1869
IV.	<i>WINTERSET</i> IN THE CONTEXT OF OTHER ANDERSON PLAYS . . . . .	1877
V.	<i>WINTERSET</i> AND <i>BILLY BUDD</i> , <i>SAILOR</i> COMPARED . . . . .	1880
VI.	CONCLUSION . . . . .	1886

## I. INTRODUCTION

*Art instructs.*

- JOHN GARDNER, ON MORAL FICTION 39 (1978).

In his collection of essays, *Punishment and Responsibility*, Hart asserts that “[n]o one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making, or unmaking, laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things.”<sup>1</sup> Hart devotes much time and effort to rationalizing principles of criminal punishment, responsibility and retribution, so perhaps we should expect the time to be made. For those with the time, these concerns are occasionally addressed through less pedantic and more vicarious ways, such as drama, fiction or poetry.

This challenge to rationalize the impact of political and moral decisions with the daily practice of law and adjudication makes the study of literature a fruitful area for illuminating the discussion of punishment and retribution

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1. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 2 (1968).

in a legal context. As one commentator in the now-established “law and literature” field has noted, “[t]he virtue of literary stories about law is that they force us to grapple with the unique elements that often come to the fore when law acts on people.”<sup>2</sup> The use of a “fictional world” to provide “a dramatic enactment” of normative claims has been attempted elsewhere.<sup>3</sup> In this regard, Maxwell Anderson’s 1935 verse play *Winterset*, taking its theme from the *Sacco-Vanzetti* case,<sup>4</sup> is one of the more prominent examples of law in literature, and to use a phrase of Judge Richard Posner, provides a cynosure here for a discussion of “the literary indictment of legal injustice.”<sup>5</sup> Such an enactment of claims has provided fodder for a debate between Professor Richard Weisberg and Judge Richard Posner with regard to *Billy Budd, Sailor* and the role of literature in illustrating injustice. *Winterset* as a contemporary play should be considered along with *Billy Budd, Sailor* in its development of themes of revenge and “ressentiment”<sup>6</sup> that have framed a significant portion of the law and literature debate.<sup>7</sup> It is a debate as to whether authority or reason will predominate.<sup>8</sup> This article explores *Winterset* in the context of that debate, and as an example of the resentment in the form of rancor identified by Weisberg as underlying

2. Richard H. Weisberg, *Entering With a Vengeance: Posner on Law and Literature*, 41 STAN. L. REV. 1597, 1612 (1989).

3. See, e.g., Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386 (1985); see also Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Peter R. Teachout, *Lapse of Judgment*, 77 CAL. L. REV. 1259 (1989); Robin West, *Law, Literature and the Celebration of Authority*, 83 NW. U. L. REV. 977 (1989); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

4. *Commonwealth v. Sacco*, 158 N.E. 167 (Mass. 1927); *Commonwealth v. Sacco*, 156 N.E. 57 (Mass. 1927); *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926).

5. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 132 (1988).

6. Weisberg defines “ressentiment” to loosely involve the misuse of power through legalistic language that cloaks the actor with authority. RICHARD A. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 4-5 (1984). Posner refers to it as “the rancorous envy of the naturally weak toward the naturally strong.” Richard A. Posner, *From Billy Budd to Buchenwald—The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, 96 YALE L.J. 1173, 1174 (1987). The word itself derives from Nietzsche. *Id.*

7. Compare RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 132-71 (1988) with RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 131-76 (1984); see also Weisberg, *supra* note 2, at 1597.

8. Weisberg, *supra* note 2, at 1606.

*Billy Budd, Sailor* and its recurrence, like a bad sore, in this century in the context of *Winterset* and the *Sacco-Vanzetti* case. Before proceeding to a more specific discussion of the debate, a few words are in order about the play itself.

## II. WINTERSET—THE PLAY ITSELF

It is difficult to understand the absence of attention paid in law and literature discussions to Maxwell Anderson. Although not an attorney, several of his plays have jurisprudential themes and build around them. Anderson's principal literary efforts occurred in the 1930's; *Winterset* among them. His more significant plays include judges and trials in a variety of settings, such as *Joan of Lorraine*, dealing with Joan of Arc, and *Second Overture*, set during the Russian Revolution. An historical playwright and realist, Anderson deliberately used poetic verse to make an often harsh social reality transcend its time and place into a more universal and lasting commentary.<sup>9</sup> He is no Homer or Aeschylus in ability; nonetheless, like them he was working with history, myth, and legend as well as dramatic tragedy, although in a modern setting in the case of *Sacco and Vanzetti*. Aware of this, he wrote "the playwright will also try to make that fable coincide with something in himself that he wants to put into words" and those words must be written for the time and place in which the older fable is, in essence, re-created.<sup>10</sup>

*Winterset* appeared in 1935, several years after the execution of Nicola Sacco and Bartolomeo Vanzetti, two anarchists and alleged murderers, and

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9. The most recent and comprehensive, if biased, biography of Anderson appears to be ALFRED S. SHIVERS, *THE LIFE OF MAXWELL ANDERSON* (1983) (while not particularly critically oriented, and often assuming a sometimes distracting familiarity with its subject, it serves as an introduction to Anderson). See also *DRAMATIST IN AMERICA: LETTERS OF MAXWELL ANDERSON 3-25* (Laurence G. Avery ed. 1977) [hereinafter *LETTERS*]; MABEL DRISCOLL BAILEY, *MAXWELL ANDERSON, THE PLAYWRIGHT AS PROPHET* (1957); BARRETT H. CLARK, *MAXWELL ANDERSON: THE MAN AND HIS PLAYS* (1933); ALFRED S. SHIVERS, *MAXWELL ANDERSON* (1976) (a predecessor work). For source material relating to Anderson, see *A CATALOGUE OF THE MAXWELL ANDERSON COLLECTION AT THE UNIVERSITY OF TEXAS* (1968); ALFRED S. SHIVERS, *MAXWELL ANDERSON: AN ANNOTATED BIBLIOGRAPHY OF PRIMARY AND SECONDARY WORKS* (1985) [hereinafter *SHIVERS, BIBLIOGRAPHY*].

10. Randall J. Buchanan, *Maxwell Anderson's Rules of Playwriting and Their Use in His Plays*, in *MAXWELL ANDERSON AND THE NEW YORK STAGE* 59, 60 (Nancy J. Doran Hazelton & Kenneth Kraus eds., 1991) (citing *MAXWELL ANDERSON, OFF BROADWAY: ESSAYS ABOUT THE THEATER* 47 (1947)).

earned Anderson a Pulitzer Prize.<sup>11</sup> Anderson had previously utilized the *Sacco-Vanzetti* case as the subject of a co-authored play, *Gods of the Lightning*, which appeared in 1928.<sup>12</sup>

The historical facts of the *Sacco-Vanzetti* case involve the murder of a paymaster in Braintree, Massachusetts. It occurred during a time of intense nationalistic and xenophobic feeling that found some expression in the arrest of two Italian-American anarchists, Sacco and Vanzetti. Although convicted, the two defendants aroused intense sympathy among the intellectual and civil rights community.

