

MELVILLE'S *BILLY BUDD* AND
PLATO'S *REPUBLIC*:
SEA CAPTAINS AND PHILOSOPHER-KINGS

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This article shows how Melville's Billy Budd, rightly one of law and literature's most widely studied canonical texts, answers Plato's challenge in Book X of the Republic: Show how "poets" create better citizens, especially better rulers, or banish them from the commonwealth of reasoned law. Captain Vere is a flawed but instructive version of the Republic's philosopher-king, even as his story is precisely the sort of "poetry" that Plato should willingly allow, by his own republican principles, into the ideal polity. Not surprisingly, the novella shows how law's agents must be wise, even as their law must be philosophical, if they are to do justice. Paradoxically, the novella also shows how "poetry" can save law's agents, particularly the more Platonic, from Captain Vere's "veer," a dangerous turn from fully legal justice to false and fatal severity.

Captain Vere has a "tragic flaw" all too common among leaders otherwise completely conscientious and competent: When faced with a range of courses—all legal, moral, and practicable—Vere invariably charts the most personally painful. Part of his "no pain, no gain" course steers him into fastidious studies that exclude both "mere" fiction and "pure" theory, ironically banishing Plato himself along with his "poets" But Vere's own story, with its narrator's frequent theoretical interruptions and occasional allusions to Plato, demonstrates that the reading of just such stories may deliver leaders like him from over-harsh treatment of themselves and their most vulnerable charges. The novella, then, not only reveals Captain Vere's "veer"; it also shows a way to

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avert that ever dangerous, often fatal tack. If the studious captain had been prepared to study stories like his own, his readings might have made him a vastly better guardian of his symbolic flock, particularly of Billy Budd, his most innocent sheep; had "Starry" Vere been more a philosopher-king and less a surrogate father-god, he need never have made his excruciating mistake, sacrificing his most beloved foster son to save their microcosmic world.

I. INTRODUCTION

From the very beginning of the modern law and literature movement, Melville's *Billy Budd* has been one of its most widely studied canonical texts, perhaps its *ur-text*.¹ Rightly so. As a generation of scholarship has amply shown, *Billy Budd* raises fundamental questions of law, of literature, and, most importantly, of their intersections and synergies. And yet more remains to be said;² *Billy Budd* deserves even more prominence, and clearer pre-eminence, in the law and literature canon. It helps us see, not only why law needs literature, but also literature, law, if we are to achieve a properly republican³ law, rule by the wise for the commonwealth. On that vital

1. For the preeminence of the novella in law and literature scholarship see THOMAS MORAWETZ, LITERATURE AND THE LAW xxviii (2007) (citing *Billy Budd* as one of the "obvious examples" of "the most familiar texts in law and literature, works that have been extensively covered elsewhere."); see also Symposium, *Inaugural Issue Dedicated to Billy Budd*, 1 CARDOZO STUD. L. & LIT. 1 (1989) [hereinafter Cardozo Symposium] (devoting its first volume to Melville's seminal novella *Billy Budd*). For many years, the preeminent edition had been HERMAN MELVILLE, BILLY BUDD, SAILOR (AN INSIDE NARRATIVE) (Harrison Hayford & Merton M. Sealts, Jr., eds., Univ. of Chicago Press 1962) (1891) [hereinafter BILLY BUDD]. See Daniel Tritter, *Preface to the Symposium: A Lusty Voice*, 1 CARDOZO STUD. L. & LITERATURE IV, IV (1989) (describing the Hayford & Sealts' edition of *Billy Budd* as the "*urtext* of the Melville work"). But in 2017 Harrison Hayford, among others, composed a new edition that heavily draws upon, and yet revises, the 1962 edition. See Herman Melville, *Billy Budd, Sailor (An Inside Narrative)*, in 13 BILLY BUDD, SAILOR AND OTHER UNCOMPLETED WRITINGS 1 (Harrison Hayford et al. eds., Northwestern Univ. Press & Newberry Lib. ed., 2017) (1891) [hereinafter MELVILLE, BILLY BUDD].

2. Indeed, as Barbara Johnson has pointed out, although critical debate has tended to assume that *Billy Budd*, for all its ambiguity, is Melville's "last word," the story itself seems, in both its structure and its content, to call the very nature of ending into question. BARBARA JOHNSON, *Melville's Fist: The Execution of Billy Budd*, in THE CRITICAL DIFFERENCE: ESSAYS IN THE CONTEMPORARY RHETORIC OF READING 79-81 (1980).

3. I choose the term "republican" with genuine trepidation; it means too many things to too many people. None of those meanings is quite right for my purposes, but no other term serves nearly so well. No one versed in legal scholarship of the last two decades will mistake my "republicanism" for the principles of the contemporary Republican Party in the United States, although what I mean by that term is actually quite close to what some scholars believe to have been Abraham Lincoln's own understanding of republicanism. See GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 312-18 (2000) [hereinafter BINDER & WEISBERG] (summarizing the views of legal scholar Alexander Bickel and historian Harry Jaffa). My use of the "republicanism" is more likely to be confused with the recent movement in legal scholarship known

point, as we shall see, legal scholarship has as much to teach as it has to learn; perhaps what it most needs to learn is how much it has to teach.

This Article will show how *Billy Budd* answers, and expands, the possibilities of republican law set out in Plato's *Republic*. From that perspective, Captain Vere is nothing less than a flawed but instructive version of the *Republic*'s philosopher-king, and the telling of his story is precisely the sort of "poetry" that Plato would willingly allow, by his own republican principles, into his ideal polity. On this republican reading, the law and Vere, its agent, can, and indeed must, be improved: the law, through agents like Vere, through the right kind of literature, the kind that rightly understands law. On this reading, law is a far more sophisticated means of balancing social needs and individual interests than any but the most legally sophisticated can appreciate. To achieve the proper balance of the personal and the political, law's agents must themselves be legally sophisticated. And, more basically, they must be free of a dangerous tropism, the Captain Vere veer,⁴ from which they cannot free themselves.

On the most radically republican reading, law, in the hands of properly literate lawyer-philosophers, can displace traditional theistic notions of human salvation with the realizable hope of rational, humanistic law. The lesson of a republican reading of *Billy Budd* is that the law can confer its benefits on the many without sacrificing the life of its most vulnerable, but only if its agents are wise in a way that nothing but proper literature can make them. To put the matter most pointedly, if Captain Vere had been a better reader, and better read, he could have

as "civic republicanism." See generally Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). My colleague Steven Gey, along with a host of others, has lamented the limitations of that movement. See Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 861-62 (1993) (expressing concern with "the potentially totalitarian overtones of civic republican thought" as a result of its moral deference to majority rule). Although I myself think that movement's merits were many, it is, for better or worse, well past its pinnacle of even academic prominence. See Rob Atkinson, *Reviving the Roman Republic, Remembering the Good Old Cause*, 71 FORDHAM L. REV. 1187, 1189-91 (2003). More importantly, my own sympathies lie more with classical republicanism, than with its revived, late-twentieth-century incarnation. See *id.* That, as even its proponents acknowledge, was more "deliberative democracy" or "left-liberalism" than genuine neo-classical republicanism. As this Article will show, my preference is aggressively neo-classical; its ideal is the republicanism of Plato's *Republic* (properly purged of Plato's apparent, but I think non-essential, meta-ethical realism). Stated less abstractly, its goal is to ensure that every child born in the world has a reasonable chance of acquiring the kind of education necessary to rule as a Platonic guardian.

4. I am not the first to notice this pun. See, e.g., Richard H. Weisberg, *Accepting the Inside Narrator's Challenge: Billy Budd and the "Legalistic Reader,"* 1 CARDOZO STUD. L. & LITERATURE 27, 29 (1989) ("mankind's awful 'vere-ing' from the glory of Nelson and times past to the repressed wordiness and pragmatic utilitarianism of our present age"). But I do use it in a distinctive way, to describe a previously unnoticed aspect of the story.

saved the allied fleet, and with it the rule of law, without killing the innocent Billy Budd.

This Article adds to the expanding conversation about *Billy Budd* in two related directions. The first is identifying the “Vere veer” of the title. Focusing on the character of the ship’s commanding officer, Captain Vere, we can read the novella as the cautionary tale of a dangerous character type, the dutiful leader with a tropism toward the most painful among plausible answers. This reading diagnoses Captain Vere’s defining neurosis as the tendency, all too common among a class of completely conscientious leaders, when faced with a range of courses—all legally, morally, and practically viable—to take the most personally painful. This tendency has, of course, its comic exemplars: the high school coach⁵ or military drill sergeant⁶ with a humorously insistent “no pain/ no gain” policy. But this tropism has tragic elements as well: the “spare-the-rod-and-spoil-the-child” parent who genuinely means “this hurts me more than it hurts you.” When taken into positions of real power, this tragic tendency reaches truly epic proportions, as old as Abraham and Isaac,⁷ as new as *Letters from Iwo Jima*.⁸ As we shall see, it may even infect the most orthodox version of Western Christianity, with its paradoxical insistence on God the Father’s sacrifice of his innocent son to save a sinful world.

The first aim of this Article, then, is to diagnose the Vere veer; its second, and more ambitious aim is to prescribe a cure, or at least outline a preventive regime for republican leaders-in-training. The novella, on this reading, not only reveals the Vere veer; it also implicitly offers a way of averting that ever dangerous, often fatal tropism. The novella itself, we shall see, both shows us what Captain Vere himself has failed to read and operates as a means of educating the next generation of Captain Veres. Here we will see Melville wrestling with matters of pedagogical substance and form that take him back—sometimes explicitly, sometimes implicitly—to three of the deepest divides in Western thought: the debate over fundamental human nature, particularly the question of perfectibility or original sin, that has always divided Jerusalem and Athens, Judeo-Christian theology and Greco-

5. See, e.g., Rip Torn’s character, ‘Patches O’Houlihan’, in *DODGEBALL: A TRUE UNDERDOG STORY* (Twentieth Century Fox 2004); see also, e.g., Billy Bob Thornton’s character, Jasper Woodcock, in *MR. WOODCOCK* (Avery Pix 2007).

6. See, e.g., Frank Sutton’s character, Sergeant Vince Carter, in *Gomer Pyle, U.S.M.C.* (Andy Griffith Enterprises 1964); see also, e.g., Goldie Hawn’s sergeant in *PRIVATE BENJAMIN* (Warner Bros. 1980).

7. *Genesis* 22.

8. *LETTERS FROM IWO JIMA* (Warner Bros. 2007); see also TADAMICHI KURIBAYASHI, *PICTURE LETTERS FROM THE COMMANDER IN CHIEF* (Tsuyoko Yoshida ed., 2007).

Roman philosophy; “the war of poetry with philosophy” that Plato identifies in the final book of the *Republic*; and the tension between social science and the humanities that has bedeviled the law and literature movement itself from its beginnings.

Part II of this Article places it in the context of on-going scholarly analysis of *Billy Budd*.⁹ In particular, this Part reviews two aspects of the current scholarship on Captain Vere, the substantive conclusions that Melville scholarship has reached in its analysis of the novella and the interdisciplinary modes of analysis that that scholarship has employed to reach those conclusions. On the substantive side, Subpart A synthesizes the original critical view that the novel presents a positive perspective on the law and Captain Vere with the revisionist view that something is radically wrong with the result, the execution of Billy Budd.¹⁰ On the formal side, the Subpart B of Part II shows that, to reach their substantive positions on the novella, whether for Vere and the law or against them, scholars have inevitably, if only implicitly, crossed what are now seen as disciplinary lines.¹¹ The modern law and literature movement is but the latest and most explicit aspect of this interdisciplinarity. Quite rightly, that movement has conceded, even insisted, that law needs to be informed by the insights of literature; this Part raises the possibility that to properly understand republican texts like *Billy Budd*, literary criticism must, for its part, understand law as well.

Parts III and IV explore these two aspects of the novella, the substantive and the interdisciplinary, in greater detail. Part III finds the source of the novella's tragic result in the flawed character of the generally virtuous Captain Vere.¹² It analyzes that character flaw, the “Vere veer” of the title, first in the microcosm of HMS *Bellipotent*, in the case of Billy Budd, then in the macrocosm of Christian theology, especially in the soteriological doctrine of Christ's atoning death. Captain Vere's failure as a “father figure” to Billy Budd, we shall see, strongly suggests a similar failing of the very God-the-Father-Almighty of whom Vere is unmistakably meant to remind us. If, as Melville implies, God, like Vere, is too severe, then perhaps the world-order of orthodox Christianity, like Vere's shipboard world, would be improved by the same reform of law and character that the novella implicitly holds up for us, extrapolated onto a universal scale.

9. See *infra* Part II.

10. See *infra* Part II.A.

11. See *infra* Part II.B.

12. See *infra* Part III.

Part IV takes up the second issue raised by prior criticism of the novella, the relationship of various disciplines and discourses.¹³ Along those lines, it explores the three great divides that *Billy Budd* tries to bridge: between “theories” of human perfectibility and “perceptions” of radical evil, or, more briefly if less accurately, “rationality versus irrationality”; between fiction and philosophy, or, classically, “poetry” and “dialectic”; and between social science and the humanities, “analysis” and “intuition.” It finds that Melville handles the first two masterfully, reconciling classical rationality with Judeo-Christian original sin by re-integrating literature with philosophy. He fails in the third, his effort to subordinate social science to literary insight or religious intuition, but in a way that paradoxically reinforces the other two points. Republic leaders who read the novella don’t need social science to verify the condition of Captain Vere, but for a very peculiar reason. In this very special case, what literature reveals without the aid of social science is not “the other,” but an aspect of our own “otherness,” a critical alienation from our truer, better selves, the selves that the Republic needs us to be, both for ourselves and for its most vulnerable citizens, those Billy Budds whose captains we must be.

II. CURRENT DIVISIONS IN SCHOLARSHIP ON CAPTAIN VERE

The scholarship on the character of Captain Vere (not to mention that on *Billy Budd* more generally) is voluminous. Here we need to look—in the most summary, and necessarily somewhat schematic, fashion—at two aspects of Vere scholarship. By way of shorthand, we will call these the substantive and the interdisciplinary. By “substantive,” I mean the actual conclusions critics have reached about various aspects of the novella; by “interdisciplinary,” I mean the overlapping disciplines, or academic discourses, these critics have had to employ, or at least borrow from, to reach those conclusions. Like all shorthands, this one is imperfect, but it highlights two critical elements we need to isolate for more detailed analysis in Parts III and IV.

As we shall see, criticism of *Billy Budd*, though predominantly “literary” originally, has always been interdisciplinary. In particular, from the very beginning commentators have not restricted themselves to assessing the novella’s independent aesthetic merits or to discerning its author’s intended or unconscious meanings; they have also evaluated its political and moral messages. Their analysis, in other words, has always been normative as well as descriptive; what is more, their normative

13. See *infra* Part IV.

analysis has always been moral and political as well as aesthetic. The advent of the law and literature movement has been but a particularly salient phase of this aboriginal, if not inevitable, interdisciplinarity. To fully understand *Billy Budd*, its critics have implicitly understood from the start, scholarship has to be interdisciplinary; we shall see, in more detail that one of those disciplines needs to be law.

A. Substance: The Cases for and Against Captain Vere and the Law

Virtually everyone agrees that Captain Vere faced a terrible situation, a suspicious homicide aboard a warship on a military mission, and that the result of his decision was tragic: the sacrifice of an innocent sailor to prevent a military, and quite possibly geopolitical, disaster. Beyond that, critical opinion divides in two basic directions, for and against Vere's decision. We can find, without too much tugging and hauling, a familiar, almost Hegelian, pattern¹⁴: first, in supporters of Vere and the law, then in their opponents.¹⁵ My own republican reading, we will see, is a synthesis of these two positions.

1. The Thesis: *Billy Budd* as Melville's "Testament of Acceptance"¹⁶

The traditional view of *Billy Budd* favors Captain Vere's decision. More precisely, it affirms not one but three basic theses: The relevant law was essentially good (or at least as good as it could be), Vere was right to follow the law more or less to the letter, and Melville himself is resigned to the tragic result. Affirming all three sub-theses is the "strong" version of the pro-Vere position, some scholars are "softer" on

14. Harrison Hayford & Merton M. Sealts, Jr., *Editors' Introduction* to *BILLY BUDD*, *supra* note 1, at 25-27 [hereinafter Hayford & Sealts, *Introduction*] (summarizing this pattern of scholarship); JOHNSON, *supra* note 2, at 101 ("And the very direction of *Billy Budd* criticism itself, historically moving from acceptance to irony, is no doubt itself interpretable in the same historical terms.").

15. See, e.g., JOHNSON, *supra* note 2, at 79, 82 (contrasting "acceptance," "tragedy," or "necessity" thesis with "irony," "injustice," or "social criticism" antithesis); see also, e.g., Hayford & Sealts, *Introduction*, *supra* note 14, at 25-27. As Johnson points out, this critical split reflects deep structural and thematic elements of the novel itself, having to do with the relation of character to action, Billy Budd's literalism and John Claggart's ironism, textual support for both "psychoanalytic" and "metaphysical" readings, and support for both "historical" and a-historical assessments of Vere's decisions. See JOHNSON, *supra* note 2, at 82, 85, 91, 101. But the Hegelian pattern is not, of course, perfect. See Hayford & Sealts, *Introduction*, *supra* note 14, at 27 ("The moral-religious-metaphysical approach continues . . . broaden[ing] the discussion beyond the black-and-white antithesis of tragedy versus comedy, acceptance versus resistance, and cases for or against Captain Vere.").

16. E.L. Grant Watson, *Melville's Testament of Acceptance*, 6 *NEW ENG. Q.* 319, 319-27 (1933).

some points than others, and scholars who maintain this thesis have differed among themselves over the novella's central character, with the earlier scholars tending to focus more on Billy Budd than on Vere.¹⁷ But this thesis, in more or less strong form, gained wide acceptance among the first generation of Melville scholars¹⁸ and has continued to find adherents down to the present.¹⁹

2. The Antithesis: *Billy Budd* as Melville's "Testament of Resistance"²⁰

Revisionist views emerged with particular force after World War II. Revisionists could, and did, deny any of the traditional view's three subtheses: the goodness of the law, the appropriateness of Vere's adherence to it, or Melville's acceptance of the result. The more aggressive denied them all. In their view, stated most aggressively, the relevant law was unjust, Vere was wrong to follow it, and Melville meant to signal to us his disapproval of both, if only in the most subtle of ironic tones. On this view, Vere may indeed be the novella's central character, but he is a villain, not a hero, tragic or otherwise, and Melville would have us see the error, even evil, not only of Vere's particular ways, but also of the law's inevitable course.²¹

17. See Hayford & Sealts, *Introduction*, *supra* note 14, at 25-26.

18. *Id.*

19. See, e.g., Charles Reich, *The Tragedy of Justice in Billy Budd* 56 YALE REV. 368 (1967), reprinted in CRITICAL ESSAYS ON MELVILLE'S BILLY BUDD, SAILOR 127, 137 (Robert Milder ed., 1989) ("Vere has been condemned for being a ramrod, but quite plainly he stands like a musket in order to control the feelings within him."); see also RICHARD A. POSNER, LAW AND LITERATURE 170 (rev. and enlarged ed. 1998) [hereinafter POSNER, LAW AND LITERATURE] (describing Vere as "a sensitive man, and not a martinet, finds himself torn between private feeling and public duty. Vere chooses the latter.").