*Winterset* revolves around its three protagonists seeking revenge or vindication, and each is mad in his own way. Judge Gaunt, the presiding judge at the Romagna trial in *Winterset* and putatively based upon Judge Webster Thayer, the actual trial judge in Sacco and Vanzetti's trial,<sup>13</sup> roams the streets of New York, dislocated and obsessed, like the Ancient Mariner, with his self-justifying tale. Trock Estrella, the "actual" gunman in the context of the play who committed the murder for which the wrongly accused man was executed, has six months to live and is seeking to silence those who may give away his guilt. He may be compared to one of the gang members who was actually involved in the real case. Mio Romagna, son of the Vanzetti-styled innocent Bartolomeo Romagna,<sup>14</sup> is also

11. Others have found inspiration in the Sacco-Vanzetti affair. See, e.g., EDNA ST. VINCENT MILLAY, *Justice Denied in Massachusetts*, in COLLECTED POEMS 230, 231 (Norma Millay ed., 1956) ("We shall die in darkness, and be buried in the rain."); JOHN DOS PASSOS, *THE BIG MONEY* 520-21 (1979) ("they have clubbed us off the streets they are stronger they are rich they hire and fire the politicians the news papereditors the old judges the small men with reputations . . . the immigrants haters of oppression lie quiet in black suits in the little undertaking parlor in the North End") (spacing in original). A comprehensive review of the *Sacco-Vanzetti* trial in literature is found in G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO & VANZETTI* 375-454 (1948).

12. JOUGHIN & MORGAN, *supra* note 11, at 402.

13. The inspiration for the play came from a lawyer friend and college classmate, attorney Robert H. Montgomery, who Anderson said told him that the trial judge, Webster Thayer, "really deserves your sympathy." LETTERS, *supra* note 9, at 313 (quoted in an interview with Anderson conducted by Louis M. Starr and transcribed as "Anderson memoir"). Montgomery authored his own version of the case, which is found in ROBERT H. MONTGOMERY, *SACCO-VANZETTI: THE MURDER AND THE MYTH* (The Americanist Library ed., Western Islands 1965) (1960). Shivers disputes the notion that the idea came from KING LEAR, apparently suggested in some quarters. SHIVERS, *BIBLIOGRAPHY*, *supra* note 9, at 147-48. Anderson himself claims not to remember much about the writing of *Winterset*. LETTERS, *supra* note 9, at 313.

14. See JOUGHIN & MORGAN, *supra* note 11, at 418. In actuality, Sacco had a son but Vanzetti did not, although some have suggested that what is said about Romagna render him consistent with the persona of Vanzetti. See *id.*

obsessed with the case and seeks vengeance upon those who would continue to slander his father.

There was another part-time member of the gang, a driver named Garth Esdras, who knew the truth but was never called as a witness at trial. This is consistent with the actual case, as there was a witness whose testimony was never taken.<sup>15</sup> In reality, the “new evidence” was a confession from a convict named Madeiros and was the subject of a motion before Judge Thayer; however, the motion was denied and the conviction upheld by the Supreme Court of Massachusetts.<sup>16</sup>

Briefly summarized, in Act One, Trock Estrella, a small-time hoodlum, has been released from prison. Garth Esdras becomes the witness that was not called and the time frame is altered, since the execution of Romagna in the play occurred eleven years prior to the action. As in the framework for a revenge play, the actions precipitating the revenge have occurred elsewhere and previously, and only alluded to in the “present” of the play. Estrella is looking for Garth as a result of a Professor Hobhouse (presumably, based upon Felix Frankfurter’s work)<sup>17</sup> stirring up new evidence. Estrella has been given no more than six months to live by his doctor and plans his revenge upon the world with impunity. He is accompanied by his subordinate, Shadow. With little imagination, we can add “of doubt.”

Nearby, Garth Esdras wrestles with his conscience. He has received a letter from a lawyer telling him “[d]on’t get me wrong, but stay in out of the rain the next few days, just for instance.”<sup>18</sup> He knows Romagna was not guilty, but he never came forward with his evidence.<sup>19</sup>

Estrella comes to Garth’s house to find out what he may have told others in light of the new investigation and the mention of Garth’s name in “the professor’s pamphlet.” Estrella claims that the trial judge, Judge Gaunt, has “gone off his nut. He’s got that damn trial on his mind, and been going

15. FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 92-119 (University Library ed., Little, Brown, and Company 1962) (1927). As impressed as Frankfurter was by this evidence, Montgomery dismisses it with equal zealotry. MONTGOMERY, *supra* note 13, at 205-23, 233-50.

16. See Weisberg, *supra* note 2.

17. See FRANKFURTER, *supra* note 15.

18. MAXWELL ANDERSON, *WINTerset* act 1, sc. 2.

19. One wonders who the lawyer was who wrote it. Was it Garth’s? Was it Romagna’s lawyer trying to warn Garth? If so, should he not have come forward with the information? Could it have been Estrella’s lawyer and, if so, had he breached a confidence? While the professional ethics issues are of more than a passing interest to the lawyer, it should be noted that “A Lawyer Should Preserve the Confidences and Secrets of a Client.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).

round proving to everybody he was right all the time and the radicals were guilty . . . .”<sup>20</sup>

In the final scene of the first act, Judge Gaunt makes his way to Garth’s house, where Garth shelters him. By his own admission, he is a man on an errand. While the judge retreats to the shadows, Mio Romagna, son of the wrongly executed man, comes to the same place searching for evidence of his father’s innocence. Eleven years have passed since that time, but the “same old business” consumes him. He meets Miriamne briefly. He is part of a lost generation, cut off:

When the State executes your father, and your mother dies of grief, and you know damn well he was innocent, and the authorities of your home town politely inform you they’d consider it a favor if you lived somewhere else—that cuts you off from the world—with a meat-ax.<sup>21</sup>

Mio Romagna, also aware of the professor’s research, has come for his own vengeance. He tells Miriamne that “all roads are mine that might revenge” his father.<sup>22</sup> In the hidden recesses of the surrealistic set (with detail, however, still vague and unsettling), Estrella and Shadow exchange threats as Shadow fears that Estrella’s plans to kill witnesses and the judge may incriminate him. Almost immediately afterward, as they part, Estrella’s men ambush and shoot Shadow.

In Act Two, Judge Gaunt comes to the Garth house, introduces himself, and feels compelled to recite his version of the case and justify his actions in light of Professor Hobhouse’s recent published account. Mio returns and asks Garth about the crime. He recognizes Judge Gaunt and they debate the fairness of the trial. Trock finds the house. He wants to “remove” the judge and ascertain what Garth has said. Shadow, who still lives, comes in and threatens Trock at gunpoint, but then collapses. Mio takes the gun and keeps Trock at bay as Gaunt attempts to call the “court” to order. As in the paradigm of revenge tragedy, *Winterset* has its own play within a play; in this case the play being the mock trial at gunpoint in the Esdras house. Mio accuses Trock of the murder; Trock claims it was Shadow. Again, Judge Gaunt recites the justifications for the result and the manner in which the legal system operated. They are interrupted by the police, who have been looking for the judge. They take Gaunt away, after failing to find Shadow’s body at Mio’s urging. Trock simply walks out, leaving Miriamne, Esdras

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20. MAXWELL ANDERSON, *WINTERSSET* act 1, sc. 2.