20. See Phil Withim, *Billy Budd: Testament of Resistance*, 20 MOD. LANGUAGE Q. 115, 115-27 (1959).

21. Robin West, *Invisible Victims: A Comparison of Susan Glaspell's Jury of Her Peers, and Herman Melville's Bartleby the Scrivener*, 8 CARDOZO STUD. LAW & LIT. 203, 204, 224-25 (1996) (discussing, in contrast to the character of Bartleby in Melville's eponymous short story, how Vere is, as scholar Richard Weisberg asserts, a creature of *ressentiment*; law is an instrument not only of victimization, but also of the legitimization of victimization); see also Richard H. Weisberg, *20 Years (or 2000?) of Story-Telling on the Law: Is Justice Detectable?*, 26 CARDOZO L. REV. 2223, 2228-29 (2005) (providing retrospection on his *ressentiment* thesis); Daniel J. Solove, *Melville's Billy Budd and Security in Times of Crisis*, 26 CARDOZO L. REV. 2443, 2444, 2454 (2005) ("build[ing] upon Weisberg's challenging interpretation of Vere," Solove depicts Vere as "the locus of the problem"); WILLIAM V. SPANOS, THE EXCEPTIONALIST STATE AND THE STATE OF EXCEPTION: HERMAN MELVILLE'S BILLY BUDD, SAILOR 32, 33 (2011) ("Far from being a 'testament of acceptance . . . *Billy Budd*, on the contrary, bears witness to the dying Melville's radical worldliness" so that "*Billy Budd* becomes a text that 'speaks truth to power . . .'" (internal citations omitted)).

3. Synthesis: A Republican Reading

My own view, like that of several other recent scholars,²² borrows a bit from both the traditionalists and the revisionists, the pro-Vere thesis and the anti-Vere antithesis. With the traditionalists, I argue that Captain Vere is basically a model military commander; more strongly, if anything, I see him as almost a model philosopher-king in the microcosm of his ship. Also with the traditionalists, I think that the legal system in which he operated, flawed and human though it was, was nonetheless basically sound. On the other hand, with the revisionists, I think that the result Vere reached was not only horrifically and unacceptably tragic, but also avertable and in a way that Melville must have meant for us to see.

At the same time, I don't believe, with the revisionists, that the fault lay in the law or with Vere's slavish following of the law. Much less do I believe, with the traditionalists, that the execution of Billy Budd, though humanly tragic, was legally inevitable or politically just. Rather, I conclude that, had Vere not fallen victim to a tragic flaw, a neurotic tropism, in his own character,²³ he could have found an easy way, well within the law, if properly understood, both to save Billy Budd and to protect the fleet, the realm, and, literally and figuratively, the rule of law itself.

Making that case will be the work of Part III.²⁴ Before turning to that, we need to examine another aspect of scholarship on *Billy Budd*, its essential interdisciplinarity, particularly, its need for a sophisticated understanding of the law.

22. See Robert P. Lawry, *Justice in Billy Budd*, in *LAW AND LITERATURE PERSPECTIVES* 169, 169-71 (Bruce L. Rockwood, ed., 1996) (positing "[m]y tentative conclusion is that no injustice was done; yet the absence of injustice is insufficient to warrant the further conclusion that justice was done," based on Lon Fuller's distinction between the morality of duty, which Vere fulfilled, and the morality of aspiration, at which he failed.); see also William Domnarski, *Law-Literature Criticism: Charting a Desirable Course with Billy Budd*, 34 *J. LEGAL EDUC.* 702, 707-12 (1984) (analyzing with approval and expanding the position of Christopher Sten and Charles Reich that Vere was a good person faced with positive law that was, and perhaps had to be, inconsistent with natural justice); cf. Solove, *supra* note 21, at 2444 ("[T]he law is not the culprit—it is something in Vere that causes his failure.").

23. Here, with Robert P. Lawry, though less explicitly, I "advocate . . . a shift in our moral focus from rule breaking toward the pursuit of virtue, or from decision-point ethics to character ethics." Lawry, *supra* note 22, at 171. I completely agree with Lawry that "[i]t is in character that Vere was ultimately deficient," but I don't entirely agree that "he lacked courage and moral imagination." *Id.* at 186. As we shall see, I locate his failure of character in a particular tropism. See *infra* Part III.A; see also JOHNSON, *supra* note 2, at 79 ("More recently, critical attention has devoted itself to the ambiguity in the story, sometimes deploring it, sometimes revelling in it, and sometimes simply listing it.").

24. See *infra* Part III.

B. Methodology: Inevitable Interdisciplinarity

As we saw in the last section, scholars have long been divided substantively into pro- and anti-Vere camps. In this section, we examine an odd feature shared by both camps: their tendency to transcend disciplinary borders, strictly conceived.²⁵ We will look, first, at the early, primarily “literary” criticism and see how, from the beginning, it borrowed, if more often implicitly than explicitly, from allied humanities. We will then look at how the advent of the law and literature movement added not only new partisans to the dispute, but also another discipline, with its own tendency to transcend, in its analysis of *Billy Budd*, any pre-conceived disciplinary constraints.

This insistence on interdisciplinarity, of course, has always been an article of faith in the law and literature movement, particularly with respect to *Billy Budd*, the movement’s ur-canonical text.²⁶ What we shall see is that the interdisciplinarity to which *Billy Budd* invites us should take the movement in directions it has tended to ignore, even eschew. On the one hand, legal scholars have been too modest in their insistence that a proper understanding of the novella, and works of similarly ambitious scope, require an understanding of the law. On the other hand, they have tended to ignore that that understanding of the law requires an appreciation of social science, especially psychology, that even Melville seems to minimize, if not miss altogether.

1. Literary Critics Transcending the Narrowly “Literary”

From the beginning, literary criticism has raised both intramural and extramural questions about *Billy Budd* on the one hand, questions that are strictly literary; on the other hand, there are questions that transcend the borders of the literary, at least as narrowly conceived.²⁷ Moreover, both the intramural and the extramural questions have been both descriptive and normative. We turn first to the intramural questions, then to the extramural.

25. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1075-78 (1999) (describing how both law scholars and literature scholars draw disciplinary lines too narrowly).

26. See *Editor’s Preface* to Cardozo Symposium, *supra* note 1 (“Our hope is that the subject matter of *CSLL*’s first number [*Billy Budd*] . . . will further indicate to our readers the ambition of Law-Literature studies to articulate issues that few if any unidisciplinary methods have approached.”).

27. See Baron, *supra* note 25, at 1075-78; see also *c.f.* TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 8 (1983) (discussing in the abstract how literature is grounded in “its relations with and differences from its surroundings” and is therefore quite difficult to “discriminate neatly between ‘practical’ and ‘non-practical’ ways of relating ourselves to language.”).

a. Intramural Questions

It is important to see, at the outset, that literary analysis of *Billy Budd* has raised both normative and descriptive issues within literature, narrowly conceived. On the normative side, it raised, early on, a fundamental question—"Is *this* great literature?"—and, at least by implication—an even more basic question: "What *is* great literature?" Using the standard of greatness current in their time, the first generation of scholars actively questioned the literary merits of *Billy Budd*.²⁸ By the time of the Revisionists, however, this question was essentially abandoned;²⁹ it was implicitly always answered in the affirmative, even though critical standards of literary excellence had notably shifted. Whatever the measure of literary merit, *Billy Budd* was deemed to meet it; debate centered, as we have seen, on more substantive issues.

We, too, can take the literary merits of *Billy Budd* as given, at least for now.³⁰ What we need to see here is that the question of literary merit is, in its own right, a normative question; in particular, as asked by earlier critics and answered implicitly by later ones, it was an aesthetic question, a question about the work's "beauty" or artistic "goodness." Seen that way, we can distinguish it from another class of questions that critics asked about the book, questions that we might still call strictly literary. For our purposes, it is important to see these as descriptive, as opposed to normative, questions.

The most basic of this latter class of questions is, "How did Melville mean for us to understand the character of Captain Vere and the nature of the law?" As we have seen, the traditional view was that Melville meant for us to see Vere and the law as good; the revisionist view was the reverse. Both are a matter of interpretation, of getting at Melville's meaning. Literary critics would, presumably, get at this answer either by ordinary principles of linguistic analysis, or by some special methods peculiar either to their field in general or to this sort of text in particular.

28. See Hayford & Sealts *Introduction*, *supra* note 14, at 25 ("During the first twenty-five years of criticism (1921-46) there was some disagreement over its literary merit . . .").

29. *Id.* at 26 ("[F]ew critics of the day [post-1946] were willing to entertain the strictures [of some earlier critics] upon the esthetic qualities of *Billy Budd* . . .").

30. See *infra* Part IV (suggesting that a republican reading of *Billy Budd* points to a radical re-thinking of what the proper criterion of literary excellence are, at least for the law and literature movement).

b. Extramural Questions

But the debate about *Billy Budd* raised other basic questions, too, questions not so easily encompassed in the scope of “literature” as traditionally conceived. These questions, like the more narrowly “literary” ones we have just identified, are also both descriptive and normative. On the descriptive side, Melville has the narrator ask very specifically whether Captain Vere was psychologically impaired.³¹ To answer this question, one must invoke standards other than the strictly literary. This is a question of ordinary human experience and of a particular discipline of social science. As we shall see, Melville has very strong views about the source of the answer to this question, about the right places to look for the answer.³² What we need to see here is that those places are not, strictly speaking, literary ones—unless Melville would have us expand the scope of “literary” quite a ways indeed.

Still on the descriptive side, but less explicitly, Melville raises fundamental questions about the nature of law, questions that literary scholars have not been shy about answering. To take but one example, Barbara Johnson notes:

In the final analysis, the question is not, What did Melville really think of Captain Vere? but rather, What is at stake in his way of presenting him? What can we learn from him about the act of judging? . . . [I]t is judging, not murdering, that Melville is asking us to judge.³³

Immediately after identifying these questions as fundamental, she goes on to say, “And yet Vere’s judgment *is* an act of murder.”³⁴ More generally, as to the law itself, she concludes, “It would seem, then, that the maintenance of political authority requires that the law function as a set of rules for the regular, predictable misreading of the ‘difference within’ as a ‘difference between.’”³⁵

And, equally sweepingly and even more pessimistically, she also concludes: “The legal order, which attempts to submit ‘brute force’ to ‘forms, measured forms,’ can only eliminate violence by transforming violence into the final authority.”³⁶ This may, of course, be true; law

31. BILLY BUDD, *supra* note 1, at 102.

32. See *infra* note 53 and accompanying text.

33. JOHNSON, *supra* note 2, at 102.

34. *Id.*

35. *Id.* at 106.

36. *Id.* at 108-09; see also SUSAN WEINER, LAW IN ART: MELVILLE’S MAJOR FICTION AND NINETEENTH-CENTURY AMERICAN LAW 145 (1992) (“For not only does Vere fail to obey correctly the measured forms of the law, but the legal system itself is shown to be profoundly defective.”); Michael A. Kahn, *From Shylock to Billy Budd: The Literary “Headline Trial,”* 55 ST. LOUIS U. L.J. 1329, 1330 (2011) (the lesson of “significant works of literature that use the courtroom as their

may be every bit as limited in its potential, as brute in its reality, as she asserts. But it is a surprisingly sweeping jurisprudential position—not to mention a depressingly pessimistic one!—to ground on the reading of a single novella, without reference to a single work of legal scholarship.

It is one thing to say that this radical jurisprudential pessimism is Melville's own position; it is quite another to say that he is right in his assessment. The first is a matter of getting at the author's meaning, a quest, quixotic though it may be, well within the purview of a literary scholar, as we have seen. The latter is, of course, a fundamental question of law, for the answer to which a literary scholar might plausibly be expected to seek, even if ultimately to reject, the insights of scholars in that field—not to mention the arguments of political philosophers back to the very *Republic* itself.

Thus critics of the novella, following Melville's lead in the novella, have raised a range of normative questions that press beyond the bounds of any narrow definition of literature. Critics have sought to discover, not just whether Melville believed, or the novel propounded, that the law was just and was Vere right to follow it, but also, whether the law really *was* just, whether Vere really *was* right to follow it. These are not, strictly speaking, literary, or even aesthetic, questions. They are, rather, normative questions of a very different sort. In the case of Vere's conduct, the question is essentially one of ethics; in the case of the goodness or justice of the law, the question is one of political philosophy or jurisprudence. In raising and answering these questions, literary scholars have engaged, more often implicitly than explicitly, in wide-ranging interdisciplinarity. (This observation itself, we should note, is descriptive, not normative: To say that literary scholars have reached outside their field is not to say that they have trespassed, much less stolen.)

2. Legal Scholarship Transcending the Strictly "Legal"

Some of these interdisciplinary questions raised by literary critics clearly fell within the province of law, even most narrowly conceived: Was Captain Vere's conduct legal, in compliance with the letter of the relevant laws in place at the time? Other questions implicate law at its widest and most ambitious ambit: Was Vere's conduct right or good? Was the outcome of the case just? Could Vere be made a better person? Could human affairs be better ordered? In Part III, I will suggest that, as

dramatic engine" is that "[a] courtroom is no place to seek justice, redemption, or any satisfactory closure.").

a “disciplinary” matter, all these are properly legal questions.³⁷ More particularly, human affairs can indeed be ordered better; for that to happen, Vere must be made a better person. For that to happen, in turn, law must encompass his story; law must, in exactly the way Plato prescribed, be both philosophical and literary. And—equally importantly—though in a way Plato could not have anticipated, it must become social scientific, too. The questions *Billy Budd* raises, in other words, tell us a great deal about what we must read, how we must read it, and with whose help.

As background for the claim that all these questions are properly legal questions, we must take a preliminary look at each of the questions in turn. Each, as we shall see, is revealingly related to the next: first, the question of the legality, narrowly speaking, of Vere’s conduct;³⁸ next, the justice of his conduct;³⁹ and, finally, the sanity, the mental stability, of his conduct.⁴⁰

a. The “Strict” Legality of Vere’s Conduct

The legality of Vere’s conduct, narrowly conceived, might be relevant to literary critics of *Billy Budd* in several ways, or not at all. Let’s begin with this last. On a strictly formalist, amoral reading, the legality of Vere’s conduct would be irrelevant, or nearly so. The law as presented in the novella would only need to be plausible; we readers would only need to be able to imagine that the law of the place and time was something like that depicted in the novel. And even this is so, significantly, only because Melville at least implicitly makes plausible law a part of the “furniture” of the novel; plausible law need hardly be part of the furniture or furnishings of every novel. Thus, for example, in Kafka’s *The Trial*⁴¹ it is the very unreality of the law that most arrests our attention. In novels that are more purely formal exercises, or purely subjective expressions, the plausibility of the law within them may be even less relevant; there need, of course, be no law in them at all.

For the novel to have any moral meaning, the “actual” legality of Vere’s conduct would have to be only slightly more significant. If, for example, we were to read *Billy Budd* simply for its depiction of a ruler faced with an agonizing choice between irreconcilable public law and private morality, then we need only be able to take, as a sort of “given,”

37. See *infra* Part III.A.3–4.

38. See *infra* Part III.A.2.

39. See *infra* Part III.A.3.

40. See *infra* Part III.A.4.

41. FRANZ KAFKA, *THE TRIAL* (Willa & Edmund Muir trans., rev. by E.M. Butler, Alfred A. Knopf Definitive Edition 1970) (1925).

that the law requires of Vere what he thought it required. To understand Creon, we need not know either the law of ancient Corinth or its familial burial mores; we need only see them in plausible conflict. *Billy Budd* has certainly been read that way, and profitably so: the picture of a tortured soul, torn between incommensurable duties, public and private.⁴² From this perspective, debate about whether the law was “really” as Melville depicts it is, ultimately, completely beside the point, as several scholars have pointed out.⁴³

If the novel were, on the other hand, to be used as some sort of “case study” of the justice of the British maritime code of the Napoleonic era, then, by starkest contrast, depicting that code accurately would be of prime importance. Doubtlessly, fiction is sometimes used that way, too, perhaps profitably so. Certainly law school hypothetical cases are, in a sense, that sort of “fiction.” But that is hardly what Melville had in mind in *Billy Budd*—nor is that what most commentators have had in mind.⁴⁴

The novella clearly raises, as Melville himself apparently intended, a much larger legal issue: the condition of humankind under law. To raise that issue, the legality of Vere’s conduct, in the narrow sense of its strict compliance with actual British naval law of the period in which the story is set, is completely irrelevant, or very nearly so.⁴⁵ For Melville’s larger purpose, the legality of Vere’s conduct, in this narrow sense, need only be plausible, like the rest of the story’s “setting.” It must merely fit in convincingly with the rest of the novel’s “furnishings.”

And yet the legality of Vere’s conduct must also be plausible in another, much more significant way. It must be a plausible account, not just of what the law was, but also of what the law can be, or cannot be. It must give us, not only credible past law, but also credible future law. This has both negative and positive implications. If, on the negative side, the story is to show the tragic limits of the law, its inability, in some cases or many or all, to reconcile the demands of society with the

42. See Reich, *supra* note 19, at 134-36.

43. See POSNER, *LAW AND LITERATURE*, *supra* note 19, at 149-50, 166; see also Domnarski, *supra* note 22, at 711 (“The more *Billy Budd* criticism moves away from an investigation of the applicability of particular statutes, the more we are able to see the legal issue at the novel’s center . . . the natural law/positive law conflict . . .”).

44. See Lawry, *supra* note 22, at 172 (“We must be careful . . . to distinguish the law that would have governed an incident such as the one described in Melville’s story, if it had really occurred, from the operative law of the story itself as set forth by the author.”).

45. For a review of the debate on the legality of Vere’s conduct under actual maritime law, see sources cited in Lawry, *supra* note 22, at 188 n.4. For the view of Lawry and others that this is essentially irrelevant to understanding the novel’s essential meaning, see *id.* at 172-73; see also POSNER, *LAW AND LITERATURE*, *supra* note 19, at 149-50, 166.

individual's most basic needs, then it must convincingly show that law cannot be made better, cannot be reformed or applied in a way that really does reconcile those demands. Otherwise, it is no more convincing an account than a tale of sailors drowning in air, or suffering from scurvy on a citrus-rich diet, or sailing off the edge of a flat earth.

On the positive side, if the story is to show that Billy Budd died unnecessarily, then it must convince us that law can produce a better result, an adequate alternative balancing of social and individual needs. As the inaugural number of *Cardozo Studies in Law and Literature* ("CSLL") put it, "And if Billy did not *have to die*, we must seek to answer the still more agonizing question *how?*"⁴⁶ On this view, the "ought" implies the "can." If, as I maintain, Vere failed in his use of the law, I must be able to show that my alternative result is possible within a plausible understanding of law's potential. I must, in other words, give an account of the law that shows how a more just legal result can be achieved. It is this latter that I undertake in Part III;⁴⁷ for now we only need to see that this position, like its opposite, implies a fairly robust jurisprudence. And, as a corollary, to advance either an optimistic or a pessimistic view of law's capacity, literary critics must themselves understand the law.

This understanding involves, in the case of *Billy Budd* and elsewhere, three critical, related points: the relationship between law and equity, the critical role of legal agents' discretion in balancing those two aspects of law, and the implications of that role for the scope of law itself. On all three of these points, literary critics have made significant errors in their judgments of Captain Vere and the law, in both directions, for and against.

First, as Richard Posner nicely points out, every legal system has two vitally related "tables" that go by various revealing but imperfect short-hand names: the letter and the spirit, law and equity, rules and principles, crystals and mud.⁴⁸ A great deal of legal thinking, theoretical and practical, ancient and modern, involves balancing these essentially paired aspects in every phase of law's operation: in how laws are written, in how they are applied, and in how those applications are evaluated. Each of these three phases, we shall see in the next section,⁴⁹ is critical in Billy Budd's case. Pending further proof, we can safely say, following Posner, that Vere's problem cannot properly be reduced to one of "legalism," a favoring of the side of rule and rigor over the side of

46. See *Editor's Preface* to Cardozo Symposium, *supra* note 1.

47. See *infra* Part III.

48. See POSNER, *LAW AND LITERATURE*, *supra* note 19, at 120.

49. See *infra* Part II.2.b.

principled flexibility in acting and judging according to law.⁵⁰ Vere, we shall see, was much more a Solomon than a Martinet.

Second, the need to balance the tables of “law” and “equity” in acting and judging under law implies that law’s agents—executive officers, judges, and lawyers—be granted an inevitable measure of discretion, sometimes more, sometimes less, but always and everywhere *some*.⁵¹ The necessity of conferring discretion on law’s agents, in turn, requires that these agents embody a particular kind of moral virtue, what the classics called “practical judgment,” or *phronesis*. Written laws are never self-executing; their authors always address them to some actual agent or other, and that agent must, within more or less wide parameters, exercise practical judgment in order to comply properly with the law’s mandate. The legal assessment of their actions, accordingly, is not limited to “legal” or “illegal”; it includes, much more subtly, issues of how well their chosen course advances law’s implicit or explicit purpose, as compared in that regard to other available, and equally legal, courses. We can, therefore, comfortably ask, in a strictly legal sense, not only whether Vere acted legally or illegally, but also whether he acted well or best. The law does not consist of two poles, the forbidden and the required; it more typically runs, rather, through a spectrum, sometimes quite wide, between those poles.