21. *Id.* act 1, sc. 3.

22. *Id.*

and Garth behind. Mio pursues Trock Estrella into the rainy night.

In Act Three, the star-crossed lovers Mio and Miriamne were ambushed and killed by Trock and his men. Mio's own indecision, or change of heart, lead to his own end. The play ends with Esdras lamenting the "masterless night."

### III. *WINTERSET* AND THE ABUSE OF LEGAL AUTHORITY

We can now frame the parameters of the discussion by placing *Winterset* within the viewpoints generally set forth by both Posner and Weisberg by beginning with the former. *Winterset* is a striking example of Posner's "revenge literature,"<sup>23</sup> because the revenge at issue occurs against a backdrop of a fairly well-developed and sophisticated criminal justice system. Anderson, as a student, was familiar with Elizabethan drama and therefore the vehicle of revenge as exemplified in that period's works.<sup>24</sup> Anderson hypothesizes the legal system itself as a form of legitimized societal revenge, as opposed to law itself being a replacement by a more rational means of dispute resolution and criminal retribution, and his sympathies appear mixed.<sup>25</sup> Even if mistakes are made, they must be legitimized because the political ramifications of such mistakes would be worse than the legal miscarriage itself. Despite the existence of that order, tragedy still results; an innocent man has been executed. It was not the result of a lone judge exercising discretion. In the play as well as in the real case, reference is made to the imprimatur the Supreme Court of Massachusetts gives to the judge's rulings.<sup>26</sup> Therefore, *Winterset* stands for the proposition that a developed legal system may be seriously flawed and does *not* necessarily replace revenge as an appropriate mechanism in all cases. In other words, a legal system—its configuration and viability—is

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23. Posner identifies this genre and discusses it in depth. POSNER, *supra* note 5, at 25-70.

24. SHIVERS, BIBLIOGRAPHY, *supra* note 9, at 39.

25. Anderson was no stranger to direct involvement in the court system. An individual named Francis Hackett sued Anderson for plagiarism in Anderson's play *Anne of the Thousand Days*. Anderson, represented by John Wharton of Paul Weiss Wharton & Garrison, counterclaimed for libel. LETTERS, *supra* note 9, at 238. The suit was settled approximately a year after it began. *Id.* at 240. Anderson was also sued by a typist/secretary named Orrie Lashin, who claimed Anderson plagiarized her work; that case settled as well. *Id.* at 239.

26. At least one source has called Thayer inconsequential, and attempted to focus more blame and attention upon the appellate judges who upheld his evidentiary and motions rulings. JOUGHIN & MORGAN, *supra* note 11, at 509.

only a function of public tolerance, a type of “rule of recognition” that might find favor with some positivist thinkers as discussed below.

In his discussion on revenge literature, Posner suggests that vengeance is an inefficient means of legal control that evolved from private to public enforcement of law.<sup>27</sup> He notes, however, that instead of eliminating revenge, law “channels” it and “replaces it as system but not as feeling.”<sup>28</sup> It is that persistence of feeling which causes law, in Posner’s view, to create the conditions so that the revenge “will not endanger social order.”<sup>29</sup> To the extent that Posner considers law a foolproof replacement for revenge, that is disputed. In his own contribution to the law and literature field, Gewirtz has argued, for example, that *Oresteia*, by Aeschylus, is an early example of revenge literature demonstrating that law and legal process cannot be made, nor should be made, wholly rational.<sup>30</sup> This tension between primal instincts towards revenge and the attempt of a legal system to harness and redirect such instincts in an acceptable fashion is at the core of *Winterset*. Stated differently, if Posner is correct that a legal system is the natural evolution to a more controlled method of channelling revenge, then such a position will have to accommodate the observable phenomenon of misuse of that legal system or, more accurately, a specific use of the legal system to exact a political purpose, such as revenge, upon certain segments of society.

We therefore return to the question initially posed, what *Winterset* can demonstrate with regard to Posner’s argument on the one hand that a legal system replaces revenge, and Weisberg’s on the other that a legal system can provide the opportunity for misuse of authority in the guise of judicial correctness, otherwise denominated *ressentiment*. It is the play’s combined plotline of three separate characters set on three separate courses of revenge, critical to Posner’s themes,<sup>31</sup> that gives the play part of its interest from a jurisprudential perspective in terms of Posner’s parameters and those challenged by his anti-authoritarian critics, and must be considered part and parcel of the discussion of resentment and authority.

The current focus of those utilizing literature for legal purposes is, at its core, the abuse of law and its language by those professing to uphold the law. At its most basic, this appears to be the focal point for the debate

27. POSNER, *supra* note 5, at 32.

28. *Id.* at 33.

29. *Id.*

30. Paul Gewirtz, *Aeschylus’ Law*, 101 HARV. L. REV. 1043, 1049 (1988).

31. POSNER, *supra* note 5, at 25-70. Judge Posner argues for a category of literature entitled “revenge literature,” with more focus on revenge as a legal theme. *Id.* at 69.

between Weisberg and Posner. Weisberg may be generally read as suggesting that literature involving legal themes sheds light upon ethical questions<sup>32</sup> or, more particularly, as arguing that literature demonstrates the dangers of legal formalism and the destructive ramifications of that.<sup>33</sup> Posner, on the other hand, argues extensively through *Law and Literature* that such a use of literature is itself a destructive type of formalism because it becomes too literal, and that literary use of law is no more than a metaphoric use of law as symbolic of fate, or adversity.

For example, although Posner insists on considering *Hamlet* a revenge play,<sup>34</sup> Weisberg finds Hamlet himself a prototype of resentment.<sup>35</sup> Weisberg, discussing resentment as a persistent rancor, argues that through narrative, through a "legalistic proclivity," protagonists in fiction have acted in legal capacities to legitimize otherwise unjust results within the framework of a legal system.<sup>36</sup> He posits, through a variety of literary texts, the notion that resentment is antithetical to the concept of justice, and that an authoritarian figure can utilize the language, or mock language, of law to achieve political ends. This concept is approached from a different angle by Professor James Boyd White, who argues that law is in reality an exercise in rhetoric, in community, and should be seen as having social, as opposed to purely positivist, implications.<sup>37</sup>

The scheme of resentment is "a series of creative verbalizers [who] organize criminal proceedings against a nonverbal defendant whose moral systems differs from their own."<sup>38</sup> The effort is deemed "considerate" communication, since the communicator seems at heart to believe in the necessity of politeness and of giving due deference to form and process.<sup>39</sup>

32. See John D. Ayer, *Aliens are Coming! Drain the Pool*, 88 MICH L. REV. 1584 (1990) (reviewing STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) and RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)).