The necessity of discretion in legal action raises a third point often missed by legally unsophisticated readers of *Billy Budd*, a point we might call the scope of the law. At the most basic level, these critics sometimes imply that the realm of the legal is to be confined to “cases” being investigated or tried. Thus, for example, Johnson speaks of Captain Vere’s decision to deal with Billy Budd “legally” when he decided to call the drumhead court, as opposed to “essentially,” some other, non-legal but not illegal, way. But, in exercising his wide discretion in handling the situation, in deciding whether to prosecute it before a drumhead court or refer it to the admiralty, Vere was acting equally legally. It is correct to say, as Johnson says, that his choice of “framing” determines the outcome; it is wrong, however, to think that alternative framings, within the context of the legal system, might not have produced a very different, and much more acceptable, outcome.

50. POSNER, *LAW AND LITERATURE*, *supra* note 199, at 171; *cf.* WEINER, *supra* note 36, at 145 (“Thus the character of Captain Vere emphasizes well-defined features of a legalistic mentality.”).

51. See Lawry, *supra* note 22 at 173-74; see also Solove, *supra* note 21, at 2457 (“Ironically, the law fails in *Billy Budd* not because it is uncompromisingly strict, but because it can be readily manipulated by Vere.”). Knowing that law involves discretionary judgments does not, of course, ensure that one will exercise one’s discretion well. See *infra* Part III.A.2.

Law, to say it bluntly, is bigger than non-lawyers, even those who are literary scholars, sometimes realize.

It is important, at this point, to see that, within the scope of the strictly legal, there are questions of two distinct, though intimately related, orders. On the one hand, legality poses strictly descriptive questions: What does the law require or forbid in this context? Similarly, but, as we have seen, more subtly: What is the permitted range of discretion here? What does the law not only allow, but encourage or expect? On the other hand, legality poses normative questions: Was a particular action in compliance with law, was it not just “subject to law,” within the realm of the law, but was it also in conformity with the law? And, as we have seen, this latter question often admits of degrees, although our ordinary legal vocabulary is surprisingly impoverished in the terms it affords us for those degrees. We can thus sensibly say that an officer of the law exercised his or her discretion well or badly, not just legally or illegally, even as we can say that a statute is well or poorly drafted, or a judge’s opinion well or poorly reasoned. In all these cases, the basis of the assessment is accomplishment of the purpose of the law; legal evaluation, in these cases, involves an assessment of whether the means to law’s ends are well-formed, or well-used, or well-judged. To ask, beyond that, normative questions about the ends of law themselves, is to move beyond legality, strictly conceived.

b. The Justice of Vere’s Conduct

We have just seen that, to answer important questions that *Billy Budd* raises about law and legality, we must bring to bear on its analysis a fairly robust understanding of law. That understanding must show us, not merely what the requirements of law are at any particular time, but also what social ordering tasks law may plausibly be expected to perform, and how law necessarily, or at least typically, goes about those tasks, and how well its agents perform those tasks. But, having seen those possibilities and methodologies and their assessment under strictly legal norms, we are faced with another, very different, question—indeed, with a very different kind of question: What tasks *should* we ask law to do (and how should we ask law to do them)?⁵² What social

52. This and the other parenthetical are meant to acknowledge, as unobtrusively as possible, that questions of justice may be procedural as well as substantive; justice, as classically understood, involves law’s means as well as its ends, and the two are famously difficult to distinguish in all but paradigmatic cases. Sometimes, significantly, law’s procedures are ends in themselves, or very nearly so. See generally Rob Atkinson, *The Reformed Welfare State as the Radical Humanist Republic: An Enthusiastic (If Qualified) Endorsement of Matthew Adler’s Beyond Efficiency and Procedure*, 28 FLA. ST. U. L. REV. 339 (2000). Thus, for example, one could object that Vere’s

ordering outcomes should we prefer (and what processes to achieve them)? Questions about the law's capabilities, what the law *can* do, of course, are descriptive questions; questions about how well law's agents advance law's purposes, as we saw in the last section, are normative questions, although normative in a strictly legal sense. By contrast, questions about what the law *should* be used to do (and how it should be used), are normative questions of a very different order. They are, in a word, questions of justice.

Thus, at this point, legal analysis, like literary criticism, is pressed beyond a narrow understanding of itself. If we are to answer these latter questions, we must have, not just a theory of law, but at least a preliminary theory of justice. What's more, as we shall see in Part III, the novella presses us to the conclusion that, for law's agents to act justly, they themselves must have both. Kings' agents, as well as kings themselves, must be philosophers.

c. The Sanity of Vere's Conduct

The two questions we have just considered—the legality of Vere's actions and the justice of the law under which he acted—are only implicitly raised in the text itself. We cannot seriously read the text without addressing those questions, but the text itself does not directly demand that we answer them. With respect to a third question, by contrast, the text, through Melville's narrator, is quite explicit: "Whether Captain Vere . . . was really the sudden victim of any degree of aberration, everyone must determine for himself by such light as this narrative may afford."⁵³ Each of us must, the narrator insists, answer this question. And, in making our determination, we are told, both directly and indirectly, what materials to use, and what not to use: this narrative (and the other narratives it commends to us) and not other sources, especially not the insights of social science.

Here, then, is a trilateral interdisciplinary intersection where law, literature, and social science all meet. Melville's narrator asks us to assess Vere's sanity, in full knowledge of the fact that such assessments are inevitable for both lawyers and others living under the law. Yet, he explicitly calls us outside the law as the source of our assessment, and he implicitly forbids us to look to the insights of social science. As we shall see, the call of law to look outside itself, to imaginative literature, is

decision to try Billy before a drumhead court was not only a poor exercise of his legally allowed discretion, but also a denial to Billy of his right, in law and in justice, to a fuller, "fairer" trial. That said, for present purposes, these qualification can be left aside, for later elaboration.

53. BILLY BUDD, *supra* note 1, at 102.

essential to the effectiveness of the message. But closing the door on the insights of social science, I shall argue, is not essential, but rather dangerous. It is understandable, in light of the dubious social science of his day, that Melville would urge closing this door. But that condition has certainly improved since his time. Understanding why this dubious move did not damage Melville's novel will reveal something critically important about both the narrative itself and us as its readers.

C. Toward a New Substantive and Interdisciplinary Synthesis

It is often said that law needs literature to give it a sense of narrative, to put flesh on the bones, to develop sensitivity to the needs of real people. That is quite so, or at least so I myself have conceded, and don't care to debate here. What we need to see here is rather the opposite point: For literature to fulfill its own destiny—unless that destiny is to be a small one—it needs law. The larger role I have in mind is the role Plato outlined in Books II, III, and X of the *Republic*, nothing short of training philosopher-kings.⁵⁴ As we have seen in this Part, the claims of both literary and legal scholars about *Billy Budd* take them beyond the confines of their disciplines, narrowly defined. This is, moreover, a step Melville invites them to take, sometimes quite explicitly.

So, we shall see in the next two Parts, it is with my own substantive assessments. In Part III, we cannot make the necessary assessments of Vere's character unless we can make subtle distinctions that are, strictly speaking, legal.⁵⁵ And these assessments, in their turn, press us toward the interdisciplinary realignments I suggest in Part IV.⁵⁶ To make these substantive assessments, I myself have to make certain normative judgments; in particular, I have to opt for ranking life above truth, at least in cases like *Billy Budd*'s. From one perspective, these judgments take me outside my own particular province, law. But, from another perspective, they tend to confirm the importance of a broader understanding of what law is, and how it is necessarily related to other disciplines. If I am right about Vere as a flawed role model, then the way to avert his fatal flaw is to do the reading he omitted, with a fuller understanding of law, justice, and literature.

54. PLATO, THE REPUBLIC OF PLATO bks. II, III, X, at 35, 63, 277 (Allan Bloom trans., Basic Books 2d ed. 1991) (c. 380 B.C.E.) [hereinafter PLATO] (grappling with, throughout the dialogue, the seemingly inextricable entanglement between poetry and politics).

55. See *infra* Part III.

56. See *infra* Part IV.

III. AVERTING THE VERE VEER: SAVING BILLY BUDD WHILE SERVING THE LAW

This Part explores an alternative substantive reading of *Billy Budd*. The first section focuses on the microcosm of the ship under Captain Vere's command.⁵⁷ It offers a reading that vindicates the law and indicts a particular aspect of Vere's character, his odd, almost certainly neurotic, tendency to associate the normatively right course of action, legally and morally, with the personally painful, psychologically if not physically. But for this character flaw, Vere might well have used his subtle understanding of law's flexibility both to save Billy Budd and to avoid any real risk of mutiny. Taking this position places me, as I have said, between the traditionalists and the revisionists, but in a particular way. I find the law here, for all its apparent harshness, eminently workable; I find fault with Vere not because he followed the law to its supposedly inevitable, unjust conclusion, but because he failed to see its real, present potential for justice. And he failed, not because his intellectual understanding of law was inadequate, but because his character was badly formed—badly formed in a way that better education, particularly proper reading, might have fixed.

The second section of this Part extrapolates that vindication of the law and indictment of Vere's character flaw to the macrocosmic scale.⁵⁸ On this view, the traditional God of Christianity shares Vere's basic character flaw. Christianity's God, like Captain Vere, is unnecessarily, even neurotically, hard on himself, with awful consequences for himself and others, particularly his "only begotten Son." On this reading, a properly republican law, the one Vere might have followed had he been a healthier, less "godly" human, is poised to replace a fundamentally flawed God as the ideal ordering force in the universe.

This twin analysis, microcosmic and macrocosmic, prepares us for the Article's final part, which shows how *Billy Budd* would have us answer questions, as old as Plato and the Prophets, about how human affairs can and should be ordered, and what role law and literature can and must play in that ordering.

A. *In the Microcosm of the Ship*

Melville does a marvelously balanced job of showing us first Vere's character, then how his tragic action emerges from it. Quite significantly, he shows Vere to be an extraordinarily able sea officer, at a

57. See *infra* Part III.A.

58. See *infra* Part III.B.

time when England's naval officers were the bulwark of the Anglo-American system of ordered liberty. The "rule of law," against a France just emerged from Revolutionary Terror and poised to plunge into Napoleonic megalomania. It is only against that background that we see the significance of Vere's handling of Billy Budd's case. For the most part, he shows himself to be an exceptionally skillful leader and a very subtle, if self-taught, student of law. His problem is not his general attitude toward the law, nor even in its particular applications. It is, rather, in the havoc wreaked when his peculiar tropism causes him, metaphorically, to "veer" from his usually balanced, well-trimmed course. If we follow Melville's lead carefully, we can locate precisely the point at which Vere turned from this course. What is more, we can reconstruct that course itself from very clear textual clues. That course shows us a way to achieve justice in this situation and leaves us to ponder why Vere was unable to do it.

We need first to look at Vere's character, his habituated ways of dealing with critical questions, then at how that character worked itself out in the particulars of Billy Budd's case.⁵⁹ Against that background, we will then step back to consider how the text suggests an alternative, much superior, handling of the case. Finally, we will examine what the novel has to tell us about the kind of person Vere had to be to miss such an opportunity in the law.

1. Vere's General Character: Exemplary "Officer and Gentleman"

In two closely linked chapters, six and seven,⁶⁰ Melville's narrator shows Vere to be very nearly the paragon of the "officer and gentleman" that has given that quaint old phrase its continued, if paled, appeal down to the present day. Chapter six begins by focusing on the centrality of ship commanders' leadership: "In their general bearing and conduct the commissioned officers of a warship naturally take their tone from the commander, that is, if he have that ascendancy of character that ought to be his."⁶¹ The rest of the chapter shows Vere to have the makings of just that sort of commander.

Thus, the narrator tells us, Vere was "a sailor of distinction even in a time prolific of renowned seamen."⁶² "He had seen much service, been

59. As Johnson has shown, the interplay between character and action runs deeply through plot of the whole novella and each of its three principal characters, Billy Budd, Claggart, and Vere; "It is this discrepancy between character and action that gives rise to critical disagreement about the story: readers tend either to save the plot and condemn Billy . . . , or to save Billy and condemn the plot" JOHNSON, *supra* note 2, at 82.

60. MELVILLE, BILLY BUDD, *supra* note 1, at 16-19.

61. *Id.* at 16.

62. *Id.*; see also Richard A. Posner, *Comment on Richard Weisberg's Interpretation of Billy*

in various engagements, always acquitting himself as an officer mindful of the welfare of his men, but never tolerating an infraction of discipline; thoroughly versed in the science of his profession, and intrepid to the verge of temerity, though never injudiciously so.”⁶³

Yet these “official” attributes do not exhaust his character: Vere had significant features not directly attributable to his career, features that were not, strictly speaking, occupational. “Aside from his qualities as a sea officer Captain Vere was an exceptional character. Unlike no few of England’s renowned sailors, long and arduous service, with signal devotion to it, had not resulted in absorbing and *salting* the entire man.”⁶⁴ These features, on first face and to an unsophisticated eye, seem at odds with his office; on deeper inspection, however, they prove entirely consistent with it, even essential to it; they are not merely appropriate ornaments, but basic components. They show us why it was important, then and perhaps now, for an officer to be a gentle-person, by showing us what it means to be a gentle-person, a genuine aristocrat, in a properly functioning meritocracy, as opposed to a merely hereditary “squirearchy.”

Foremost among these exceptional features was Vere’s “marked leaning toward everything intellectual.”⁶⁵ The relationship between his love of books and his more strictly technical work was complex. On the one hand, his studiousness affected his perspective on both the details of his craft and the larger purpose that his craft served—both the tactical and the strategic, we could say. As to the tactical, “in illustrating of any point touching the stirring personages and events of the time he would be as apt to cite some historic character or incident of antiquity as he would to cite from the moderns.”⁶⁶ As to the strategic, “[i]n this line of reading he found confirmation of his own more reserved thoughts . . . 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.”⁶⁷

On these latter, strategic matters, Vere favored as commentators “unconventional writers . . . who, free from cant and convention, honestly and in the spirit of common sense philosophise upon

Budd, 1 *CARDOZO STUD. L. & LITERATURE* 71, 75 (1989) [hereinafter Posner, *Comment*] (“The novella presents Vere to the reader with high accolades . . .”).

63. MELVILLE, *BILLY BUDD*, *supra* note 1, at 16.

64. *Id.* at 18.

65. *Id.*

66. *Id.* at 19.

67. *Id.* at 18.

realities.”⁶⁸ They confirmed his conservatism, his favoring the traditionalist English cause over the revolutionary French. The strong implication is that he read both Paine and Burke, and, after a careful weighing of the two, sided with the latter. His commitment to the English cause was not jingoism, not even a merely reflexive patriotism. As illustrative of the writers he preferred, the narrator gives the French essayist Montaigne.⁶⁹ The touchstone of his preference was excellence, not nationality. And his measure of excellence, significantly, was the public good—literally “res publica,” the foundation, philosophically and etymologically, of “republic.”

Unlike many of his less studied colleagues, he was not conservative out of self-interest. Rather, he put aside general class interest; even more, he wholly shunned narrow personal interest. Indeed, as we shall see, the excess of this last virtue became his tragic flaw, if not his besetting sin. It was his settled conviction, based on his careful reading, that radicalism of the French fashion could not be contained in sustainable forms:

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 be insusceptible of embodiment in lasting institutions, but at war with the peace of the world and the true welfare of mankind.⁷⁰

Quite significantly, then, Vere’s was a contingent conservatism. By easy negative implication, if he could be convinced that alternative social arrangements, better for “the true welfare of mankind,” could succeed, then he would accede to them, even support them. This made him something of a paradoxical conservative, very firmly in the position of his aristocratic ancestors. They were of the highest and oldest Norman nobility, but they made their name in the vanguard of prototypically revolutionary causes. The most illustrious Vere, the narrator reminds us, made his name in the Protestant cause in the German wars of the early seventeenth century.⁷¹ In the English Civil war, the narrator expects us to know, Vere’s people took the side of the Parliament against the king; they cast their lot with the Commonwealth, literally, the common good. Indeed, the Lord Fairfax, from whom Melville took Vere’s middle name,

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 17.

was the general commander of the Parliamentary army that defeated the royalist forces in the first phase of the English Civil War.⁷²

Yet, like his namesake, Fairfax balked at regicide and, apparently, republicanism. Perhaps like Vere, he did not believe that such radical principles, putatively in the public interest, could be embodied in permanent institutions. Tragically, his conservatism proved correct; whether as a self-fulfilling prophesy, we cannot, of course, ever know. Fairfax retired from the service rather than countenance regicide; command of the army, and later the country, passed to his lieutenant, Oliver Cromwell. Fairfax never reconciled with this old comrade-in-arms; the Commonwealth gave way to Cromwell's Protectorate, a kind of neo-classical dictatorship, which itself collapsed shortly after Cromwell's death.⁷³ Perhaps the republican experiment asked too much, too soon; perhaps it needed only the continued support of men like Fairfax to succeed.

In any case, a chastened monarchy was restored under the executed king's much savvier son,⁷⁴ after him, his reactionary brother's brief reign precipitated the paradigmatically English "Glorious Revolution": the constitutional establishment of a limited monarchy, the political and social entrenchment of a hereditary "squirearchy," and the economic unleashing of an amazingly successful, and upwardly mobile, merchant and eventually manufacturing class.⁷⁵ England became the imperial power that dominated world trade and manufacturing at the threshold of the nineteenth century. And, of course, its navy was the principal bulwark against both the radicalism of the late Republic and Napoleon's imperial ambitions, "a fleet, the right arm of a Power then all but the sole free conservative one of the Old World."⁷⁶

It was near the height of this oddly mixed regime, in the midst of this anomalous amalgamation of inherited position and reward of talent, that Melville's Vere made his career. As the narrator tell us, "[t]hough allied to the higher nobility his advancement had not been altogether owing to influences connected with that circumstance."⁷⁷ Vere was born high and earned his way up.

Vere's noble name, like his "officer and gentleman" status, has several related dualities. As my title indicates, there is the unmistakable

72. See generally Joseph Leondar Schneider, *Melville's Use of the Vere-Fairfax Lineage in Billy Budd*, 26 J. ONOMASTICS 129, 129-38 (1978).

73. See CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION: 1603-1714*, 111-18 (Christopher Brooke et al. eds., 1961) (narrating events from 1640-1660).

74. *Id.* at 193-99 (narrating events from 1660-1688).

75. *Id.* at 257-61 (narrating events from 1688-1714).

76. MELVILLE, *BILLY BUDD*, *supra* note 1, at 12.

77. *Id.* at 16.

pun of “Vere” with “veer.” We shall explore that in more detail later, against the background of the particular incident where Vere’s fatal “veer” occurs. We have seen already the aristocratic and revolutionary heritage of the Fairfax-Vere family. We need now to see a critical duality in Captain Vere’s nickname, “Starry.” As the narrator tells us, it was a Fairfax cousin who conferred it upon him in congratulation, after Vere’s role in a major naval victory.⁷⁸ That cousin had been re-reading Andrew Marvell’s poem *Appleton House*, written about Marvell’s pupil, the niece of the great General Fairfax, when Marvell was himself the father’s protégé, before he went on to become special aid to Milton, Cromwell’s virtual secretary of state.⁷⁹ In the critical passage, Marvell alludes favorably to “the discipline severe”—perhaps another pun on Vere, by both Marvell and Melville—“of Fairfax and the starry Vere.”⁸⁰

“Starry,” in that connection, means primarily, if not exclusively, “stellar,” “of the highest order of excellence”—in a word, a star. And so, surely, Captain Vere’s cousin meant “starry” to apply to him. He called him that on the heels of a major military success, a success of the kind to remind the two of them, and all their peers, of their illustrious Vere ancestors.