33. Nancy T. Hammar, Book Review, 88 Mich L. Rev. 974 (1990) (reviewing RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984)).

34. POSNER, *supra* note 5, at 54-70.

35. Richard H. Weisberg, *More Words on The Failure of the Word: A Response to Heinzelman and Levinson*, 7 CARDOZO L. REV. 473, 480-81 (1986); see generally POSNER, *supra* note 5, at 64 n.34.

36. WEISBERG, *supra* note 6, at 4.

37. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* x-xiv (1985).

38. WEISBERG, *supra* note 6, at 133-34.

39. *Id.* at 139.

Weisberg states his theme as culminating in Herman Melville's *Billy Budd, Sailor* as finding resentment prevailing, that such "verbal formalism and reactive hatred are the principal legacy of the old value system."<sup>40</sup> One could also view this embodiment of resentment as the prevailing authority to justify status quo, regardless of the actual law or a sense of justice. Given Weisberg's approach to certain literary works from the standpoint of whether they exemplify the workings of a resentment as he has argued, this approach finds fertile terrain in *Winterset*, where the analogy to *Billy Budd* and Captain Vere are present in the verbalization and fictionalization of the judge in the *Sacco-Vanzetti* case.

Posner is dismissive of these types of arguments to the extent that he suggests they read too much into the literary works they discuss, although applauding the thoughtfulness about legal issues they engender.<sup>41</sup> In direct counterpoint to Weisberg's discussion of *Billy Budd, Sailor*, for example, Posner finds a sympathetic figure in the form of the officer who tries Budd, Captain Vere, performing in a fully consonant manner with the spirit and letter of the law.<sup>42</sup> In *Billy Budd*, a young sailor, Billy Budd, was framed for mutiny by the ship's petty officer, Claggart. In the presence of Captain Vere, Budd was unable to respond to the allegation because of his speech impediment. Vere interpreted this as Budd needed more time. Vere put his arm around Budd, at which point Budd's arm shot out and hit Claggart, killing him. Vere convened a drumhead court and after hearing the case, convicted Budd and sentenced him to be hanged. Whereas Weisberg has devoted considerable effort to questioning the legal premises underlying Vere's action and presenting him as a prototype of resentment,<sup>43</sup> Posner has objected to this reading in a defense of Vere and authority.<sup>44</sup>

Posner would argue that *Winterset* and its legalistic themes are merely metaphors for something else, that is, it is not a play about procedure or due process, but uses those features to build a classic story dealing with classic themes of envy, revenge and love. He would emphasize mitigating factors in support of Judge Gaunt's actions as he did in his defense of Captain Vere

40. *Id.* at xiv.

41. POSNER, *supra* note 5, at 174-75.

42. *Id.* at 164.

43. WEISBERG, *supra* note 6, at 131-76; see also Richard H. Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982) [hereinafter Weisberg Judges].

44. POSNER, *supra* note 5, at 155-65; see also Richard A. Posner, *From Billy Budd to Buchenwald—The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, 96 YALE L.J. 1173 (1987)

and find numerous examples within the play of Gaunt's own statements. In the case of Sacco and Vanzetti, for example, there was a jury.<sup>45</sup> Although there is evidence that one juror was tainted and malicious, the remaining eleven jurymen were considered impartial.<sup>46</sup> Posner would presumably find Judge Gaunt vindicated to a large extent by the fact that he was not the ultimate fact-finder and, equally significant, he was sustained on appeal.

Weisberg's textual approach would serve well, however, in bringing *Winterset* back within the fold of a work about resentment. Gaunt uses poetic language, highly formalistic language, which is the essence of the authority figures who are embodiments of resentment. Such language is used to rationalize the acts that are causing the defensiveness in the first place. It is most arresting to note the dramatic and fictional, if hauntingly accurate, commentary of *Winterset*'s Judge Gaunt in attempting to justify his conduct at the trial:

Suppose it known,  
but there are things a judge must not believe  
though they should head and fester underneath  
and press in on his brain. Justice once rendered  
in a clear burst of anger, righteously,  
upon a very common laborer,  
confessed an anarchist, the verdict found  
and in the precise machinery of law  
invoked to know him guilty—think what furor  
would rock the state if the court then flatly said;  
all this was lies—must be reversed? It's better,  
as any judge can tell you, in such cases,  
holding the common good to be worth more  
than small injustice, to let the record stand,  
let one man die. For justice, in the main,  
is governed by opinion. . .<sup>47</sup>

This is an expression of an analogous type of rationale that Weisberg argues is employed by Captain Vere in his judgment and sentencing of Billy Budd in terms of its reference to social and political expediency of the day.

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45. See JOUGHIN & MORGAN, *supra* note 11, at 201-20 for a general discussion of the jury.

46. *Id.* at 203. Notwithstanding this, Joughin and Morgan still consider the verdict tainted and the result of an overriding fear of anarchy; as they note, "[a] sick society makes sick decisions." *Id.* at 205.

47. MAXWELL ANDERSON, *WINTERSSET* act 2.

It is precisely the situation described by Weisberg when he notes that in *The Brothers Karamazov* and *Billy Budd, Sailor* “the now fully developed verbal character uses the language of the law to control a less articulate, more popular, and basically well-adjusted criminal defendant.”<sup>48</sup>

That this is so is supported by the comments of the non-lawyers in the play. For example, these views are consistent with those held by Garth Esdras himself. As Garth explains to his sister, “everybody knew Romagna wasn’t guilty! But they weren’t listening to evidence in his favor. They didn’t want it. They don’t want it now.”<sup>49</sup> Presumably, “they” refers to the jury that convicted Romagna. As to why he wasn’t called, he says “[s]o far as I know they never’d heard of me—and I can assure you I knew nothing about it.” Early in the play there is the notion planted of law as the avenger; the paymaster was murdered, an Italian scapegoat was available,<sup>50</sup> and justice would be done in accordance with what is convenient for the State as opposed to the individual. For example, Romagna’s friend, Carr, tells him “[t]he State can’t afford to admit it was wrong, you see. Not when there’s been that much of a row kicked up over it. So for all practical purposes the State was right and your father robbed the pay roll.”<sup>51</sup> To which Mio Romagna replies, “[t]here’s still such a thing as evidence.”<sup>52</sup>

Part of the backdrop of this discussion of Judge Gaunt’s literary exposition and its comparison with the actual Judge Thayer, as well as Captain Vere in *Billy Budd*, are the basic tenets of positivism. Although not discussed by either Posner or Weisberg in their argument over the interpretation of Vere’s actions in *Billy Budd*, the literary argument over resentment, authority and use of language and theme can also be viewed against a

48. WEISBERG, *supra* note 6, at xii.

49. MAXWELL ANDERSON, WINTERSET act 1, sc. 2.

50. One recent commentator on American legal history sees the case as nothing more than this. See CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 368 (1980).

51. MAXWELL ANDERSON, WINTERSET act 1, sc. 3.

52. *Id.* To which Carr states:

It’s something you can buy. In fact, at the moment I don’t think of anything you can’t buy, including life, honor, virtue, glory, public office, conjugal affection and all kinds of justice, from the traffic court to the immortal nine. Go out and make yourself a pot of money and you can buy all the justice you want. Convictions obtained, convictions averted. Lowest rates in years.

*Id.*

Mio Romagna’s reply sets the tone for the play; he is out for vengeance, to “go back, and hang the carrion around their necks that made it!” He will “find out who did it and make them see it till it scalds their eyes and make them admit it till their tongues are blistered with saying how black they lied!” *Id.*

jurisprudential setting. In other words, it is not only a question of whether Judge Gaunt in *Winterset* is operating with rancor and misusing language, but even conceding that, the issue is also whether he is operating within the bounds of acceptable behavior as an example of a type of jurisprudential philosophy. In this regard, having begun this essay with a quote from Hart, it is possible to shift the focus of the discussion slightly to view Judge Gaunt as a literary exposition of a judge acting in accordance with positivist principles.

Hart noted, for example, in *Punishment and Responsibility*, that obedience to law exists “because it offers a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear.”<sup>53</sup> Therefore, in order to have a legitimate legal system, the only “minimum conditions” are

rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.<sup>54</sup>

Indeed, Hart has argued that a legal system may claim authority even though its citizens may challenge its moral legitimacy, provided that there is continued acceptance of the law based upon the actions of officials and their criticisms of officials who deviate from the accepted law.<sup>55</sup> Morality is irrelevant provided that acceptance of a rule of recognition, which itself defines how other rules are determined, exists.

In this regard, then, a positivist would find the legal system discussed in *Winterset* an effective one, particularly since there is acceptance of moral aberrations by those subject to the particular legal system who are, in essence, all of those who are not judges.<sup>56</sup> Deviations from the rule are met by coercion; the fictional Judge Gaunt as well as the actual Judge Thayer both find support in the affirmation by the Supreme Court of Massachusetts. This is significant because the real judge, like the fictional judge, was upheld in his exercise of discretion in rulings on various points, particularly regarding the scope of cross-examination.<sup>57</sup> This is also

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53. HART, *supra* note 1, at 50.

54. H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961).

55. For a recent criticism of Hart’s positivism as ultimately self-serving, see David Dyzenhaus, *Law and Public Reason*, 38 MCGILL L. J. 366 (1993).

56. HART, *supra* note 1, at 50.

57. See Weisberg, *supra* note 2.

meaningful in analyzing this work of literature and its portrayal of a judge seemingly steeped in positivism and using that positivism as a basis for acting, as Weisberg would have it, with rancor. In other words, this was not the work of a single judge, but of a system that sustained that judge's rulings on appeal. *Winterset*, then, through its portrayal of a real judge through a fictitious judge that nonetheless speaks against a legitimate jurisprudential background, demonstrates the arguments for and against that jurisprudence by vivid example in a way that the more academically oriented essay could not. Language becomes critical, whether in the hands of a playwright or judge. In *Winterset*, poetic language emphasizes the philosophy being set forth.<sup>58</sup>

Judge Gaunt espouses a primitively worded rule of recognition concept, which Garth Esdras seems to confirm, that finds its source in the historical record of the real trial. In reality, during much of 1924, Arthur D. Hill, a Boston attorney then representing Sacco and Vanzetti, had a variety of conversations with Judge Thayer in which he later recalled that Judge Thayer expressed himself "about the danger of our institutions from foreigners and radicals, and the importance of respect for the law and of a firm hand in the administration of justice."<sup>59</sup> It is the use of literature in its mirror of reality that renders such works directly relevant in viewing the "real world" impact of legal decisions. To the extent that Posner argues that literature is really not useful in this regard, such a view ignores the use to which other critics put legal themes in literature. For example, the words of Judge Gaunt in *Winterset* provide justifications that the reader will assume are similar to those in the "real life" practice of law. These are precisely the types of justifications that West attacks, through her use of

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58. Poet and dramatist T.S. Eliot has noted that language "will only be 'poetry' when the dramatic situation has reached such a point of intensity that poetry becomes the natural utterance, because then it is the only language in which the emotions can be expressed at all." T.S. ELIOT, *Poetry and Drama*, in ON POETRY AND POETS 75, 78 (1957). The critical view of the poetry utilized by Anderson, however, is far from unanimous. For example, see POETIC DRAMA 40 (Alfred Kreymborg ed. 1941) (calling Anderson's plays "devoid of real poetry and the prose more poetic than the verse. . . . The public swallowed the verse because of the exciting action and not because they were listening to the march of poetic drama."). Kreymborg called *Winterset* "a melodrama dressed up in picturesque verse." *Id.*; see also Walter J. Meserve, *The Dramatist and their Plays*, in 8 THE REVELS HISTORY OF DRAMA IN ENGLISH 147, 260 (1977) (Anderson "approached the probing concern for modern man that distinguishes the best dramatists, but he was usually hampered by an inability to achieve the kind of poetry and the well-structured play that would show the theatre to be that cathedral of the spirit in which he believed.").

59. MONTGOMERY, *supra* note 13, at 272 (quoting Arthur Hill) (emphasis added).

Kafka, as prevalent in Posner.<sup>60</sup> West argues, for example, that Posner's central claim that the state of affairs resulting from an expressly commercial transaction is a moral one, is belied by the representation of such market transactions in Kafka's works.<sup>61</sup> Similarly, then, *Winterset* can be discussed critically and used to criticize jurisprudential viewpoints.

The statements from Judge Thayer are reality, and provides proof of the dangers of the type of legal resentment discussed by Weisberg, and a contemporary snapshot of the awful dangers of wrongful persuasion identified by White in his discussion of *Philoctetes*, in which Odysseus manipulates Neoptolemus to persuade Philoctetes to give up his bow.<sup>62</sup> It is the veneer of authority that colors law and its proper function; it is literature that provides the focus through its use of heightened language to make the point. Having said this, we can return to the original question posed, namely, whether *Winterset* is a contemporary *Billy Budd* and, in that regard, whether it represents a form of legal resentment, or rancor, such as described by Weisberg and objected to by Posner.

#### IV. *WINTERSET* IN THE CONTEXT OF OTHER ANDERSON PLAYS

It is a theme of this essay that *Winterset*, in exemplifying Hart's legal positivism, helps focus the Weisberg-Posner debate over whether literature can really provide such a forum in the first place. Even if one were to find the *Sacco-Vanzetti* rulings aberrational, as did the contemporaneous academic community,<sup>63</sup> Judge Gaunt's justification, such as it is, finds a comfortable place within Hart's discussion of finality and infallibility in judicial decisions.<sup>64</sup> These legal and procedural errors find analog in the discussions of *Billy Budd*, *Sailor*, particularly in terms of Captain Vere's effort to legitimize his result within the veneer of process.<sup>65</sup> Despite the outcry of the intellectual and artistic community, Sacco and Vanzetti were executed, and the Massachusetts judiciary was not ousted. Morality does not enter into the discussion. Judge Gaunt appears more introspective by what

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60. Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

61. *Id.* at 391.