But Melville neatly balances this positive association, as he does much else he says positive about Vere, with curious qualifications. First, and most obviously, he has the nickname taken up by those of Vere’s peers who do not appreciate his finer, more “genteel” qualities. Chief among these qualities, and closely aligned with his essential studiousness, is a tendency toward abstraction in thought and aloofness in conduct. Lesser officers, even those who appreciated his successes, did not fully understand the source of these qualities, their rootedness in the truly aristocratic elements of his character. That character perplexed, and to some extent alienated, those of lesser ability, even as they admired Vere and compared him favorably with Nelson: “Vere is a noble fellow, Starry Vere. Spite the gazettes, Sir Horatio . . . is at bottom scarce a better seaman or fighter. But between you and me now do’nt you think there is a queer streak of the pedantic running through him?”⁸¹

For these sympathetic but uncomprehending colleagues, “starry” was “starry-eyed”; even as they juxtapose “noble” and “starry,” they fail to see their essential connection. They see “starry” as a qualification of,

78. *Id.* at 17.

79. 1 NORTON ANTHOLOGY OF ENGLISH LITERATURE 1287, 1302-03 (M.H. Abrams, et al. eds., 3d ed. 1974).

80. MELVILLE, BILLY BUDD, *supra* note 1, at 17.

81. *Id.* at 19.

and detraction from, “noble,” rather than a compliment to it, even component of it. What’s more, and closely associated with this perception of Vere’s “abstraction,” was that lesser officers also found him at least a little aloof and humorless;⁸² this, as we shall see, doubtlessly affected their perception of his conduct in the particular case of Billy Budd.⁸³

Melville counterbalances this “popular” doubt with the suggestion that Vere’s abstraction is very much the part of “higher” natures. His narrator concedes that “Captain Vere, though practical enough upon occasion, would at times betray a certain dreaminess of mood.”⁸⁴ But he goes on to suggest that this befits the best of minds: “As with some others engaged in various departments of the world’s more heroic activities”⁸⁵ His intellectualism is part and parcel of his larger character; like this part, Vere’s character as a whole works in complex synergy with his official role as a naval officer. That synergy is the core of classical virtue: that condition of a person or thing in which it best performs its essential function.⁸⁶

The narrator strikes a similarly precise balance between the popular and the informed understanding of Vere with respect to a related aspect of his character, his distinctly diplomatic, non-military bearing when off-duty. On the one hand, this seems at odds with his official status, but only to the uninitiated, those who are not even in the military themselves, much less naval officers: “Any landsman observing this gentleman . . . might have taken him for the King’s guest, a civilian aboard the King’s-ship, some highly honorable discreet envoy on his way to an important post.”⁸⁷ When “nothing demanded his paramount

82. They “found him lacking in the companionable quality, a dry and bookish gentleman as they deemed.” *Id.* at 18. They thought he “evinced little appreciation of mere humor” and was “grave in his bearing.” *Id.* at 16. See also Solove, *supra* note 21, at 2466 (“In all descriptions of Vere, his only fault seems to be a bit of remoteness.”).

83. Vere, for his part, seemed oblivious to the opinions of these lesser lights, perhaps like Socrates and “the many.” “He seemed unmindful of the circumstance that to his bluff company such remote allusions however pertinent they might really be were altogether alien But considerateness in such matters is not easy to natures constituted like Captain Vere’s. Their honesty prescribes to them directness, sometimes far-reaching” MELVILLE, BILLY BUDD, *supra* note 1, at 19. And yet, if he could not see how they misperceived his “abstraction,” he carefully takes account of his fellows’ lack of abstraction in his argument to the drumhead court.

84. *Id.* at 17.

85. *Id.*

86. PLATO, *supra* note 54, bk. I, at 32 (“[D]oes there seem to you also to be a virtue for each thing to which some work is assigned?”); see also ARISTOTLE, NICOMACHEAN ETHICS bk. II, at 41 (Martin Ostwald trans., 1962) (c. 384 B.C.E.) [Hereinafter NICOMACHEAN ETHICS] (“[E]very virtue or excellence (1) renders good the thing itself of which it is the excellence, and (2) causes it to perform its function well.”).

87. MELVILLE, BILLY BUDD, *supra* note 1, at 17.

action, he was the most undemonstrative of men.”⁸⁸ On the other hand, the narrator suggests that, from the perspective of the truly knowing, the reason for Vere’s demeanor might be quite different, deeply rooted in the “gentlemanly” complement to his “officer” position: “But in fact this unobtrusiveness of demeanor *may* have proceeded from a certain unaffected modesty of manhood sometimes accompanying a resolute nature, a modesty evinced at all times not calling for pronounced action, and which shown in any rank of life *suggests* a virtue aristocratic in kind.”⁸⁹ As the words placed in italics indicate, the narrator offers this observation in a tantalizing tentative conditional mode; Vere’s character may be—but cannot yet definitively said to be—genuinely aristocratic, truly part of the rule of the “best.”

In a similar vein, almost but not quite taking away what he is just about to give, Melville has his narrator raise this critical qualification, even as he introduces the appellation “Starry Vere”: “How such a designation happened to fall upon one who whatever his sterling qualities was without any brilliant ones”⁹⁰ What are we to make of the narrator’s ambivalence about the “excellence” of Vere’s character, the normative assessment of the descriptive features that lie behind it? Some have said that it is part of a careful effort to show Vere in a disadvantageous light, overshadowed by the more illustrious Nelson.⁹¹ Others have pointed out that, at the time of the story, before even his victory at the Nile, Nelson himself was yet a great way from his own apotheosis at Trafalgar. Indeed, had Vere not died shortly after Billy Budd, he might himself have become a Nelson.⁹²

For purposes of my analysis, it is important to see an even more plausible alternative, an intermediate between these two. Vere, on this view, was admittedly no Nelson, no charismatic, sport-of-nature naval genius. But we are not to think less of him on account of that. Some, the narrator reminds us, thought that Nelson’s boldness, even bravado got him killed and that his premature death interfered with orders that might have made the victory at Trafalgar both more complete and less costly.⁹³ Vere was a very different but equally essential sort of character, less

88. *Id.* at 16-17.

89. *Id.* at 17 (emphasis added).

90. *Id.*

91. See, e.g., RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 106 (1992) [hereinafter WEISBERG POETHICS] (“Vere’s colleague and rival, Admiral Horatio Nelson”).

92. POSNER, LAW AND LITERATURE, *supra* note 19, at 169 (“It is true that Vere is no Nelson, but neither was Nelson in 1797”); see also Lawry, *supra* note 22, at 183 (“But Vere was not a Nelson.”); Posner, *Comment*, *supra* note 62, at 80 n.13.

93. MELVILLE, BILLY BUDD, *supra* note 1, at 14.

brilliant but more steady, far more in the common run of military officers, but at least equally important for exactly that reason. The successful operation of the navy required just such men as Vere, in much larger numbers than its Nelsons. Vere's form of excellence is accessible to all holders of his office, not just a tiny minority. In all these respects, he is something of a philosopher-king in his own little microcosmic shipboard commonwealth. He was a creature, not of genius, but of reason, and a particularly important kind of reason, in both classical philosophy and law: Aristotle's *phronesis* or "practical wisdom,"⁹⁴ our "practical reason," "contextual judgment," or "prudentialism."⁹⁵

On this view, Melville is tentative about Vere's character because he wants us to judge it, at least in large part, by his conduct in the particular case he is about to decide, the specific test he himself must soon take. Melville gives us the general standard of excellence, captainly virtue; we ourselves must decide whether, in Vere's great personal test, he measures up, is truly excellent. For classical morality, virtue is not an abstract, absolute state. Rather, as we have seen, it is the condition of a thing in its proper use: sharpness in a knife, speed in a horse, proper "job performance" in a human being.⁹⁶ To see if Vere is virtuous, we must see him at his work, and at a particularly challenging point in that work.

That challenge, Melville is careful to tell us, came to Vere precisely because of his character, his particular embodiment of the relevant military virtues. It was precisely this combination of qualities—not merely officer and gentleman, but also better officer because superior gentleman—that caused Vere to be put to his test: "probably . . . the character of her commander, it was thought, specially adapted him for any duty where under unforeseen difficulties a prompt initiative might have to be taken in some matter demanding knowledge and ability in addition to those qualities implied in good seamanship."⁹⁷ Thus was Vere's vessel dispatched to pursue an enemy frigate.⁹⁸ At exactly that

94. NICOMACHEAN ETHICS, *supra* note 86, bk. II, at 40. For a definition of *phronesis* see Ostwald's glossary in NICOMACHEAN ETHICS, *supra* note 86, at 312.

95. See ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 86-87 (1993); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 170-71 (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 21-25 (1998) [hereinafter SIMON, PRACTICE OF JUSTICE].

96. See NICOMACHEAN ETHICS, *supra* note 86, bk. II, at 41.

97. MELVILLE, BILLY BUDD, *supra* note 1, at 40; cf. SPANOS, *supra* note 21, at 88 (narrator's account of Vere's character and career "suggests . . . that, however intelligent, well read, and well-meaning he is, Captain Vere's decisions as a naval officer are not those of a free agent, but are ultimately determined by a hegemonic discourse that he has deeply internalized.").

98. MELVILLE, BILLY BUDD, *supra* note 1, at 40.

critical juncture, Claggart makes his false but fatal accusation against Billy Budd.

2. Captain Vere's "Veer" in Billy Budd's Case

We have just seen that Vere generally acquits himself quite well as both an officer and a gentleman. The real question about Vere comes up in his handling of Billy Budd's case. As the narrator puts it, that question is "[w]hether Captain Vere . . . was really the sudden victim of any degree of aberration;"⁹⁹ whether he was "not mad indeed, but yet not quite unaffected in his intellects."¹⁰⁰

On the evidence the narrator presents, the answer to his questions, leading as they are, is emphatically yes. Vere is not "mad" in any general sense; as we have just seen, he was almost the opposite, a model of measured discretion. But he handled this case very badly, because he has a serious character flaw, a radically skewing tropism, a severe tendency, under just the right circumstances, to "veer." The challenge to us as readers is to identify exactly the point and nature of his departure, a matter that, according to the narrator, "one must determine for himself by such light as this narrative may afford."¹⁰¹ At precisely the point where a call for subtle judgment implicates his own personal interest, he "veers" toward what harms him the most, is the most painful to him. In this section, then, we must discover the precise point at which Vere "veered" in the wrong direction, took and the wrong tack.

A more apt nautical metaphor is implicit in the very name "Vere." A "veer," in the nautical parlance of the Napoleonic era, is what is more commonly today called a "jibe." It is the opposite of the relatively safe and easy "change of tack," a change of direction when sailing into the wind; it is the always dangerous change of course when the wind is with you, at your back.¹⁰² To change directions radically when things are going your way, to be inclined to make that dangerous maneuver in just those favorable circumstances, is precisely the Vere "veer." In the third section of this Part, we will see what other "course" he might have taken, a course more in keeping with his general character and the

99. *Id.* at 49.

100. *Id.* at 48; see also Solove, *supra* note 21, at 2469-70 ("This is the stark message of *Billy Budd*—that despite the manifest virtues of leaders such as Vere, despite all the outward appearances, we may be failing to peer beneath the veneer.") (citation omitted).

101. MELVILLE, *BILLY BUDD*, *supra* note 1, at 49.

102. According to the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1419, 1451 (1976), to "vere" is "[t]o change the direction of a ship by turning away from the direction of the wind; wear ship"; to "wear ship" is "[t]o make (a sailing ship) come about with the wind aft . . . [t]o come about with the stern to windward."

demands of Billy's particular case.¹⁰³ In the final section of this Part, we will examine why he did not take that course. Now we must examine, in some detail, the wrong turn, the veer, he actually made.

At every point in the unfolding of the case, Melville perfectly counterposes the evidence of Vere's state of mind: cautiousness on the one hand, expeditiousness on the other. We need to examine Vere's state of mind at each critical phase of decision-making: his initial handling of Claggart's accusation, his interrogations of Claggart and Billy Budd, his reaction to Billy Budd's killing of Claggart, his decision to call a drumhead court, his argument to the tribunal, and his final "audience" alone with the condemned Billy. Melville shows us that the attention of Vere's fellow officers was focused on his decision to call the tribunal and then to press that tribunal toward a conviction. He poses the critical question of Vere's sanity just after the calling of the tribunal, right at the outset of the trial.

But to us, his readers, he points in two directions, forward and backward, with the reference to "such light as this narrative may afford."¹⁰⁴ Critical elements—structural and substantive parallels—all implicitly ask us to question a logically and chronologically prior decision: whether to reveal beyond the circle of original witnesses, himself and Billy, what actually befell Claggart. Vere decides to proceed publicly, making of the matter a formal, legal "case." Had he decided to do otherwise, we shall see, the fatal chain of events need not have been set in motion. Taking this alternative course would have involved straining, if not breaking, the letter of the law, but in a way that would much more effectively have served its spirit.

As we saw in Part II, the demand for just this sort of decision is precisely what positions of legal authority frequently, even paradigmatically, place upon their holders.¹⁰⁵ This is particularly problematic in light of what the narrative shows us about the nature of a very wide range of legal activity. More basically, many legal decisions are committed to the sound discretion of the law's agents; nowhere is this more so than in the military, in time of war.¹⁰⁶ These decisions are virtually unreviewable in a court of law, but not, as we have seen, unreviewable as a matter of legal norms, even narrowly conceived. We can plausibly say that Vere's actions were not subject to legal sanction, even as we say that they were not up to the highest standard the law

103. See *infra* Part III.A.3.

104. MELVILLE, BILLY BUDD, *supra* note 1, at 49.

105. See *supra* Part II.

106. See Posner, *Comment*, *supra* note 62, at 78 (execution as "justifiable"); *id.* at 79 (noting that "distasteful" legal outcomes may nonetheless be "permissible" choices under relevant law).

itself holds up for its agents as the measure of how well they have advanced law's own ends. The need for sound judgment in such situations is especially heightened here; what the situation called for in a commander were "two qualities not readily interfusable—prudence and rigor."¹⁰⁷ Vere's tragedy lay in exercising that discretion poorly, more specifically, with unnecessary severity. At every point, Melville shows Vere's actions to be perfectly poised between these two demands,¹⁰⁸ except where his own "interests" entered the picture and skewed his decision.

Billy Budd's case is but an especially crucial example of the requirement of such judgment. This was because, to use Melville's carefully chosen term, this case was "crucial,"¹⁰⁹ in multiple meanings of that word, ways that heighten the need for administrative virtues and cast into higher relief the egregiousness of Vere's lapse—or the severity of his "veer." The total effect is to suggest how much better things would have gone had the two critically parallel lines of ministerial character, prudence and rigor, never been allowed to cross. Much better if the dilemma had been avoided, the crucifixion averted.

As the narrator points out, there was a "crossing over" of guilt and innocence; Billy Budd's moral innocence becomes legal guilt.¹¹⁰ And the more clear the real innocence, the "worse for the responsibility of a loyal sea-commander inasmuch as he was not authorised to determine the matter on that primitive basis."¹¹¹ The stress of that responsibility itself would be excruciating, literally, like being crucified. And, of course, Billy Budd's case was "crucial" in the more general sense of being very important. Life and death turned on very finely calibrated considerations.

We need, then, to descend to a fairly detailed analysis of the crisis Vere faced; we need to look closely, at each critical phase of decision-making, at both Vere's state of mind and his outward conduct. In what follows, we begin with Vere's interrogations of Claggart and Billy Budd and continue through his decision to make a formal "case" out of the accidental killing, his constituting of the tribunal, and his argument to the tribunal down to his pronouncement of final, fatal sentence. That analysis will show us how well he handled the case right up to his tragic

107. MELVILLE, BILLY BUDD, *supra* note 1, at 49.

108. See Lawry, *supra* note 22, at 175 ("Melville's characteristic ambiguity is at work here. . . . What is significant is that it would not be unreasonable for the Captain, to think that mutiny aboard the *Bellipotent* was a real possibility.")

109. MELVILLE, BILLY BUDD, *supra* note 1, at 49.

110. *Id.*

111. *Id.*

“veer,” and how inexorably badly—but not illegally—events went after that.

a. Vere's Handling of Claggart's False Accusation

Vere handles the first phase of the case, Claggart's initial accusation of Billy Budd, with unimpeachable deftness. His assessment of their respective characters is perfectly astute, and his spontaneous choice of procedures is impeccably savvy. Any errors in his judgment here are minor; they escape notice, much less censure, from all but the most unforgivingly harsh hindsight.

From the very outset, Vere is extremely suspicious of Claggart, as well he should have been. The narrator gives ample evidence that Vere's suspicions were grounded in prior contacts with him and in accurate intuitions about his character. When Claggart first approached him with accusations, before Claggart had said a single word, Vere's expression showed something like “a vaguely repellent distaste.”¹¹² He quickly recovered “much of his wonted official manner,” except “a sort of impatience” in bidding Claggart to speak.¹¹³ But, as Claggart did speak, Vere's “aspect changed into restiveness under something in the testifier's manner in giving his testimony.”¹¹⁴ Vere had recalled an earlier misgiving about Claggart: “upon a prior occasion the patriotic zeal officially evinced by Claggart had somewhat irritated him as appearing rather supersensible and strained.”¹¹⁵ And that, in turn, reminded him of a parallel case in his earlier service: “Furthermore, something even in the official's self-possessed and somewhat ostentatious manner in making the specifications strangely reminded him of a bandsman, a perjurous witness in a capital case before a court-martial ashore of which, when a lieutenant, Captain Vere, had been a member.”¹¹⁶

On the other hand, Vere was extremely well disposed toward Billy Budd—again, on good evidence, rightly perceived from the beginning. When first impressed into the navy, Billy bid farewell to his old merchant ship with a jaunty but ambiguous “[a]nd good-bye to you, too, old *Rights-of-Man*.”¹¹⁷ The subordinate officer in charge took this as something approaching insubordination, as did Vere upon hearing that officer's report. But the narrator assures us that Billy was incapable of

112. *Id.* at 41.

113. *Id.*

114. *Id.*

115. *Id.* at 42.

116. *Id.*

117. *Id.* at 7.

any such subtlety or “satiric sally,”¹¹⁸ and Vere himself interpreted Billy’s parting salute to the merchant vessel favorably, even generously, “admiring the spirit that could take an arbitrary enlistment so merrily and sensibly.”¹¹⁹ Billy’s performance once aboard so thoroughly confirmed Vere’s initial impression that he had resolved to have him promoted to command of a sail-top nearer his own inspection. And his pre-disposition toward Billy was not only, in the strictest sense, professional; it was aesthetic, perhaps even a bit erotic, as well. Upon first seeing Billy after his impressment, Vere congratulated the officer who found him for “his good fortune in lighting on such a fine specimen of the genus homo, who in the nude might have posed for a statue of young Adam before the Fall.”¹²⁰

Accordingly, upon hearing the dubious Claggart’s accusation against the spotless Billy, Vere shows “unfeigned astonishment.”¹²¹ He was, at first, short with Claggart himself, giving outward and active play to his internal analysis and doubts. Put off by Claggart’s circumlocution in referring to impressed sailors, Vere impatiently interrupts with “[b]e direct, man; say impressed men.”¹²² Even more put off by Claggart’s allusion to the recent Nore mutiny, he interrupted more heatedly, “[n]ever mind that,” displaying at least a measure of anger at the thought that Claggart had meant to alarm him as to his own personal safety.¹²³ Mindful of an earlier perjury case, Vere put Claggart on notice: Perjury in capital offenses is itself a capital offense. In sum, the narrator makes quite clear that Vere, true to his character, sized the men up accurately, and hesitated only about how to proceed most wisely.¹²⁴

b. Vere’s Initial Investigation of Claggart’s Charge

Although reflective and careful in deciding how to proceed, he was both quick and effective in his decision. The steps he took here are very significant, especially by way of contrast with what he does after the assault. “At first indeed he was naturally”¹²⁵ in support of having Claggart bring forward his informants. But, as the narrator says, “such a proceeding would result in the matter at once getting abroad.”¹²⁶ That,

118. *Id.* at 43.

119. *Id.*

120. *Id.*

121. *Id.* at 42.

122. *Id.* at 41.

123. *Id.*

124. *Id.* at 40-45.

125. *Id.* at 44.

126. *Id.*

“in the present stage of it, he thought, might undesirably affect the ship’s company.”¹²⁷ Thus he overrode his initial, natural inclination with an almost instantaneous, but nonetheless thoughtful response, based on apparently correct perceptions of the inevitable consequence, word getting out, and a reasonable assessment of the relevant risks, unsettling the crew in the course of a delicate and dangerous military engagement.

The alternative procedure he immediately hit upon was no less clever and effective for all its near spontaneity. He would test the credibility of the accused and the accuser: If Claggart proved incredible to Vere himself, that would end the matter. To achieve this, Vere needed to change the scene from public to private, from above decks to below, and to bring Billy Budd in without alerting anyone, including Billy himself, of the purpose of the meeting. To achieve this, Vere actively and explicitly enlisted his “cabin boy” in concealing the real place and purpose of the meeting.¹²⁸ Thoroughly in keeping with his character, “he thought this could be done in a quiet undemonstrative way.”¹²⁹ And so it was. Vere’s secret summons worked as planned; word did not get out among the crew at large.

Even when the confrontation between Billy and Claggart initially went awry, Vere more than kept his wits about him. Billy mistakenly but plausibly believed the meeting was about his being promoted to captain’s coxswain; he assumed Claggart was there to give a positive assessment of his performance. When Claggart’s accusation strikes Billy literally dumb, Vere immediately recognizes the problem, instantly seeing it as analogous to a speech impediment of a schoolmate of his.¹³⁰ Placing a fatherly hand on Billy’s shoulder, he tells him to take his time. This genuinely generous gesture goes horribly awry, increasing rather than diminishing Billy’s frustration, which erupts in his fatally striking Claggart.¹³¹ But no amount of foresight on Vere’s part could have predicted this turn of events. Only afterward, albeit very shortly afterward, does Vere do anything even arguably amiss.

c. Vere’s Handling of Billy Budd’s Homicide

Immediately after Billy Budd, in uncontrollable frustration, strikes Claggart down, Vere loses neither his calm nor his fatherly mode. He declares “fated boy . . . what have you done,”¹³² but only in a whisper,

127. *Id.*

128. *Id.* at 45.

129. *Id.* at 44.

130. *Id.* at 46.

131. *Id.*

132. *Id.*

and he asks for Billy's help in the futile task of propping up the now lifeless Claggart. Only then does Vere pause reflectively, cover his face, and eventually re-emerge with his fatherliness replaced by the demeanor of the military disciplinarian.

Here, we shall see, is where he fundamentally erred, setting in motion a deadly chain of events. Here he might have taken a different course, concealing, rather than revealing, Billy Budd's homicide. We, Melville's readers, see both this option and its alternative, Vere's decision to proceed formally and "legally." But his fellow officers see only the course actually taken, the decision to call the military tribunal. We see that the same process skews both. We are in a position to see that, just as Vere called for the tribunal in an unduly agitated state of mind, so, in the same state of mind, had he previously decided to go forward "legally" at all. And, just as referring such matters to the admiralty was the norm, so also was handling things secretly, discreetly, the norm. But referring matters to the admiralty would have changed nothing for Billy, and would have run very serious risks for the navy; concealing the homicide, on the other hand, would have both saved Billy and put the navy and the nation at less, not more, peril.

Before turning to that possibility, that excluded alternative, we must examine the way Vere actually did handle Billy Budd's case, and the evidence on the basis of which his fellow officers questioned his judgment, even his sanity. As we shall see, they were ironically right in their assessment of his mental deviation, even as they were wrong about what he should have done differently.

In the immediate aftermath of the homicide, as we have seen, the narrator tells us that a stern military discipline displaces Vere's previously fatherly feeling for Billy. He orders an acquiescent Billy to an aft statesroom, then sends for the surgeon to determine Claggart's condition.¹³³ Calling in the surgeon serves two purposes, one internal to the plot, the other external. "Inside" the narrative, it gives Vere confirmation of Claggart's death; more importantly, it gives us readers, in the surgeon, an "internal" witness to Vere's conduct at the time, particularly his next decision, calling the tribunal.

Vere's handling of the homicide involved three phases visible to his fellow officers: his initial reaction to the surgeon's declaration of Claggart's death, his immediately subsequent calling of the drumhead court, and his conduct before that court. His fellow officers saw evidence of mental deviation in all three phases. In the remainder of this section, we need to see that, although his demeanor may well have been

133. *Id.* at 47.

disquieting and his state of mind disturbed, his actual conduct of the case was quite defensible, even inevitable, under the circumstances. What we shall see in the next section is that one of those circumstances, the disclosure of the homicide, was entirely within Vere's control; concealment was an option at the outset, an option Vere fatally failed to exercise, apparently even to consider.

d. The Decision to Call a Drumhead Court

After the doctor's confirmation of Claggart's death, Vere convulsively seizes the surgeon's arm and exclaims, "[i]t is the divine judgment on Ananias!"¹³⁴ Only after becoming "absorbed in thought" does he again convulse and declare: "Struck dead by an angel of God! Yet the angel must hang!"¹³⁵ After that outburst, Vere regains his composure, recounts the killing to the surgeon, enlists his aid in removing the corpse to a stateroom, and orders him to summon the lieutenants and the captain of the marines for a drumhead court, enjoining them to secrecy.¹³⁶

The surgeon is deeply troubled by Vere's conduct, both his charged reaction to the confirmation of Claggart's death and his decision to call the tribunal. As to the latter, the surgeon thought Vere should have followed the general practice of referral to the fleet command, as opposed to holding his own drumhead court.¹³⁷ The other officers, in their turn, agreed with the surgeon.¹³⁸ Having been informed of Vere's calling of the tribunal, but not his state of mind, "[l]ike him [the surgeon] too they seemed to think that such a matter should be referred to the Admiral."¹³⁹ Thus everyone who knew of this decision—surgeon and officers of the tribunal—thought referral to the admiralty was preferable. But the narrator gives us ample reason to believe that Vere's was the wiser course (once he chose to reveal the truth about the homicide).

Indeed, according to the narrator, Vere himself would have preferred the course his subordinates thought proper: "The case indeed was such that fain would the *Bellipotent's* captain have deferred taking any action whatever respecting it further than to keep the foretopman a close prisoner till the ship re-joined the squadron and then submitting the

134. *Id.*

135. *Id.*

136. *Id.* at 48.

137. *Id.*

138. *Id.*

139. *Id.*

matter to the judgement of his Admiral.”¹⁴⁰ Thus, at this critical initial point of decision,¹⁴¹ Vere moved in a direction that, although clearly legal, was not legally compelled;¹⁴² indeed, it was, of the two courses then open, the course least expected by his fellow officers because less according to general practice. And Vere himself inclined toward the more popular course. Though he was a strict disciplinarian, the narrator tells us, “he was no lover of authority for mere authority’s sake”; indeed, “very far was he from embracing opportunities for monopolizing to himself perils of moral responsibility, none at least that could properly be referred to an official superior or shared with him by his official equals or even subordinates.”¹⁴³ Thus the ideal compromise seemed to be to call a tribunal of this own officers, a combination of necessarily expedient action and shared responsibility.¹⁴⁴

The narrator makes clear that Vere chose as he did from two concurrent impulses, an ingrained sense of duty and an instinctive sense of danger. As to the sense of duty, the narrator tells us that the “true military officer,” like the “true monk” in his “self-abnegation,” will keep “his vows of allegiance to martial duty,” even as the other “his vows of monastic obedience.”¹⁴⁵ As to Vere’s sense of danger, the narrator is equally clear:

Feeling that unless quick action was taken on it, the deed of the foretopman, as soon as it should be known on the gun-decks would tend to awaken any slumbering embers of the Nore [mutiny] among the crew, a sense of the urgency of the case overruled in Captain Vere every other consideration.¹⁴⁶

The narrator leaves neither doubt that Vere dutifully called the drumhead court to forestall mutiny, nor does the narrator give us any sense that Vere’s sense of duty was misplaced, or his sense of danger mistaken.¹⁴⁷

140. *Id.* at 50.

141. See Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1091 (analyzing “the central legal issue raised in *Billy Budd*” as “whether Billy should have been tried by a drumhead court or remitted to the fleet for a formal court-martial”) (citation omitted).

142. See *id.* (“[T]he allocation [of decision-making authority] issue is more complex than a bipolar choice between two spheres.”).

143. MELVILLE, BILLY BUDD, *supra* note 1, at 50.

144. See Lawry, *supra* note 22, at 174 (“Vere exercise[d] his discretionary power to call a drumhead court . . . [b]ecause he feared mutiny if he did not dispose of this case with firmness and speed”); see also *id.* at 177 (“Another reason that Vere called a drumhead court was to seek the help and counsel of others.”).

145. MELVILLE, BILLY BUDD, *supra* note 1, at 50.

146. *Id.*

147. Cf. Lawrence Friedman, *Law, Force, and Resistance to Disorder in Herman Melville’s Billy Budd*, 33 T. JEFFERSON L. REV. 61, 62-63 (2010) (locating Vere’s fatal character flaw in his obsessive anxiety about disorder).

e. Vere's Conduct Before the Drumhead Court.

As with Vere's decision to call a drumhead court, so with his insistence on its convicting Billy Budd, the surgeon and the other officers thought Captain Vere mistaken, even deranged, at least initially, and they clearly questioned the justice, if not the legality, of the result he pressed them to.¹⁴⁸ Scholars have long and deeply divided, of course, on all these points. From a legal standpoint, several things about that result itself are clear enough. First, the result Vere pressed for was entirely legal, tragic though its consequences may have been. Second, Vere pressed for that result with a basically sound understanding of the law's capacity for policy-oriented, as opposed to strictly literal, interpretation.¹⁴⁹ Third, and most relevant to us here, the result Vere pressed for was the one the law itself seemed to require in this situation. The policy of the Mutiny Act was to err, painful though it might be, in favor of the collective over the individual, if there were no alternative course.¹⁵⁰ Real risks were not to be run in striking that balance; too much was deemed at stake, precisely as Vere set out in his argument to the court. Vere may not have believed entirely what he said about "role morality" in his argument to the tribunal; he seems, rather, to have been using the rhetorical means at hand to get the job done. In fact, the narrator intimates that Vere may well have used procedural flexibility to include on the court the master of marines, a slight but not unprecedented irregularity, precisely because this kind of specious argument would appeal to him.

Most significantly, deferring the case would have produced the worst, not the best, of all worlds: It would have risked mutiny without much prospect of saving Billy Budd;¹⁵¹ it would, in essence, have at best passed the buck, and at worst let mutiny smolder, if not erupt. The basic

148. See MELVILLE, BILLY BUDD, *supra* note 1, at 53 (The other officers were particularly troubled by Vere's first comment about the "no fault" nature of the offense, which was "[c]ouched in it seemed to them a meaning unanticipated, involving a prejudgment on the speaker's part.").

149. See Posner, *Comment*, *supra* note 62, at 72-73; see also POSNER, LAW AND LITERATURE, *supra* note 19, at 170-72 (analyzing Vere's argument and the balancing he conducts of the "two tables" of the law).

150. MELVILLE, BILLY BUDD, *supra* note 1, at 55-56.

151. Lawry argues otherwise, *supra* note 22, at 181 ("Thus, Vere could have easily satisfied the demands of strict justice, and at the same time served a higher justice or fairness that takes circumstances into account, if he had held Billy for the Admiral."); see also *id.* at 183 ("[V]ere could, in the circumstances set up by Melville, still have avoided injustice had he followed ordinary practice and held Billy for the Admiral."). But, as Posner points out, the result under the law as Melville gives it, would have been the same. POSNER, LAW AND LITERATURE, *supra* note 19, at 166-67, 170-71. It is, for reasons already given, see *supra* Part II.B.b(1), irrelevant to our analysis of the novel that many such cases were commuted or otherwise rendered without capital sentence. Thus we are pressed back to other alternatives, like my own. See *infra* Part III.A.3.

point is this: Vere chose among alternative legal courses on the basis of safety, the very purpose that the law's strictness was supposed to serve. He rejected the other approaches, equally plausible as a matter of legal interpretation,¹⁵² because he knew that the primary purpose of the relevant law, preventing mutiny, could only be surely served this way. He is quite explicit that the need to convict Billy Budd flows not only from the compulsion of the Mutiny Act's letter, but also from the rational appeal of its purpose. Asked whether the tribunal could not convict, but then mitigate the penalty, he replies, "[m]y man, were that clearly lawful for us under the circumstances consider the consequences of such clemency."¹⁵³ He then argues, to the tribunal's conviction, that the crew would regard clemency as cowardice, with predictably disastrous effects for both morale and discipline.¹⁵⁴ Thus Vere's argument is not for a slavish following of the letter of the law, but rather an understanding service to the law's purpose, preservation of the rule of law itself.

But, of course, Vere's fellow officers are acutely aware, as are we, of two very significant, intimately related, points. First, Vere's choice was made in a manifestly disturbed state of mind. Second, even if it served one legal interest, preserving public order, it radically compromised another, protecting an innocent's life. Melville scholars have uniformly shared the subordinate officers' sense of tragedy, even as they differ on their assessment of Vere's conduct and the law's requirements. Those who come out in favor of Vere's decision to try Billy and the appropriateness of his conviction tend to ignore his agitated state of mind altogether or to dismiss it as a sort of "no harm, no foul" offense. What does the skewed state of mind matter, if it produced the appropriate result? On the other hand, those who find the result unacceptable either fault Vere for taking an overly harsh view of the law, or fault the over-harshness of the law for pressing its conscientious agent to the brink of insanity, if not beyond. Melville scholars, like Vere's officers, take the disclosure of Billy Budd's conduct as a necessary given, disputing only what was to be done about it, and why.

There is, however, a very different way of dealing with these two related points, the law's manifestly harsh penalty on the "naturally innocent" Billy and Vere's obviously grave state of mental agitation in pressing for that result. What if Vere's agitation, a kind of "harmless

152. See Lawry, *supra* note 22, at 181-83 (discussing the legality of simply handing Billy over to the Admiral).

153. MELVILLE, BILLY BUDD, *supra* note 1, at 56.

154. Cf. Lawry, *supra* note 22, at 185 ("He might have followed the option suggested by one of the adjudicators: conviction and mitigation.").

error" once he chose to make the truth of Claggart's death public, in fact caused Vere to make an absolutely catastrophic error at an immediately prior juncture, the point at which he decided to reveal, rather than conceal, the truth about what actually caused Claggart's death? Vere may have been right, once the truth was out, to call the tribunal and insist on conviction. But he was evidently suffering under some distress, some disturbance of mind. Are we merely to conclude "no harm, no foul"? Or is that very oddity to press us back to see that the harm was readily avertable, and thus the foul very great?

What we need to explore in the next section, then, is the possibility that Vere's agitated state of mind caused him to overlook or reject an alternative that might well have reconciled both of the law's substantive goals, individual rights and public security, by a much less severe sacrifice of one of its procedural goals, administrative transparency. Like his decision to call the drumhead court, Vere's arguments for conviction turn on a single critical assumption: Claggart's death at Billy Budd's hands will be *known*, sooner or later, to everyone on board ship. Yet this critical variable is very much in Captain Vere's hands. Leave that assumption in place, and his arguments to the court are completely compelling and the court's sentence inevitable as a matter of proper legal reasoning. Billy Budd's death is tragic: Law compels the death of the innocent one to save the many. But remove the assumption that the real cause of Claggart's death must be publicly known, and Billy Budd's death is not necessary, but gratuitous. It is not an example of the maxim that *hard cases make bad law*, but rather evidence that law may offer a way, within itself, rightly understood, to reconcile public needs and private rights.

3. The Course Vere Did Not Take: Concealing the Homicide

Let us consider, then, the course that Vere did not take, the course from which he initially "veered." Most starkly stated, that course was simply to report Claggart's death as an accident, enjoining Billy Budd not to reveal the truth. Keeping the homicide a secret would have neatly averted Billy Budd's trial and conviction; if it were not known that he struck Claggart, there would be no need to proceed against him under the Mutiny Act. This would obviate the need not only for a drumhead court, where the law seemed to require his conviction, but also any referral to the admiralty, where his conviction would have been equally inevitable, if a bit later. Innocence would thus have been spared, in accord with one of the law's most basic goals.

At the same time, the Mutiny Act's more particular goal, preservation of public safety, would also have been served. Concealing

the real cause of Claggart's death would have removed any risk that leniency toward Billy, sooner or later, might undermine discipline and hence run the risk of another mutiny. If no one knew Billy had struck Claggart, no one could have seen laxity in not punishing him for it. As a practical matter, the lie would have been plausible enough; shipboard accidents were (and are) commonplace, and the blow to Claggart's head could as easily have come from a slip and fall down a treacherously wet stairway as from Billy's fist. Either way, Claggart is at the bottom of the steps, dead from a fatal head injury.

Not insignificantly, the world—legally and morally, literally and symbolically—is a better place for it. Virtually no one doubts Vere's initial judgment about Billy's fatal blow: "It is the divine judgment on Ananias!"¹⁵⁵ Indeed, the narrator gives us to understand that Claggart is to be identified, not only with the thieving Ananias,¹⁵⁶ but also with the very devil himself, his deed with the original and elemental wrong, tempting innocence to its own destruction. What's more, even as Vere himself instantly realizes, Billy's hand is, in a fundamental sense, the hand of cosmic justice itself. Claggart, he declares, is "struck dead by an angel of God!"¹⁵⁷ What radically does not follow, what troubles us deeply, is Vere's immediately subsequent *non sequitur*: And yet the angel must die!

But the alternative of concealment, elegant though it is, is not without problems of its own. Can it have occurred to Vere, given what we know of his character? On first face, it is easy to dismiss concealment as an alternative that Vere would never consider. Can it be an alternative that Melville is offering, within the narrative, to us? We need to look, then, at how consistent it is with both his character and the course of the plot; as we shall see, these factors are inextricably interwoven in Melville's narrative. To say that it *could* have happened, of course, is not to say that it *should* have. Is it an alternative we can accept? We will need to look, next, at the popular acceptance of just such concealments, both in general and in a familiar and paradigmatic case of law-abiding violations of law. Then we can ask whether, for all their popular appeal, this is an alternative that we can consider both just and lawful. We need to see that such intuitively appealing concealments can be understood, not only as consistent with legality, but also as

155. MELVILLE, BILLY BUDD, *supra* note 1, at 47. Richard Weisberg sees Claggart as Christ, but this is a view very compelling questioned by others. See POSNER, LAW AND LITERATURE, *supra* note 19, at 167 ("even a rabid anti-Christian—even a Nietzsche—could not find any similarity in character or deeds between Christ and Claggart.").

156. Acts 5:1-6 (Revised Standard).

157. MELVILLE, BILLY BUDD, *supra* note 1, at 47.

required by law's deepest strivings for justice. For that, we must examine the normative case for an apparent paradox, breaking the law in order to serve, even save, the law.

Finally, against that background, we can approach the question toward which my title directs us: Why, in light of all this, did Vere not choose the course of concealment? We need to see exactly why Vere could not consider it, and why considering it would be perfectly compatible with the relationship between the law and its agents that has been both academically defended and popularly accepted. As we shall see, Vere could not consider this alternative because he was committed to taking the most personally painful of alternative public actions; this tropism, in turn, blinded him to a profound jurisprudential reality: Sometimes the law's agents, in order to serve the law's spirit, must violate its letter. Vere could not see what we must see, which is what we have always known: At least sometimes, the letter killeth, when the spirit could give life.¹⁵⁸

a. The "Intrinsic" Plausibility of Concealment: Consistency with Plot and Character

Vere's decisions that most troubled his peers, going forward with a drumhead court and then pressing for conviction and execution, parallel a prior decision, visible to only two people within the narrative, Vere and Billy Budd. The officers can, in the very nature of the narrative's unfolding, look only at Vere's conduct after his revelation of the homicide; by contrast, the narrator explicitly has us look backward as well as forward, to his narrative as a whole. And parallels within that narrative also point us to a synoptic perspective. The final private interview of Vere and Billy—again, outside the purview of Vere's officers—effectively leads us to consider their first private interview, immediately after the homicide.