62. WHITE, *supra* note 37, at 3-27.

63. Comment, *Cross-Examination to Impeach*, 36 YALE L.J. 384 (1927).

64. HART, *supra* note 1, at 138-44.

65. See WEISBERG, *supra* note 6, at 147-59; see also Weisberg *Judges*, *supra* note 43, at 1.

he has done than Judge Thayer in the “mock” trial of the play.<sup>66</sup> In this regard as well, he is like the fictional Captain Vere who chooses his “duty” over his own humanistic feelings, having already pre-defined that duty in accordance with prevailing political standards.<sup>67</sup> In further support for a reading of *Winterset* as a play about legal authority, similar themes may be found in other verse plays by Anderson. Again, this “rule of recognition” that Hart has defined is utilized by “resentful” authority figures—in these cases, judges—who utilize their position to justify otherwise legally indefensible positions. It is the literary exposition of these protagonists, and their abbreviated, poetic dialogue, that drives home the point.

Anderson develops this theme of legal authority relying, in essence, upon policy arguments to justify the results, in two other poetic works, *Joan of Lorraine* and *Second Overture*. In *Joan of Lorraine*, Peter Cauchon, Bishop of Beauvais, was the chief judge in the inquiry of Joan of Arc by the faculty of the University of Paris.<sup>68</sup> Joan had been captured by troops loyal to the Duke of Burgundy, who with the English opposed Charles VII’s ascension to the throne of France. The English, under the Duke of Bedford, bargained for her custody and placed her on trial to undo political damage. Putting her to death would ensure her martyrdom, and it therefore was necessary to the English to defuse the situation and establish an independent ground for finding Joan guilty. Here, as in *Winterset*, extrinsic political considerations are part of a legal order, accepted by the judges. Cauchon explains and gives insight into the role of a trial not as fact-finding exercise, but as a political expedient:

First, I believe that many who have sat with us misunderstood the character of this trial. . . . We sit as an ecclesiastical court to examine in a case of alleged heresy, blasphemy and sorcery. But if that were our only business we should have concluded the matter long ago. It is obvious that Joan the Maid is guilty on all three counts. She has freely admitted enough heretical beliefs and actions to burn all the virgins in

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66. Judge Thayer, apart from the illness, was not a perfect match, temperament-wise, for Judge Gaunt. JOUGHIN & MORGAN, *supra* note 11, at 418.

67. One might make a comparison with the so-called Rodney King trials, where the reverse situation occurred: The prevailing political climate disapproved of the jury acquittal after full process, whereas in the *Sacco-Vanzetti* case, there was a conviction but only intellectual outcry.

68. *The Law as Literature*, in THE WORLD OF LAW 335, 335-45 (Ephraim London ed., 1960). Of interest as well is George Bernard Shaw’s preface in his play *Saint Joan* and the brief discussion in BARBARA W. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 588-89 (1978).

Europe. In my mind she is condemned and the trial is over. And yet we must go on with it. And we must be more skillful and resourceful than we have been so far or we shall be beaten.<sup>69</sup>

In *Joan of Lorraine*, one of the inquisitors expresses his doubt as to the guilt itself, prior to the trial, stating "I shall not allow any temporal influence, whether French, English or Burgundian, to touch my judgment."<sup>70</sup> Cauchon responds in language that recalls Judge Gaunt's own philosophical underpinnings:

Why, sir, I would not myself judge a case in opposition to my belief. But when it happens, as it happens now, that the just thing is the politic thing—when it happens that the laws of the church require of us the same verdict which is demanded of us by the heads of the state—is there any reason why we should not render that verdict?<sup>71</sup>

As in *Winterset*, Anderson here portrays a judge who looks to politics and the politics that the general populace will accept as legitimate in determining the lengths to which he may go in deciding a legal issue.

Similarly, in *Second Overture*, a verse play in one act, set in January, 1918 in a small town near Moscow, the same "rule of recognition" operates to justify analogous results.<sup>72</sup> A group of refugee-prisoners are awaiting a decision on their future. The commissar who speaks for the new government advises that "[w]e have neither time nor use for legalistic forms."<sup>73</sup> In his exchange with his former colleague Gregor, the same conflict raised with Judge Gaunt and Bishop Cauchon arises. Commissar Charash declares all the prisoners guilty of crimes of counter-revolutionary activities and sympathy, except his former colleague and now prisoner Gregor. Charash, convinced of his moral basis, states:

I shall not lose my faith.  
But we shall win, and after we have won  
There will be time for justice. The task now  
Is a cleansing of the empire of the filth  
Of a thousand years. I have no more time  
And this is a fruitless argument. Come with me.

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69. MAXWELL ANDERSON, *JOAN OF LORRAINE* act 2, sc. 5.

70. *Id.*

71. *Id.*

72. *See* MAXWELL ANDERSON, *SECOND OVERTURE* act 1.

73. *Id.*

I have my orders and my own convictions.  
You will not change them.<sup>74</sup>

Anderson has taken resentment to its outermost extreme. Charash has his “orders” and they are legitimized, much as Vere’s and Gaunt’s “orders” have come from somewhere else, namely, the world of the political. It is the poetic language that also reinforces the veneer of authority.

#### V. *WINTERSSET* AND *BILLY BUDD, SAILOR* COMPARED

This essay began with the proposition that literature does have something to say about law, and that *Wintersset* and some of Anderson’s other plays have been too long ignored in these discussions. It cannot be assumed that Anderson would have intended these plays as celebrations of authority, as discussed. That is likely how Posner would read them consistent with his themes in *Law and Literature* and his critic’s interpretations of those themes.<sup>75</sup> Indeed, Posner criticizes Weisberg for presenting “prosecutors as villains and criminals as heroes.”<sup>76</sup> Posner specifically notes the textual absence in *Billy Budd, Sailor* of any suggestion of illegality in the court-martial and execution of Billy Budd.<sup>77</sup> Posner finds legitimization of Captain Vere within the system; there is a parallel to Judge Gaunt’s real-life model, Judge Thayer, in that his rulings were sustained on appeal.<sup>78</sup>

One of the critical features of the Posner-Weisberg debate over *Billy Budd* in particular is the exposition of authority figures in literature in general. In this regard, Posner has attempted to categorize two distinct theories of law that flow roughly along positivist and natural law lines. The analysis, which Posner used to discuss issues in *The Merchant of Venice* that are not dissimilar to those raised in both *Billy Budd* and *Wintersset*, contrasts a vision of law as a more objective, dispassionate, rule-oriented system, with a vision of law as a more personal, subjective, flexible and equitable notion.<sup>79</sup> Utilizing this framework that he finds applicable to various works of literature relating legal themes, Posner argues against the one-sided portrayal of Vere that he finds in Weisberg’s analysis, and puts forwards

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74. *Id.*

75. See POSNER, *supra* note 5.

76. *Id.* at 137.

77. *Id.* at 157.