Vere's decision there, visible only to Billy Budd, nicely parallels, in both its form and its content, the decision, seen by the surgeon, that first called into question the captain's sanity. In the scene with the surgeon, "Captain Vere, with one hand to his brow, was standing motionless"; a little later, "Captain Vere was now again motionless, standing absorbed in thought."¹⁵⁹ In the earlier scene, alone with Billy Budd, "Captain Vere with one hand covering his face stood to all appearance as impassive as the object at his feet,"¹⁶⁰ Claggart's corpse. Just there, the narrator raises

158. 2 *Corinthians* 3:6 (Revised Standard).

159. MELVILLE, BILLY BUDD, *supra* note 1, at 47.

160. *Id.*

a vital question: “Was he absorbed in taking in all the bearings of the event and what was best *not only now at once to be done, but also in the sequel?*”¹⁶¹ If so, then he may have made errors in judgment here parallel to those that others who saw him thought he made later; just as we are explicitly invited to examine those later errors, so we are implicitly invited to look for an error here. Indeed, the very “harmlessness” of any later errors, given what we have seen to be the Mutiny Act’s inexorable result, presses us either to think that that the result is appropriate, or, alternatively, to look back for an earlier, “harmful” error.

In making the initial, critical decision, alone with Billy Budd, Vere visibly changed from paternalism to something very different: “The father in him, manifested towards Billy thus far in the scene, was replaced by the military disciplinarian.”¹⁶² What follows from that turn, we know all too well from its sequel: the calling of the drumhead court, Billy’s conviction and execution. But we are led to wonder: What might have followed from the continuation of his fatherly mode?

We get an important glimpse of this possibility in Captain Vere’s final interview with Billy Budd, after the trial. In that scene, we see the reversal of Vere’s initial change from father to military disciplinarian, and we see it in just the tentative, hypothetical terms in which we must speculate about the possibility of a parallel concealment at the beginning. Speculating on the final interview, the narrator tells us that Vere:

[W]as old enough to have been Billy’s father. The austere devotee of military duty letting himself melt back into what remains primeval in our formalised humanity may in end have caught Billy to his heart even as Abraham may have caught young Isaac on the brink of resolutely offering him up in obedience to the exacting behest.¹⁶³

As we shall see in the next Part, this allusion to Abraham’s near sacrifice of Isaac calls into question the very core of the Judeo-Christian creed, the God who demands, and makes, extreme sacrifices. Here we need to note how the qualities revealed in that final meeting might, properly deployed in the earlier meeting, over Claggart’s corpse, have completely averted the disaster of Billy’s death and fully vindicated not only “natural justice” for innocents, but also the law’s deep interest in their protection, without increasing at all, and perhaps diminishing more,¹⁶⁴ the risk of mutiny.

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.* at 58.

164. *See id.* at 64 (describing a mutinous undercurrent at the moment of Billy’s hanging); *see*

At the outset of that final interview, the narrator describes the characters of Billy Budd and Captain Vere as “each radically sharing in the rarer qualities of our nature.”¹⁶⁵ This may well have made it possible for them to be completely candid with one another, completely transparent to each other. Thus the narrator speculates that, in delivering the verdict, Vere would have “concealed nothing from the condemned one” and “frankly disclosed to him the part he himself had played in bringing about the decision, at the same time revealing his actuating motives.”¹⁶⁶ This confession may well have been one that Billy could fully “appreciate,” in both senses of that word. He would have understood the trust that it implied of the captain for him, and he would have been grateful for the manifestation of that trust: “Not without a sort of joy indeed he might have appreciated the brave opinion of him implied in his Captain[‘s] making such a confidant of him.”¹⁶⁷

Against that background, the narrator suggests the analogy between Vere as Abraham and Billy as Isaac, “on the brink of resolutely offering him up in obedience to the exacting behest.”¹⁶⁸ Pressed any further, though, the analogy rings radically false: Isaac, unlike Billy, was spared. God, whatever the merits of this inhumane test of Abraham’s faith, relents at the last;¹⁶⁹ in sharpest contrast, Vere’s apparent masters—the law in general, his own devotion to military duty in particular—never relents. God provides an alternative sacrificial victim, the ram caught in the thicket by his horns. We are left to wonder whether there might be such an alternative in Billy’s case, and who it is that might provide it. The answer to this latter question may be Vere himself; in a proper relationship to both Billy and the law, he may well have been able to obviate the need for any sacrifice at all or, at worst, sacrificed a lesser value to a greater.

Billy, as the closeted scene with Vere is designed to show, is entirely trustworthy, capable of understanding and keeping the most significant of confidences. Indeed, by this time we have already seen Billy Budd conceal, in misguided innocence, a much weightier secret,

also Reich, *supra* note 19, at 139 (“Nor is the punishment useful in curbing mutinous tendencies among the crew; as we are shown, Billy’s execution is far more likely to cause mutiny than to quell it.”).

165. MELVILLE, BILLY BUDD, *supra* note 1, at 58.

166. *Id.*

167. *Id.*

168. *Id.*

169. See Lawry, *supra* note 22, at 184 (noting that “[n]o human idea of justice could conceive that it” was “just to order Abraham to slay his son Isaac,” but concluding that “[p]erhaps God’s ways are not our ways, as the Scriptures tirelessly tell us.”) (citations omitted).

his assignation by one who seems to have been a genuine mutineer.¹⁷⁰ He failed to report this on his own initiative, and he failed to reveal it on direct examination in his trial. Vere, then, would not have been teaching a purely honest innocent to lie; he would have been showing a misguided protector of the seditious how to lie to protect, not the guilty, but the innocent, even when the innocent is himself. If Billy is capable of keeping confidences after the end of the proceeding, as the narrator suggests, why could he not have kept them before the beginning?

What must be sacrificed, significantly, is not Billy Budd the innocent, but the innocence of Billy Budd. And that latter, as we have seen, is not so pure as it at first appeared. Though Billy Budd lacks the sophistication to make an intentionally double-tongued sally on leaving the *Rights of Man*, he is not above lying to protect a possible plotter. Vere would have been taking him into a plot, but with a very different goal, good rather than evil. Billy's compromised innocence then, would not have been so much lost, as redeemed, where redemption means civilized, brought into the service of the commonwealth,¹⁷¹ made an integral part of the ship-board republic.

Vere himself has already proved to be the master of secrecy, at every prior stage of the process. Vere, we are told repeatedly, kept various aspects of the proceeding secret: the original calling of Billy to answer Claggart's accusation, the concealing of Claggart's corpse in one of the staterooms, the summons of the surgeon, and the constituting of the drumhead court itself. At several points, he actively engaged his agents in assisting his concealments; he often relied in these matters on his "hammock-boy, a sort of sea-valet in whose discretion and fidelity his master had much confidence."¹⁷² These concealments in the particulars of Billy Budd's case, moreover, were not out of keeping with Vere's general character; quite the contrary. Melville repeatedly and positively refers to Vere's "quiet undemonstrative way" and the rare circumstances in which he departs from it. If anything, it is his "demonstrativeness" in response to Billy Budd's case that is precisely what initially strikes the surgeon as unusual.

To be sure, Vere's secrecy in various aspects of Billy Budd's case was questioned by his critics.¹⁷³ Melville's repeated references to

170. MELVILLE, BILLY BUDD, *supra* note 1, at 34.

171. Even so, in Plato's *Republic*, the innocents Glaucon and Adeimantus initially shocked to learn that literally untrue accounts about the random assorting of talents among all citizens must be cultivated in order to establish the regime's meritocracy, eventually embrace the practice. PLATO, *supra* note 54, bk. III, at 93-99.

172. MELVILLE, BILLY BUDD, *supra* note 1, at 45.

173. *Id.* at 49-50.

secrecy cast doubt on this alternative, itself never explicitly raised, by casting doubts on other “secret” actions. At the very beginning, the surgeon had misgivings about concealing Claggart’s body.¹⁷⁴ More generally, the narrator tells us, Vere was “not a little criticized by some officers” for keeping the entire proceeding a secret as long as possible.¹⁷⁵ The narrator himself expresses doubts on the general question of secrecy: “Here he may or may not have erred.”¹⁷⁶ “[I]n these particulars lurked some resemblance to the policy adopted in those tragedies of the palace which have occurred more than once in the capital founded by Peter the Barbarian.”¹⁷⁷

But, the narrator also tells us, Vere had his defenders, including the very cousin who had given him his sobriquet “Starry” as a proud reference to their rigorous, reforming ancestor. More generally, Vere’s detractors are lesser men unable to take the full measure of his merit.¹⁷⁸ Even as we have seen them as generally wrong about the more aloof side of his character, so here we see them wrong about this particular aspect of his conduct. If he had not kept the matter a tight secret, he would have risked a mutiny; his procedural handling of the case nicely matched the substantive purpose of the law. It would have been absurd to place form over substance, to risk a mutiny by publicizing a trial the very purpose of which was to forestall a mutiny. On this the narrator would clearly have us think Vere was correct. And this permits us to see a neat paradox that must be lost on them, and for that very reason may be right: What the situation called for was not less secrecy, but more.

In just the same way, the narrator’s allusion to Russian palace intrigues is not itself wholly negative, at least to the knowing. “Peter the Barbarian”¹⁷⁹ is also Peter the Great; “Barbarian” reflects the scorn of backward-looking orthodox Russophiles, opponents of Peter’s “Enlightenment,” if not always enlightened, reforms; “the Great” is the verdict of Europe and the West, toward which Peter wanted to move his homeland. And secrecy was famously a part of that program. So, in *Moby Dick*, Melville can favorably compare the harpooner Queequeg’s enlisting in a Western whaling ship to Peter’s spying out Western naval ways: “But like Czar Peter content to toil in the shipyards of foreign cities, Queequeg disdained no seeming ignominy, if thereby he might

174. *Id.* at 48.

175. *Id.* at 49.

176. *Id.*

177. *Id.* at 50.

178. See RICHARD A. POSNER, *LAW AND LITERATURE* 158 (Harvard Univ. Press 1988) (“The surgeon’s speculation that Vere might be crazy should not be taken at face value; it is a commentary on the surgeon’s inability to understand a greatly superior person.”).

179. MELVILLE, *BILLY BUDD*, *supra* note 1, at 50.

happily gain the power of enlightening his untutored countrymen.”¹⁸⁰ Like Peter, “[t]here was excellent blood in his veins—royal stuff.”¹⁸¹ And more excellent, ironically, even than that, from an American and republican perspective: “Queequeg was George Washington cannibalistically developed.”¹⁸²

Thus, although each exercise of secrecy was questioned, each was also defensible. Each seems, under the circumstances, to have been the right and prudent thing. Taken together, they also reveal something essential about the nature of secrecy and its apparent opposite, disclosure. They are not polar opposites, with disclosure a virtue and secrecy a vice. They are, rather, extremes on either end of a prudential spectrum. Virtue lies in the middle, at the Aristotelian mean. Just as disclosure is not an absolute virtue, so secrecy is not an absolute vice. The proper measure of each, rather, is relative to the circumstances at hand. It is, in that respect, very like the choice between severity and laxity, caution and risk, which, as we saw in the other context, also involves finding the right mean. Excessive secrecy is bad, inconsistent with good government; excessive disclosure is bad, risking loss of control over the unsophisticated governed.¹⁸³

The converse of keeping secrets from unreliable subordinates, of course, is revealing them to responsible superiors. Even if Vere had kept the truth about the homicide secret from both the crew and his inferior officers, he may well have been bound to reveal it to his own superior officer, the admiral of the fleet. This would have both preserved the law and protected Billy Budd, at the expense of Vere; had the Admiral disagreed with Vere’s course of conduct, Vere himself would have suffered. And this would have made Vere, not Billy Budd, the victim, the sacrificial lamb. It would have been the father’s sacrifice, not the son’s, that saved the world. This, too, seems thoroughly in keeping with Vere’s character as a conscientious naval officer, superior in rank to some, in his turn subordinate to others.

On the other hand, there is clear evidence, in the narrative itself, of the fatal danger of “over-exposure.” That, of course, is precisely what happened in Billy Budd’s case. But here Billy Budd is in the very best of tragically good company; “over-exposure” was fatal to both Vere¹⁸⁴ and

180. 1 HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* 61 (Heritage ed. 1943) (1851).

181. *Id.* at 60.

182. *Id.* at 55.

183. See ARISTOTLE, *POLITICS*, bk. V, at 235 (Benjamin Jowett trans., Clarendon Press 1931) (c. 350 B.C.E.) (establishing and preserving governments as a matter of finding the appropriate mean).

184. MELVILLE, *BILLY BUDD*, *supra* note 1, at 69 (“Captain Vere in the act of putting his ship alongside the enemy with a view of throwing his boarders across her bulwarks, was hit by a musket-

Nelson, as victims of literal “snipers.” If Vere had taken the course I recommend, his figurative “snipers” would not have even known about it. A secret shot, fired from within the enemy’s main cabin, laid low the figure of fatherly benevolent rule on the *Bellipotent*; had Vere been concealed, he might have lived. Even so the angelic Billy Budd’s blow to the serpentine Claggart, delivered in the main cabin of the *Bellipotent* itself, rid her of the very figure of evil incarnate; had Billy been concealed, he might have survived. And Vere’s death, of course, was a prefigure of Nelson’s death on the deck of the *Victory* at Trafalgar. The narrator makes quite clear that some thought Nelson’s exposure was vainglorious, and that it cost not only his life, but also an even greater allied victory.¹⁸⁵

As we have seen, the Mutiny Act, once publicly invoked, can, consistent with the clear directive of the law and the demands of the situation, produce only one result.¹⁸⁶ At the outset of the case, though, there is a radically different alternative, at the very limit of law: The Mutiny Act in its letter, in order to serve its deeper spirit and that of law more generally, need not be invoked at all. Concealing the truth about Claggart’s death is a very real possibility within the structure of the story. It not only fits the plot, but elements of the plot neatly point us to the possibility. It is also consistent with Vere’s balanced use of secrecy in other contexts, and his extraordinary discretion in all matters of importance.

b. The “Extrinsic” Plausibility of Concealment: Consistency with Readerly Expectations

But to say that Vere’s concealment is consistent within the story raises, almost automatically, a question at another level of analysis: Would presenting that possibility “sell” to likely readers of the story? Or would the alternative of concealment sound to them like too much to ask of law enforcement officers, too much latitude to give lawyers and other agents of the law? It is impossible to answer these questions with absolute precision. And yet, near the core of many of our paradigm “lawyer stories,” something very like this frequently happens. Significantly, this possibility is typically much more appealing to the laity and the lawyerly rank-and-file than to the profession’s theoretical elite. This Part analyzes whether the concealment has what we might call “extrinsic” plausibility. It is, we shall see in the final Part, absolutely

ball from a porthole of the enemy’s main cabin.”).

185. *Id.* at 14.

186. *See supra* Part II.B.

essential to a “republican” reading of *Billy Budd*. If *Billy Budd* is to succeed, as the *Republic* succeeds, it must present an alternative that is plausible, not only to the fictional characters within the story, but also to the real readers outside the story. It must, like the *Republic*, create a fictional world that we the readers would be willing to “enact” in our real world, as its model and prototype.

Harper Lee’s *To Kill a Mockingbird* is, by all accounts, among the most popular and appealing of our culture’s lawyers stories, much-beloved by lawyers and lay-folk alike.¹⁸⁷ The conclusion of that novel presents us with a virtuous but illegal “cover-up” instructively analogous to the situation in *Billy Budd*. Atticus Finch, the bar establishment’s poster-boy of the ideal lawyer, has profoundly offended the town reprobate, Robert E. Lee Ewell, by discrediting on cross examination Ewell’s false allegation that a Black man, Tom Robinson, attempted to rape his daughter. The racist, all-white jury convicts Robinson nonetheless, but Ewell’s anger is unassuaged. He vows to avenge himself, and he chooses as his targets Atticus’s children, Jem and Scout. As they walk home alone one fall evening from a school pageant, Ewell waylays them in the shadows, attempting to stab them to death with a switch-blade. And he would certainly have succeeded, but for the intervention of the children’s self-appointed guardian angel, their reclusive neighbor, Arthur Boo Radley. Radley pulls Ewell away from Scout, stabs him to death with a kitchen knife, and then carries the badly injured Jem home, with Scout in tow.

Atticus has the local doctor and sheriff summoned; after the doctor stabilizes Jem’s condition, the sheriff and Atticus discuss how to handle the situation. Atticus insists on doing what he thinks is right, but he is thoroughly addled about what actually happened. He assumes that his son Jem killed Ewell with Ewell’s own knife, and he insists on having this account presented at the coroner’s inquest. There, Atticus assures the sheriff, he himself will justify the homicide as self-defense.

The sheriff, for his part, takes a very different tack; he insists: “Bob Ewell fell on his knife.”¹⁸⁸ Atticus mistakes this as a friendly but morally

187. Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L. J. 601, 735-36 (1999); see *Top Rated Movies*, IMDB, <http://www.imdb.com/chart/top> (last visited Sept. 17, 2019) (IMDb.com’s list of top 250 movies of all time, which places TO KILL A MOCKINGBIRD at number 99); see also *Top Heroes and Villains Named in Movie List*, NEWS.COM.AU: ENTERTAINMENT (Nov. 26, 2007, 1:46 PM), <https://web.archive.org/web/20080207153521/http://www.news.com.au/entertainment/story/0,26278,22822370-10388,00.html> (list of the top 100 movie heroes of all time, which places Atticus Finch at number 50).

188. HARPER LEE, *TO KILL A MOCKINGBIRD* 315 (35th anniversary ed., HarperCollins Publishers 1995) (1960).

misguided effort to cover up his son's homicide, and he insists that the truth be told. Otherwise, he fears, his son will grow up under a cloud of suspected favoritism before the law; worse still, both his son and his daughter will lose their respect for him, their only living parent, as a proper citizen and agent of the law.

But the sheriff eventually persuades Atticus of what actually happened, and why the identity of Boo Radley, Ewell's real killer and the rescuer of Atticus's children, must be covered up:

I never heard tell that it's against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he [Boo Radley] did, but maybe you'll say it's my duty to tell the town all about it and not hush it up. Know what'd happen then? All the ladies in Maycomb includin' my wife'd be knocking on his door bringing angel food cakes. To my way of thinkin', Mr. Finch, taking the one man who's done you and this town a great service an' dragging him with his shy ways into the limelight—to me, that's a sin. It's a sin and I'm not about to have it on my head. If it was any other man it'd be different. But not this man, Mr. Finch.¹⁸⁹

Repeating his insistence that “Bob Ewell fell on his knife,” the sheriff stamps off into the night.¹⁹⁰

This leaves Atticus on the front porch with his daughter, at a loss to explain his connivance in what she knows to be a false account. He repeats that account, and asks her, “Can you possibly understand?” To his surprise and relief, she understands completely; she has learned the lesson of the novel, the lesson we, too, are apparently to learn: “Yes sir, I understand . . . Mr. Tate [the sheriff] was right. . . . it'd be sort of like shootin' a mockingbird, wouldn't it?”¹⁹¹

Atticus, early in the book, had forbidden Jem and Scout to shoot mockingbirds with their Christmas BB guns: “[R]emember it's a sin to kill a mockingbird.”¹⁹² Unlike the rascally and raucous jays, “Mockingbirds don't do one thing but make music for us to enjoy.”¹⁹³ In the rather heavy-handed symbolism of the book, we have two eponymous mockingbirds. The first, Atticus's ill-fated Black client, is falsely accused of rape precisely because he has selflessly assisted a poor young white woman; madly fleeing prison after his unjust conviction, he is shot to death. The second mockingbird is Jem and Scout's savior, Boo Radley. It is absolutely pivotal to the book's moral

189. *Id.* at 317-18.

190. *Id.* at 318.

191. *Id.*

192. *Id.* at 103.

193. *Id.*

message that he, at the more merciful hands of Atticus and Scout, be spared. And it is equally vital to the book's *legal* message that his salvation come through the false testimony, in a formal legal proceeding, of the town's most respected lawyer and long-time law-honoring sheriff. This is the Gospel of *To Kill a Mockingbird*: The letter killeth; the spirit giveth life.

Like *To Kill a Mockingbird*'s Sheriff Tate, Captain Vere is "the law" in his domain; like Sheriff Tate, he has in his hands a "natural" innocent whose commission of homicide has rid the world of a moral monster. Vere is, in fact, a much more nearly absolute law, and much more sophisticated legal agent. And his protégé and surrogate son, Billy Budd, is presented to us as quite capable of keeping confidences,¹⁹⁴ even very dangerous confidences, every bit as much as Atticus's much younger daughter Scout. Vere certainly has it within his power to do what Sheriff Tate did, what he eventually convinced the supremely scrupulous Atticus to join him in doing: violating the letter of the law by misrepresenting facts in a coroner's inquest, the better to save a life. Indeed, where Sheriff Tate was only figuratively saving a life, preserving the peculiarly private quality of Boo Radley's reclusive existence, Vere would have been literally saving Billy from an horrific and ignominious execution.

The way this "precedent" works, it is important to see, is only partial and provisional. It works, that is, not as a full-blown normative justification, but in two other ways: as examples of what plausible characters can be expected to be capable of doing, and as evidence of what general readers will be willing to accept as proper. We turn, now, to the fuller normative justification of lying to serve the law.

c. The Justifiability of Concealment: The Convergence of Law and Justice in Legal Law-Breaking

It has often been remarked that popular lawyer stories frequently involve the triumph of justice over legality,¹⁹⁵ indeed, in the words of one commentator, "the lawyer must be lawless to uphold the law."¹⁹⁶ One of the things that make *Billy Budd* disturbing (and perhaps unpopular) is that it has no such "Hollywood" ending. The conflict between justice and law, resolved in favor of justice at the expense of

194. JOHNSON, *supra* note 2, at 88 ("he [Budd] does not prove to be totally incapable of lying").

195. See Robert Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 381-82 (1987); see also SIMON, PRACTICE OF JUSTICE, *supra* note 95, at 93-95.

196. Post, *supra* note 195, at 382.

law in popular fiction, is tragically resolved the other way in *Billy Budd*. What we need to see here is that it could have been resolved, in Billy Budd's case and elsewhere, in favor of both law and justice, by a more sophisticated understanding of law itself. On this view, breaking the literal law may be in the service, not only of justice, but also of the law itself, better understood—and understood in a way made generally accessible through just such stories.

Since Watergate, we are deeply inclined to believe that “It's not the crime, it's the cover-up.” (And, with our appropriately raised sensitivities about domestic violence, we are profoundly disinclined to credit accounts of serious injuries that involve falls down stairways.) But it may be more respectful of the law itself to admit that, in a significant class of cases, it is the other way around: Sometimes the nature of the crime demands, in law and in justice, a cover-up. More generally, sometimes law's agents must choose the spirit of the law over its letter.

William Simon has spelled this position out admirably in his *Practice of Justice*.¹⁹⁷ Simon's principal task is to offer an alternative to what he calls the Dominant View of legal ethics. That view maintains that anything a lawyer does for a client, within the strict letter of the law, is professionally appropriate, even virtuous, no matter how thoroughly it frustrates either the spirit of the law or extra-legal norms like ordinary morality.¹⁹⁸ In the bulk of his book, Simon demonstrates the weakness of the Dominant View and offers an alternative, under which proper lawyering advances, not all literally legal claims of clients, but only those consistent with a nuanced, contextualized understanding of the law's purpose. Lawyers, as lawyers, are to “practice justice” because justice is not a value extraneous to law, but the very core value of law itself.

Here we need to examine a corollary of the Dominant View, and Simon's critique of that corollary. Just as the Dominant View holds that all lawyerly action within the strict letter of the law is proper, irrespective of how much that action frustrates the law's spirit, so the Dominant View maintains the converse: any legal action in conflict with the law's letter is improper, however much it advances the law's spirit, which Simon identifies with justice. Just as the Dominant View categorically excuses, or congratulates, all strictly legal conduct, so it categorically condemns all breaches of the law's letter, no matter how technical, and no matter how much they further the manifest purpose of

197. See generally SIMON, PRACTICE OF JUSTICE, *supra* note 95.

198. See *id.* at 78-79.

the law itself.¹⁹⁹ Simon, by contrast, maintains just the opposite: Even as lawyers must, in the service of justice, sometimes do less for their clients than the letter of the law allows, so also they must sometimes do more; sometimes they must transgress law's letter to serve its spirit, justice.²⁰⁰

Simon points out that the Dominant View's narrow legalism is not just theoretically suspect; it is also practically dangerous, a threat to the accomplishment of justice in particular cases. This danger lies in the way the Dominant View frames cases like Billy Budd's. The Dominant View automatically characterizes any conscientious inclination to violate the letter of the law as a conflict between law and some extrinsic norm, typically justice or individual morality. This framing of the question, Simon argues, always tips the scales in favor of literal legal compliance, even though it does not preclude striking the balance in favor of justice or morality over law, narrowly defined. But it does preclude something else: Recognition that a choice in favor of justice and against legality, narrowly defined, may be a choice in favor of both justice and law, broadly defined.²⁰¹

The Dominant View's "law or justice" framing is exactly the rubric under which both traditionalists and revisionists assess the law and Captain Vere's response to it in Billy Budd's case. Either the law's inexorable insistence on Billy Budd's death justly struck the balance between the individual and society, as the traditional view maintains, or it did not, as the revisionists maintain. If the law was unjust in its harshness, then either Vere rightly honored his obligation to obey even an unjust law, as the School of Resignation maintains, or he should have conscientiously violated the law to achieve extra-legal justice, or compliance with higher, supra-human law, as the School of Resistance insists.

Posed this way, evaluating Vere and the law requires impaling oneself on either horn of a painful dilemma: justice or law. Assessment of my concealment alternative can also be framed that way: Should Vere fulfill a legal obligation to disclose the truth of Billy's homicide, thus setting in motion the inexorable injustice of his trial and execution, or should he violate his legal obligation to save Billy from that injustice? The choice between concealment and disclosure would thus pose the familiar dilemma of the Dominant View: Concealment advances justice at the expense of law; disclosure advances law at the expense of justice.

199. *See id.*

200. *Id.* at 81-82.

201. *Id.* at 102-03.

But Simon's analysis offers a radically different way to see the course of concealment. It is the way that Simon recommends in a large class of structurally parallel cases: a transgression of the letter of the law to serve the spirit of the law. On this view, the law itself compels, rather than forbids, concealment; concealment vindicates, rather than violates, legal norms.

A Simonian legal analysis of the course of concealment would go like this. Three values of republican law are at stake here: public safety, individual fairness, and administrative transparency. As Melville has stacked the deck, only two of the three can be fully honored: If we are to protect public safety in a transparent administrative proceeding, Billy Budd must die. If, however, we are willing to sacrifice a measure of administrative transparency, to conceal the truth about Claggart's death, then we can preserve the other two values: Discipline in the navy can be preserved, even as Billy Budd's life is spared.

What is more, this result is defensible not merely as morally just, but also as legally appropriate, as the result that, in the circumstances of this particular case, rightly balances the relevant legal values, here innocent life and public safety over against administrative transparency. To think of transparency as the supreme value in all legal affairs is not to honor law over justice; it is simply to honor a vision of law that inflexibly privileges one legal value over other, competing legal values.²⁰² Another, more comprehensive view of law sees the subordination of one legal value to another as a relatively routine function of both the law and its agents. On this latter, more expansive view of the law, we cannot say that either approach, disclosure or concealment, is categorically legal or illegal. On the other hand, we can discuss, quite comfortably, which course is the legally better course, not simply the more just or fair or moral. On my view of the merits of the matter, the legally better course is concealment, because it achieves the most situationally appropriate balancing of the three relevant values, all of which are internal to the legal system itself.

This view of the merits can also be criticized from the expansive legal perspective, but not nearly as well. This is largely because seeing the course of disclosure in a more expansive way does not reveal a way for the law and Vere to get out of their predicament. The striking fact about Vere's conduct once he chooses to disclose Billy's homicide is

202. See John P. McWilliams, Jr., *Innocent Criminal or Criminal Innocence: The Trial in American Fiction*, in CARL S. SMITH, JOHN P. MCWILLIAMS, AND MAXWELL BLOOMFIELD, *LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS* 45, 74-76 (1983) [hereinafter "McWilliams, *Innocent Criminal*"] (arguing that Vere's jurisprudence of societal need over individual rights is that of Holmes's *The Common Law*).

this: He does, in fact, follow a very sophisticated understanding of the law. As we have seen, he is no legal literalist; he understands that the spirit of the Mutiny Act, in the circumstances of the case, requires rigor; he does not seek an extreme result because he is an inflexible agent of the law, a Javert or a Martinet.

Non-legal readers of *Billy Budd*, of course, can hardly be faulted for failing to anticipate Simon's subtle jurisprudential critique of the Dominant View of legal ethics. And, as its very name implies, the Dominant View is prevalent even among lawyers themselves. But once we understand that the choice between concealment and disclosure can be seen as a conflict, not between law and morality, but within law itself, we are at the threshold of another possibility: That choice can also be seen as a choice within morality itself, too.

In some ways, in fact, this is the more plausible framing, both *prima facie* and on closer inspection. The narrative never explicitly poses any legal problem with Vere's concealing the truth about the homicide. Our deeper, Simonian analysis reveals that administrative transparency is indeed a legal value brought into play explicitly elsewhere in the narrative, and implicitly here, at the point where Vere veered. But concealment, though obviously at odds with this particular legal value, is much harder to see as the violation of any literal legal obligation. We are given a very strong sense that Billy Budd was under just such an obligation to report the mutinous plot in which Claggart's agents seem to have been trying to enmesh him. But we are given no such clear sense that, once an impropriety comes to the attention of the highest legal official in the ship's microcosmic legal world, there is anything he must necessarily do. To the contrary, in fact: Prosecutorial discretion is very deeply imbedded in our concept of a prosecutor's legal duty. Some cases, for a wide range of legitimate reasons, simply should not be brought.²⁰³ If the Mutiny Act in any way cut back on this basic assumption, the narrative in no way informs us of it, and the narrator is quite clear that it is on the basis of the narrative that we are to make our assessment of Captain Vere.

What troubles us with the concealment alternative, I suspect, is not so much that it is legally appropriate, but that it is morally suspect. It would not violate any law, but it would inevitably involve lying. The concealment alternative thus poses a conflict between a narrower and a broader view of morality, even as it poses a conflict between a narrower and a broader view of legality. Just as a more nuanced legal analysis

203. See STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE § 3-3.9 (AM. BAR ASS'N 1992).

requires balancing three legal values—public security, individual rights, and administrative transparency—so a more nuanced moral analysis requires three moral values—welfare of the many, life of the one, truth-telling. And just as the choice between concealment and disclosure requires the relative subordination of one of these three legal values, so it also requires a precisely parallel subordination of one moral value to another. To save Billy legally, we must subordinate administrative transparency to individual right; to save Billy morally, we must value innocent life over absolute truth-telling. It is worth noting that Captain Vere's very name is truth, very close to the Latin root of verity and its allied virtue, veracity.²⁰⁴ Melville has us on notice, in the most salient possible way, that truth is in the balance.

Moral philosophers, of course, sometimes agonize over whether truth is an absolute value; sadly, the letter of our law, particularly our law governing lawyers, sometimes shares their befuddlement.²⁰⁵ But moral people seldom agonize long, if at all, as the stories of our heroes—historical, literary, and religious—all attest. Doubtlessly many a Dutch family lied to Nazis to conceal Jews like Anne Frank's family; Atticus, as we have seen, connived in a lie to hold Boo Radley harmless; the Hebrew midwives lied to Pharaoh to frustrate his genocidal orders, and the Scriptures of both Jews and Christians say God Himself rewarded them munificently.²⁰⁶

As soon as we analyze Vere's case as a moral case, we see that it is not a very hard case; just as we saw when we analyzed it as a legal case. What is more, we see that it is, essentially, the same case, involving the same choice among the same values. But that insight, in turn, raises a series of related questions: Why, if it is such an easy case, did Vere not get it right? Why, in fact, does he seem not even to have seen concealment as an alternative at all? And why do we as readers, like generations of scholars, not see it that way ourselves? To answer those questions, we must look now, at the central problem: the Vere veer.

4. The Vere Veer

We have seen that Vere was, in general, an exemplary sea commander. Yet we have also seen that, in the particular case of Billy Budd and Claggart, he followed a course that was deeply morally and

204. See POSNER, *LAW AND LITERATURE*, *supra* note 19, at 175 n.58 (noting "his name, with its echo of 'veritas' and 'verity.'").

205. See William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 *GEO. J. LEGAL ETHICS* 433, 435, 460-61 (1999) (discussing a number of factors, such as privacy interests, that may confer a certain degree of nobility to lying).

206. See *Exodus* 1:15-22 (Revised Standard).

legally disturbing. Still worse, he had before him an alternative that was both practically available and normatively superior. We are left to wonder, in this Part, why Vere did not take that course. As Simon points out, popular accounts of lawyers choosing justice over law are often bildungsromans, coming-of-age stories of inexperienced, inflexible characters maturing into more comprehensive and subtle visions of both life and law.²⁰⁷ But Vere is an old seadog, not a young pup, and subtle, sophisticated judgment, as we have seen, is an old trick he has long mastered. Why, then, did he err so radically, and fatally, here?²⁰⁸

Vere's general character, Melville's narrator is careful to show us, influences his actions at every point in Billy Budd's particular case. But nowhere does he tell us how that general character is formed, and nowhere does he indicate the source of this particular, skewing feature. It is, however, the one characteristic that undermines, rather than enhances, his performance as a sea officer. And, of course, it is the one characteristic that both costs Billy Budd his life and leads his fellow officers to question his sanity.

It seems, at bottom, the psychological equivalent of a powerful thought experiment, employed by moral philosophers as great as Plato and Kant.²⁰⁹ To identify the essence of moral goodness, one abstracts away all thought of personal advantage. Although it may be useful, as both a theoretical and practical matter, to distinguish the good from the personally advantageous, it does not follow that the good is always that which involves the maximum degree of personal disadvantage. Indeed, it seems that, early in the *Republic*, Socrates is quite at pains to demonstrate the opposite: What is really good is, at bottom, also what is most personally advantageous.²¹⁰ Vere, in starkest contrast, seems to confuse the absence of self-interest with the presence of virtue, and presence of personal injury as guarantee of disinterest.

And yet, at a deeper level of analysis, Vere's tropism toward self-abnegation paradoxically involves a kind of second-order egoism.²¹¹ It

207. SIMON, PRACTICE OF JUSTICE, *supra* note 95, at 94-95.

208. See Jami K. Elison, *The Prosecution of Billy Budd (Ultra Vires of Positive Law)*, 35 WILLAMETTE L. REV. 57, 81 (1999) (calling for "public debate" to "inform prosecutorial and judicial discretion."). James McBride, alluding to Elison's language, notes the absence of such "a sense of 'prosecutorial and judicial discretion'" within Vere. See James McBride, *Revisiting a Seminal Text of the Law & Literature Movement: A Girardian Reading of Herman Melville's Billy Budd, Sailor*, 3 U. MD. L.J. RACE RELIGION GENDER & CLASS 285, 285, 294 (2003).

209. See generally IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Black trans., The Bobbs-Merrill Co., Inc. 1959) (1785).

210. PLATO, *supra* note 54, bk. I, at 33.

211. See Steven L. Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 CARDOZO L. REV. 2471, 2485 (2005) (noting parallels between Vere's implicit "this hurts me more than you" position and that of Melville's father-in-law, Chief Justice Lemuel Shaw of the Supreme

puts personal virtue above the good of not only the public in general, but also particular individuals. From this perspective, what seems to matter most to Vere is neither protecting the fleet nor saving Billy Budd, but something more like "avoiding the appearance of impropriety."

There is no doubt that Vere genuinely suffers pain from his decision. But there is an unmistakably sadomasochistic element about at least some aspects of his suffering. At two critically painful junctures that frame Vere's involvement in Billy's fate, Melville's narrator gives us unmistakable hints of erotic excitement. When Vere ceases to stoop over Claggart's inert body, described as being "like a dead snake," the narrator describes Vere as "regain[ing] erection." Immediately afterward, he goes into the reverie from which emerges as the strict "military disciplinarian." And, when Billy Budd, just about to the hoist to his death, shouts "God bless Captain Vere" and the entire crew echoes that shout, the narrator notes that "Captain Vere, either through stoic self-control or a sort of momentary paralysis induced by emotional shock, stood erectly rigid as a musket in the ship-armorer's rack."

What is more, we have good textual evidence that Vere's veer toward the personally painful was not calculated, but entirely reflexive. It seems to follow, not from a considered habit of mind, but from a deeply engrained psychological tick. We have hardly a hint of his actual mental process; all we know is that, just before turning from a fatherly to a disciplinary mode toward Billy Budd and just before declaring to the surgeon that Billy must die, the Captain went into a sort of private reverie. The privacy of that reverie is particularly disturbing, both in these two particular instances and as a matter of general moral decision-making. In both instances, it cut him off from engaging in conversation with those who might have counseled a better course of action; in general, it involved a retreat from dialogue into what seems a particularly neurotic form of self-reflection. What is more, an important aspect of this retreat inward and away from dialogue is itself symptomatic of the underlying problem. To share the problem with others would seem like shirking; choosing to decide by oneself places the hardest decisions on one's own shoulders alone.

For all these reasons, Vere's inclination toward the personally costly course of action, whether instinctual or habitual, seems to be distinctly dangerous. From a republican perspective, the distancing of oneself from dialogue is particularly dubious. It is, as a matter of character, the sort of thing that should be, if at all possible, cured rather than cultivated.

Judicial Court of Massachusetts, a notorious Northern enforcer of the infamous Fugitive Slave Act).

B. *In the Macrocosm of Christian Theology*

What we have seen in the microcosm of ship suggests a parallel in the macrocosm of the morality universe: As Vere was toward his little shipboard world, so is God toward the world at large.²¹² This parallel is quite clear in the text, particularly in the execution scene, and has been analyzed in detail by many scholars.²¹³ Here, as elsewhere, scholars have reached diametrically opposed normative positions,²¹⁴ generally following their takes on Vere and the law. Some see the Christological parallel as vindicating Vere and the law;²¹⁵ others, as an almost cruelly ironic parody. Most radically, some of Vere's critics take the parallel as an implied criticism of Christian theology itself.²¹⁶

This Part will take up that last possibility, based on the foregoing analysis of Vere's character and actions. It will show that, in light of the flaws in Vere's character that produce his fatal mistake in handling Billy's case, we can see—quite possibly, are meant to see—flaws in the entire system of Christian theology. God, like Vere, is an oddly over-severe father. And yet, just as Vere is in many respects an admirably excellent officer and gentleman, so, too, we can imagine a different but ultimately appealing system of just such human beings governing the world.

1. The Implicit Critique of Orthodox Christianity

To see this parallel, let us begin with what is, perhaps, the most widely known and quoted verse of the Christian Scriptures: "For God so loved the world that he gave his only Son, that whoever believeth in him should not perish but have eternal life."²¹⁷ According to this crucial text,

212. *But see* Edwin M. Yoder, *Fated Boy: Billy Budd and the Laws of War*, 31 J. MAR. L. & COM. 615, 620 (2000) ("What is flatly inconsistent with the text is to read Melville's representation of a tragic but defensible act of military justice as an act of gratuitous cosmic cruelty.").