78. See Weisberg, *supra* note 2.

79. POSNER, *supra* note 5, at 107-08.

Vere as embodying a duality of both columns.<sup>80</sup> He does this by finding justification for Vere's actions in the legal system in which he operates, and renders him sympathetic because of the arguable emotion and regret Posner finds in the text. One could also argue, in such a vein, that there is a similar duality in Judge Gaunt in *Winterset* as a result of his rationalization. In many respects, Judge Gaunt seems the literary apologist for positivist jurisprudence, a judge insistent on removing morality from his consideration. He views his role as piercing through the cunning of defense attorneys, to make sure the "proofs" he held "in his hands" were found by the jury. Of interest in this regard are Gaunt's comments describing his function as the ideal judge:

Certain laws  
seem cruel in their operation; it's necessary  
that we be cruel to uphold them. This cruelty  
is kindness to those I serve.<sup>81</sup>

One might recall Captain Vere's remark upon the fatal blow struck by Billy Budd which killed the ship's officer Claggart, a blow that was clearly an accident: "Struck dead by an angel of God! *Yet the angel must hang!*"<sup>82</sup> The cruelty of the result is a kindness; angels who kill must hang. Gaunt like Vere is therefore a judge who rules out moral and historical considerations, and even this extreme view of his retributive function might still find a place within Hart.<sup>83</sup> Similarly apt comparison could be made to the speech of Captain Vere in which he defends loyalty to the king even at the expense of loyalty to natural law or one's feelings; "let not warm hearts betray heads that should be cool."<sup>84</sup> Gaunt does not say whom it is that he services because Gaunt the man is only Gaunt the judge. The question is raised as to whether he can function as a human being, or if as judge he must be guided by different standards. Ironically, when he is not deciding a case but rather advising the police officer in the play how to deal with hobos, Gaunt cites the First Amendment and urges gentleness.<sup>85</sup> On the other hand, when functioning as judge, he will not question the intent behind the laws.

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80. *Id.* at 165.

81. MAXWELL ANDERSON, *WINTERSET* act 2.

82. *Id.* (emphasis added).

83. HART, *supra* note 1, at 235-37.

84. HERMAN MELVILLE, *BILLY BUDD*, SAILOR 110-11 (1962); *see also* Weisberg Judges, *supra* note 43, at 12-13.

85. *See* MAXWELL ANDERSON, *WINTERSET* act 1, sc. 2.

The manner in which Anderson portrays Gaunt and his other authority figures allows for sympathetic interpretation. As noted, Anderson was moved by his friend's sympathy towards Judge Thayer, even though most observers of the play would be offended by the result in light of the truth that was revealed in *Winterset* as to the innocence of Romagna. In viewing Gaunt's pronouncements, Posner would be struck by their sincerity, as he was by those of Captain Vere.<sup>86</sup> They are the statements of a conscience-driven man, justifying his actions in law, not from a sense of justice or politics. The fictional Gaunt has "scanned and verified and compared the transcripts of the trial,"<sup>87</sup> and yet came to a result that not only in the light of his fictional history, but even of the contemporary analysis of the Hobbouse equivalent of Frankfurter, was wrong. The real Judge Thayer, after listening to the lengthy final speech of Vanzetti prior to pronouncing the death sentence, took refuge in the jury verdict, claiming the judge had no role whatsoever, and that he had been vindicated by the Supreme Court of Massachusetts in that court's review of the numerous exceptions taken.<sup>88</sup> Gaunt is convinced of the rightness of his decision, yet states "even I am not free of regret—even I."<sup>89</sup> He lacks "the homing instinct."<sup>90</sup> Interestingly, these remarks may be contrasted with the persona displayed by the actual Judge Thayer because, according to Montgomery, as noted above, it was the depression or madness of Judge Thayer that led to the inspiration of the play.

Posner finds sympathy with similar comments made by Captain Vere in *Billy Budd*.<sup>91</sup> As with Vere, much of Gaunt's justification for his actions results from a sense of "Rule of Law," that is, of the necessity to have enforcement and toleration of authority, despite harsh results, for the public good and for the maintenance of order.<sup>92</sup> One imagines that Gaunt, like Vere, was acting against a backdrop of mutiny: Sacco and Vanzetti were self-avowed anarchists at a time in American history when tolerance for such viewpoints was at a lower ebb than usual. Anderson, long a champion of individual liberties and clearly offended by the result in the *Sacco-Vanzetti* matter, nonetheless has taken Montgomery's comments to

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86. POSNER, *supra* note 5, at 164.

87. MAXWELL ANDERSON, *WINTERSET* act 2.

88. Speeches to the Court, in *THE LETTERS OF SACCO AND VANZETTI 377-78* (Marion Denman Frankfurter & Gardner Jackson eds., 1928) [hereinafter *SACCO AND VANZETTI*].

89. MAXWELL ANDERSON, *WINTERSET* act 1, sc. 3.

90. *Id.* act 2.

91. See POSNER, *supra* note 5, at 162.

92. *Id.*

heart. Gaunt admits that he has been “ill,” and accuses the academic troublemaker Hobhouse of writing with bias and “malicious intent to undermine the public confidence in justice and the courts.”<sup>93</sup> Since the “case was clear,” and “Romagna was known guilty,” Gaunt did not call Esdras as a witness.<sup>94</sup> (Anderson takes a liberty here; the prosecution or defense would have called such a witness, not the judge.) Gaunt refuses to see the bias and accuses Mio of having his own bias. Mio accuses the judge of pandering to mob hysteria in order to convict.

Having considered a Posnerian reading of the play, then, viewing it from the other end of the spectrum provides ample grounds for considering *Winterset* as a play presenting the perspective of resentment. There is some biographical support for this reading as well. For example, Anderson was a rabid anti-Communist in the 1950's, lending an ambiguity to his persona and attitudes towards tolerance and authority. Some of this ambivalence is recognizable in *Winterset*; at least one Anderson critic reads *Winterset* to find an ambivalent justice, not being the whole truth or at least not a one-sided polemic.<sup>95</sup> This shade of gray would be visible to Posner, but probably decriable critics such as West, who views his argument as one that renders order, not justice, as its goal; law is good solely because it is authoritative.<sup>96</sup> On the other hand, Anderson himself was a pacifist in World War I, which cost him his teaching position in North Dakota early in his career.<sup>97</sup> He taught at Whittier College in California, where he left after one year, precipitated by his controversial defense of a conscientious objector.<sup>98</sup> This history of opposition to intolerance, which Shivers suggests makes Anderson a “champion of liberty and justice, particularly as these applied to the individual citizen in conflict with overly zealous minions of the law.”<sup>99</sup> There is an ambiguity to the playwright that textures the play with sarcasm and sympathy—readings available in *Billy Budd*, *Sailor* as well. Nonetheless, Anderson's portrayal of Gaunt is that of one using the language of the law and of authority to oppress the innocent.

Gaunt will not question the intent behind the laws. In some ways, he is an extreme positivist:

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93. MAXWELL ANDERSON, *WINTERSET* act 2.

94. *Id.* act 2.

95. BAILEY, *supra* note 9, at 139.

96. Robin West, *Law, Literature, and the Celebration of Authority*, 83 NW. U. L. REV. 977, 989 (1989).

97. SHIVERS, *BIBLIOGRAPHY*, *supra* note 9, at 6-7.

98. *Id.* at 55.

99. *Id.* at 111.

For always, night and day,  
 there lies on my brain like a weight, the admonition:  
 see truly, let nothing sway you; among all functions  
 there's but one godlike, to judge. Then see to it  
 you judge as a god would judge, with clarity,  
 with truth, with what mercy is found consonant  
 with order and law. Without law men are beasts,  
 and it's a judge's task to lift and hold them  
 above themselves. Let a judge be once mistaken  
 or step aside for a friend, and a gap is made  
 in the dykes that hold back anarchy and chaos,  
 and leave men bound but free.<sup>100</sup>

Posner suggests that legalism is, if anything, “the pariah’s protection.”<sup>101</sup> Yet, there are suspicions of madness in Captain Vere expressed by the ship’s surgeon in *Billy Budd*, much as there are clearer statements of Judge Gaunt’s madness in *Winterset*. These are irrelevant to Posner’s reading of *Billy Budd* and would be, we presume, in a reading of *Winterset*. He would point to the almost fatherly way that Gaunt speaks to Mio, attempting to make Mio see that Mio himself is as biased the other way and therefore incapable of perceiving not only the truth, but what the evidence showed.

It is difficult to rationalize the protestations of “mercy” consonant with law, in light of the remainder of the statement. Clearly, in Gaunt’s mind, mercy is not a separate factor, but a presumed and inherently inchoate ingredient in the ordained norms embodied in society’s laws. Despite his own human regrets, as judge he defends the system; injustice occurs only “by regrettable chance.”<sup>102</sup> Such is the statement of abusive authority.

It is not only Judge Gaunt whose actions and statements bear upon the analysis of the play in terms of its portrayal of authority and resentment. Mio Romagna’s sarcastic and knowing accusation as to whom the judge serves elicits further refuge by Judge Gaunt in strict obedience to the letter of the law:

Would I have chosen  
 to rack myself with other men’s despairs,  
 stop my ears, harden my heart, and listen only  
 to the voice of law and light, if I had hoped

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100. MAXWELL ANDERSON, *WINTERSET* act 2.

101. POSNER, *supra* note 5, at 136.

102. MAXWELL ANDERSON, *WINTERSET* act 2.

for some private gain for serving? . . .

For hope of heaven or place on earth, or power  
or gold, no man has had my voice, nor will  
while I still keep the trust that's laid on me  
to sentence and define.<sup>103</sup>

Gaunt calls Romagna guilty, and while admitting some injustices in court from time to time, assures Mio Romagna that that did not happen here. In a vein reminiscent of Captain Vere, Gaunt says "Romagna was found guilty by all due process of law, and given his chance to prove his innocence."<sup>104</sup> In actuality, a contemporaneous criticism of the Massachusetts Supreme Court's rulings in the *Sacco-Vanzetti* case on critical points of cross-examination suggests otherwise.<sup>105</sup>

Mio Romagna raises the jury charge as a refutation to the judge's effort to hide behind process and the jury, calling the judge the "fountain-head of the lies that slew" his father.<sup>106</sup> As Mio states, "[e]very word you spoke was balanced carefully to keep the letter of the law and still convict."<sup>107</sup> The argument between Gaunt and Mio is about evidence sought and not found; Mio claims Gaunt led the jury astray and Gaunt replied "[a]nd if the jury were led astray, remember it's the jury, by our Anglo-Saxon system, that finds for guilt or innocence. The judge is powerless in that matter."<sup>108</sup>

What Judge Thayer stated in full is worth repeating. Like Captain Vere pronouncing sentence, he shows no more remorse in real life than his fictional counterpart in *Winterset*. Posner justifies Vere's reaction as due to shock and extreme emotion; there is a convenience to that and perhaps Posner would apply the same to Judge Thayer, whose response is close to the poetic version created by Anderson:

103. *Id.*

104. *Id.*

105. Comment, *Cross-Examination to Impeach*, 36 YALE L.J. 384, 386 (1927). The commentators argue that the Massachusetts rule, holding "that as long as the evidence admitted has a degrading tendency, there can be no abuse of discretion," interpreted literally, "is an interpretation which in the present state of American jurisprudence, at least, may lead to the conviction of defendants for crimes which they never committed," *Id.* at 385-86. See also FRANKFURTER, *supra* note 15, at 25.

106. MAXWELL ANDERSON, *WINTERSSET* act 2.

107. *Id.*

108. *Id.*

Under the law of Massachusetts the jury says whether a defendant is guilty or innocent. The Court has absolutely nothing to do with that question. The law of Massachusetts provides that a Judge cannot deal in any way with the facts. As far as he can go under our law is to state the evidence.<sup>109</sup>

And yet Frankfurter, like Judge Gaunt reviewing the “many thousand pages” of the record, concluded “that the *trustworthiness* of the testimony which placed Sacco and Vanzetti in Braintree on April 15 is the foundation of the case.”<sup>110</sup> There were fifty-nine witnesses for the prosecution and ninety-nine witnesses for the defendants on the issue of the identity of the murders, which Frankfurter indicates raises by sheer numbers the implication that identification was far from clear-cut.<sup>111</sup> It is that very trustworthiness that Judge Gaunt refuses to question. Posner is able to find affection between Captain Vere and Billy Budd, and cites the final words of Vere (“Billy Budd”) and Budd (“God Bless Captain Vere”) as evidence of the relationship between the two of them. Interestingly, the last words of Vanzetti were that he forgives *some* of those who were his enemies.<sup>112</sup>

*Winterset* fully develops and stands within the range of discussion of Weisberg’s theme of resentment, and bears strong comparison with the literary and legal analyses of *Billy Budd*. It has not been my intention to embark upon yet another analysis of the actual trial of Sacco and Vanzetti. It is within the context of the literary work *Winterset* that implications for lawyers, and particularly judges, are found. As such, *Winterset* can be read as an attack upon injustice but, at the same time, find textual threads that fit within the fabric of the Weisberg-Posner debate.

## VI. CONCLUSION

I have attempted to bring to the table a significant play that has been all but ignored in the recent discussions of law and literature. That this should happen to *Winterset* is surprising in light of the significant twentieth-century parallels to a work such as *Billy Budd, Sailor*. I agree with those who, in growing number, are looking to literature to gain (if not regain) a perspective on law—what it is and what it is meant to achieve. We are

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109. SACCO AND VANZETTI, *supra* note 88, at 377-78.

110. FRANKFURTER, *supra* note 15, at 11 (emphasis added).

111. *Id.*

112. Vanzetti’s Last Statement, in THE LETTERS OF SACCO AND VANZETTI 404 n.1 (Marion Denman Frankfurter & Gardner Jackson eds., 1928).

creatures of metaphor and analogy, often incapable of grasping the complexities of life except by vicarious vision. *Winterset* provides that vision. While the play may have its critical faults, it nonetheless encapsulates a modern legend no less powerful than those employed by ancient writers.