213. *See* JOHNSON, *supra* note 2, at 83 ("This story, which is often read as a retelling of the story of Christ, is thus literally a cruci-fiction—a fiction structured in the shape of a cross."); McWilliams, *Innocent Criminal*, *supra* note 202, at 78 ("The narrative thus transpires on two levels simultaneously: the trial of William Budd, foretopman, and a modern reenactment of the Fall of Man;" working this latter allegory shows "how thoroughly disillusioned Melville's religious views have become"); *see also* Lawry, *supra* note 22, at 190 n.37 ("Melville's description of the sky at the time of Billy's death makes him unmistakably a Christ-figure . . ."); McBride, *supra* note 208, at 316 ("Melville's descriptions of Billy Budd are replete with allusions to the Christ figure.").

214. *See* Lawry, *supra* note 22, at 186 ("There is reason to think Melville's own attitude is radically anti-Christian, mitigating a theory of justice based solely on atonement, although the story itself is . . . ambiguous on this (and my other) points.") (citation omitted).

215. *Id.* at 185 ("[P]erhaps the answer is yes, from the religious perspective, justice was done in the case of Billy Budd.") (footnote omitted).

216. *E.g.*, WEISBERG, POETHICS, *supra* note 91, at 114-16; *see also* RICHARD WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION, ch. 8 & 9 (1984).

217. *John* 3:16 (Revised Standard).

the measure of God's love for humanity seems to be the extreme cost to himself, his sacrifice of his own and only son. Vere, to ensure the safety of his ship—and with his ship, the fleet, and with the fleet England, and with England, the rule of law in the world—had to sacrifice his beloved Billy, whom he knew to be morally innocent. So God, the Gospel of John suggests, sacrificed his innocent and beloved son to save the world.

But, as we have seen, Vere's sacrifice of Billy seems, upon closer inspection, to have been, not only practically unnecessary, but deeply neurotically motivated. If our analysis is right, Vere may well have done the wrong thing, because he analyzed the matter the wrong way. By casting the sacrifice of Billy in unmistakably Christological terms, Melville invites a parallel analysis of what seems the very core of Christianity, God the Father's sacrifice of Christ the Son.

Having felt the moral wrong Vere wrought upon Billy Budd, we are led to wonder, more generally: How can the sacrifice of an innocent ever be the basis for salvation of the guilty? How can the symbolic Hebraic and Hellenistic rituals of the scape-goat²¹⁸ be made effective by being made literal, with Jesus as "the Lamb of God, who takes away the sin of the world!"²¹⁹ To the legal, as opposed to the theological or mythopoetic mind,²²⁰ this is not a balancing of accounts, but a serious compounding of injustice.

We are led back to our more basic sense of this injustice by seeing Christ's supposedly sacrificial death in a different but closely parallel situation. We wonder why Vere, a basically virtuous and caring person, does something so monstrous; we are tempted—quite literally, tempted—to wonder why God did essentially the same thing. God, we recognize, has much more latitude than Vere. Why is God, the source of justice, bound by such an apparently perverse, inhumane justice?

2. Implicit Alternatives to Orthodox Christianity

This questioning leaves traditional Christian soteriology (the "thesis" of traditional European religion) very much in doubt. This is, of course, a very old and difficult problem for Christian theologians.²²¹

218. See McBride, *supra* note 208, at 306 (describing the ritual of scapegoating in ancient Israel and Greece).

219. *John* 1:29 (Revised Standard).

220. See generally McBride, *supra* note 208 (analyzing Billy Budd's death in terms of the Rene Girard's theory of surrogate victims as the foundation of both religion and law as means of restraining social violence).

221. See ANSELM OF CANTERBURY, *Why God Became Man*, in ANSELM OF CANTERBURY: THE MAJOR WORKS 260, 285 (Brian Davies & G.R. Evans eds., Oxford Univ. Press 1998) (c. 1100) ("For, since God is so free that he is subject to no law and no judgement, and is so benevolent that nothing can be conceived of more benevolent than he, and since there is nothing right or proper

Whether it can be worked out adequately, of course, is beyond the scope of our discussion. We have no real sense, from Melville's text, as to whether he thought such a resolution possible within the bounds of traditional Christianity. But we do know, from his setting of his story in the critical period of the French Revolution, that he meant to note that the very foundation of European culture was, in a very real sense, called into question. Thus we need to note that his critique offers, or at least leaves open, three other possibilities. Each is more radical than its predecessor, but none is a cosmic counsel of despair. The last, in fact, is a counsel of very real hope: the universal rule of enlightened, enlightening law at the hands of leaders of the kind we have seen Captain Vere might well have been, or become.

a. Other Theisms

The least radical alternative would be non-Christian theism; this is an alternative eminently ready-to-hand, at least as a matter of history and theology. Christianity's odd soteriology, its insistence on the death of God's innocent son to save guilty humanity, is a peculiarly "intramural" problem, a problem that the other two great Abrahamist religions, Judaism and Islam, completely avoid. Their God is also, perhaps essentially, perfectly forgiving, and yet no innocent humans have to die to propitiate him. Jesus said the Jews' God was his God; Muslims say Jesus's God is theirs. Jesus saw himself coming to fulfill the Jewish law and prophets; Islam takes him as a prophet of their own. Thus, it would seem, only the God of Christians is the problem.

But only, it must be admitted, from a pre-modern perspective. As the very names of the ships of the Revolutionary navy remind us, the Enlightenment, especially in France, had launched a thorough-going atheism onto the waters of European thought; by the end of the eighteenth century, it had become part of a militant political movement.

except what he wishes, it does seem surprising that we should be saying that he is in no way willing to forgive an injury to himself, or that it is not permissible for him to do so, whereas we are in the habit of seeking forgiveness from him even for things we do to other people."); *see also id.* at 313 ("How, then will man be saved, if he does not himself pay what he owes, and is bound not to be saved if he does not pay? What effrontery it is on our part to assert that God, who is 'rich in mercy' beyond human understanding, cannot do this merciful thing!") (citation omitted); *see also* Lawry, *supra* note 22, at 184 ("From the Christian perspective, Anselm of Canterbury argued that God Himself had to find a way to escape the consequences of His justice which damned all men to death via the sin of Adam's first disobedience. This justice conflicted with His merciful love. But love itself is subject to justice. The solution? The underserved *substitutional* death of His Son, the God-Man. Whatever its theological weaknesses, Anselm's theory of atonement has had a rich life in Western Christianity, partly because it satisfies psychologically anyone who believes in a God of love who is also a God of justice.") (citation omitted).

Melville has the Godly father-figure of his tale struck dead by a well-aimed shot from the Revolution's *Athée*–Atheism.

b. French Atheism

This atheism, allied with if not inseparable from French Revolutionary politics, is a second alternative to traditional Christianity.²²² It is not, we are told, a way open to Captain Vere: He sees that, for all its promise of humanitarian reforms, it fails to take account of basic elements in human nature, and thus will not be able to establish itself in enduring forms. He thus opposes it, not out of narrow self-interest or class interest, but from an informed regard for the common good. From the perspective of the late nineteenth century, the time of Melville's writing, Vere's pessimism might be said to have been vindicated. Vere's generation already knew the Reign of Terror; Melville himself knew Napoleon. Melville, indeed, warns his readers that, sheltered by the distance of time and lulled by an outcome that seems, in retrospect, inevitable, they might forget how, in Vere's time and even after, all hung seriously in the balance:

That era appears measurably clear to us who look back at it, and but read of it. But to the grandfathers of us graybeards, the more thoughtful of them, the genius of it presented an aspect like that of Camoens' Spirit of the Cape, an eclipsing menace mysterious and prodigious. At the height of Napoleon's unexampled conquests, there were Americans who had fought at Bunker Hill who looked forward to the possibility that the Atlantic might prove no barrier against the ultimate schemes of this French upstart from the revolutionary chaos who seemed in act of fulfilling judgment prefigured in the Apocalypse.²²³

The "Preface" to earlier editions of *Billy Budd* make the background of the French Revolution even more apparent:

The year 1797, the year of this narrative, belongs to a period which as every thinker now feels, involved a crisis for Christendom not exceeded in its undetermined momentousness at the time by any other era whereof there is record. The opening proposition made by the Spirit of that Age, involved the rectification of the Old World's hereditary wrongs. In France, to some extent this was bloodily effected. But what then? Straightway the Revolution itself became a wrongdoer, one more oppressive than kings. Under Napoleon it

222. See JOHNSON, *supra* note 2, at 104 ("Even behind the martial order of the world of the man-of-war, there lies a religious referent: the *Bellipotent's* last battle is with a French ship called the *Athée*.").

223. MELVILLE, BILLY BUDD, *supra* note 1, at 21.

enthroned upstart kings, and initiated that prolonged agony of continual war whose final throes was Waterloo. During those years not the wisest could have foreseen that the outcome of all would be what to some thinkers apparently it has since turned out to be, a political advance along nearly the whole line for Europeans.²²⁴

Although current scholarship now sees this “Preface” as an erroneous interpolation,²²⁵ no one questions that Melville wrote it or that it expresses, albeit in less subtle form than the text’s final version, his sentiments about the significance of the background it describes.²²⁶

c. Anglo-American Law

Yet we have no reason to think that Melville liked Metternich any better than Bonaparte; he places Vere, after all, in the navy of Europe’s most stable constitutional monarchy, not the service of the Emperor, the Czar, or the Kaiser. Both Vere and Melville seem to have been on the side, not of Continental reaction, but of Anglo-American reform. Melville’s narrator is at pains to point out that even the mutiny at the Nore, the dark background against which Vere enacts his drama, led to real reforms in England’s own navy;²²⁷ Melville himself dedicated his novella to a reform-minded English Captain under whom he himself served aboard an American warship. The American Civil War, perhaps more than anything else, moved Melville toward a greater appreciation of the law. As McWilliams points out, “His volume of poems on the Civil War is filled with welcoming references to the eventual ‘victory of law.’”²²⁸

That reform, bloody as it sometimes was, in Melville’s day as in Vere’s, was essentially legal reform—incrementalist, not revolutionary; cognizant of human imperfectability but not despairing of human improvement. For it to work, what we need is a legal system—even if a wholly secular legal system. For that system itself to work, to keep congenital wolves like Claggart from devouring innocent if imperfect lambs like Billy, we need capable shepherds like Vere. In the macrocosm of the world, as in the microcosm of the ship, it need not be the Lord who is our shepherd; it can also be, Melville suggests, the likes

224. HERMAN MELVILLE, *BILLY BUDD* 131 (Frederic Barron Freeman ed., Harvard Univ. Press 1948) [hereinafter “*BILLY BUDD* (Freeman ed.)”] (editor’s footnotes omitted).

225. Hayford & Sealts, *Introduction*, *supra* note 14, at 16-19.

226. MELVILLE, *BILLY BUDD*, *supra* note 1, at 12 (contrasting England’s “flag of founded law and freedom defined” with “the enemy’s red meteor of unbridled and unbounded revolt.”).

227. *Id.* at 11-13.

228. McWilliams, *Innocent Criminal*, *supra* note 202, at 77 (citing this as evidence of Melville’s shift from an early emphasis on natural, individual rights to his later “pro-law position”).

of Captain Vere. In a very real sense, then, the solution to the fallen condition of the world, not just the threatened state of HMS *Bellipotent*, is the kind of Captain who has learned Melville's lesson about the Vere veer, writ large as well as small.²²⁹

3. Summary

If the human tragedy of Billy Budd can make us see, descriptively, the parallel with Christ's death, then it can also suggest that God's judgment in that case, like Vere's in Billy's, can be judged, normatively, in human terms. We can imagine a better fate for Billy Budd because we can imagine Vere's being—blasphemous though it may sound when bluntly stated—better than God, where better simply means more fatherly, more humane. And we can imagine this because we can imagine human law being superior to the kind of divine law that would demand the unnecessary sacrifice of the innocent. God, in the case of Christ, like Vere in Billy's case, could have followed the example of Atticus in Boo Radley's case. And so, in our governance of the world at large, may we, if we honor the spirit of the law by the breach of its letter. The key, in the macrocosm as in the microcosm, is agents of the law who can implement the law in that paradoxical way.

IV. MELVILLE AND PLATO: *BILLY BUDD*'S REPUBLICAN READING

If my analysis in Part III is correct, then an "improved" Captain Vere would be, not only the ideal naval commander in a world where the navy is the bulwark of the rule of law, but also the ideal agent of the law in a world where law is not merely the metaphorical hand of Providence, but its virtual replacement. He would be, as I have said, something approaching a philosopher-king; by extrapolation from his microcosmic world to our macrocosm, our high-level agents of the law would be as well. That, in turn, would make improving Vere, removing his tragic flaw, a vital public policy imperative.

But this imperative poses twin paradoxes. First, the medium that brings us to see his flaw, Melville's novella and other works of that genre, are not readily available to Vere himself or to others like him, precisely because of who they are. They are intensely serious-minded

229. Cf. Lawry, *supra* note 22, at 186-87. Lawry suggests that we need more than moral analysis if we are to fulfill, not just our obligations, but also our aspirations. He suggests help from a higher source—if not God, "then perhaps from a luminous work of art" like Rilke's sonnet *Torso of an Archaic Apollo* and, beyond that, Rilke's last words: "You must change your life." I suggest that the source is that to which the sonnet points us, that in light of which we are to examine and change our lives, the whole of the Western tradition, seen as the source of its law. See Lawry, *supra* note 22, at 186-87, n.40.

leaders, whose very serious-mindedness leads them to shun “fluffy,” self-indulgent stuff like fiction in favor of more meaty reading material. This is, of course, only a special case of the Vere veer, but one with very severe general consequences. This particular veer directs Vere and his ilk away from the very reading that, if Melville is right, would protect them from many another veer, some of them predictably disastrous.

The second paradox flows from this first. If reading works like *Billy Budd* would make men like Vere better leaders, then, for that very reason, that reading is what Plato calls for in the *Republic*; indeed, it is the kind of reading that the *Republic* itself is. And yet, it is the very kind of reading that Book X of the *Republic* seems to ban, with “baby-and-the-bathwater” overbreadth.

In this final Part, then, we need to unpack the twin paradoxes of Vere’s reading. Subpart A looks at how Vere’s reading ironically excludes both Plato and Melville, giving the two of them a double common ground.²³⁰ Beyond that common ground, we will see in Subpart B they differ on three basic issues, but Melville’s resolution of those differences is itself deeply Platonic.²³¹ That will prepare us, then, in the final Subpart, to see *Billy Budd* as Melville’s republican answer to the *Republic*.²³²

A. Finding Plato and Melville’s Common Ground: Excluded Educators

Reading, Melville’s narrator makes clear, was a fundamental part of Vere’s life: “He had a marked leaning toward everything intellectual”; in particular, “[h]e loved books, never going to sea without a newly replenished library, compact but of the best.”²³³ What’s more, his reading had a profound effect upon his outlook:

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 His settled convictions were as a dyke against those invading waters of novel opinion social, political and otherwise, which carried away as in a torrent no few minds in those days, minds by nature not inferior to his own.²³⁴

230. See *infra* Part IV.A.

231. See *infra* Part IV.B.

232. See *infra* Part IV.C.

233. MELVILLE, *BILLY BUDD*, *supra* note 1, at 18.

234. *Id.*

Given the importance of Vere's reading in shaping his character and convictions, the narrator is at pains to show us, with considerable particularity, what he read, and why:

With nothing of that literary taste which less heeds the thing conveyed than the vehicle, his bias was toward those books to which every serious mind of superior order occupying any active post of authority in the world, naturally inclines: books treating of actual men and events no matter what era—history, biography, and unconventional writers, like Montaigne, who, free from cant and convention, honestly and in the spirit of common sense philosophize upon realities.²³⁵

These choices, we shall see, are as significant for what they exclude as for what they include.

1. The Paradoxical Exclusions

Two omissions are immediately apparent: books like Melville's *Billy Budd* and Plato's *Republic*. On the one hand, "natural" leaders of Vere's sort incline to histories and biographies, books about "actual men and events"; not, by implication, fiction, tales of invented characters and imagined events. On the other hand, leaders like Vere incline to the works of writers who philosophize about such real events; not, again by implication, imagined dialogues aimed at establishing ideal commonwealths.

Thus each of the two headings of Vere's readings, "nonfiction" narratives and "worldly" philosophy, omits two very real possibilities, which are both classically important and intimately connected: fiction that reveals "truth" about "actual men and events" and philosophy, "free from cant and convention," that is in the form of fiction. Both of these excluded alternatives, we should notice, are "internal narratives" in ways that the accounts Vere prefers cannot be. This takes us back to both the subtitle of the novella and to the first clause in Melville's critical sentence: Vere's preference, natural but possibly misplaced, for substance over form, and his apparent failure to see that these two, too, may be more intimately related than he realizes.

2. The Necessary Education

In this very important respect, then, Melville and Plato stand, at the outset of the Vere's story, on common ground: exclusion from the shaping of the central character. In their respective understandings of that shaping, moreover, Plato and Melville share another, more

235. *Id.*

affirmative common ground. Vere, the narrator tells us, reads what all great leaders are naturally inclined to read. Melville strongly suggests, as I argued in Part III, that Vere's is the stuff of which leaders are made.²³⁶

But this inclination on the part of leaders, though "natural," is problematic; Melville names it, not merely an inclination, but, more skeptically, a bias. In many, if not most, analyses of the *Billy Budd*, Billy represents nature and Vere, culture,²³⁷ and we are invited to choose one over the other, to lament or accept, with Melville, their inevitable and tragic incompatibility. The quoted passage about Vere's natural inclinations to certain books suggests both that the distinction between nature and nurture is not that sharp, and that Melville may believe the apparent conflict between them can be modulated.

This is because the cultured themselves have a "nature" of their own, and it is a nature that itself needs cultivating. That, of course, is what a large part of the *Republic*,²³⁸ if not the whole of it, is designed not only to show, but also to accomplish, even as it is, on this analysis, the conclusion toward which Vere's story points us.

The immediate reason for this paradox is the intimate relationship between the nature and nurture, the inclination and education, of leaders. Such people incline toward reading, and reading of certain kinds of books; reading, especially the kinds of books they read, makes them who they are. Vere's character, as we have seen, had a literally fatal flaw; that fatal flaw, we need to see now, is both related to his reading and curable by it. What Vere read made him good, but not quite good enough; what he didn't read might have made him better, maybe even good enough to save Billy Budd.

B. *Reconciling Plato and Melville's Differences*

As we have seen, Melville shows us how Vere's reading shaped and confirmed his character. Plato and Melville implicitly agree, then, that the character of leaders needs to be shaped, and that reading can radically shape that character. Beyond those admittedly basic points, however, Melville reveals three points of apparently radical

236. See JOHNSON, *supra* note 2, at 82 ("Vere, then, is an honest, serious reader, seemingly well suited for the role of judge and witness that in the course of the story he will come to play.").

237. See, e.g., Reich, *supra* note 19, at 128, 131; see also Weisberg's *ressentiment* argument, *supra* note 21, at 2223-29. But cf. POSNER, LAW AND LITERATURE, *supra* note 19, at 155-65 (criticizing Weisberg's position).

238. PLATO, *supra* note 54, bk. II, III, at 54-95. We see this perhaps most acutely at the beginning of Book X as Socrates struggles to boldly confront his own nature, a nature deeply impressed by the words of Homer, a poet for whom Plato possessed admiration, but whose authority was now being challenged. See *id.* bk. X, at 277.

disagreement. In the profoundly pregnant sentence that describes Vere's readings, Melville shows us three vital omissions, omissions that significantly limit Vere's insights into the character of both others and himself: traditional religious texts, particularly the Bible; imaginative literature, particularly fictional narratives; and empirical social science, especially sociology and psychology.

In this section we will examine these omitted readings, and what they might have told Vere about others and about himself. We will also examine why Vere omitted these readings: Vere's veer itself. We will see, explicitly at some points, implicitly at others, that Melville raises the prospect that the problem is the triumph of a particularly modern attitude with very ancient roots, a fundamentally flawed rationalism traceable back to Plato himself. We will see that Melville offers in *Billy Budd* two vital correctives to this kind of Platonism, traditional religious texts and his own narrative fiction. And yet what he presents is not a refutation of Plato, but a Platonic answer. It is not too much to say that *Billy Budd* is Melville's new *Republic*. The point is not merely that *Billy Budd* may be read from a "real" republican perspective, but that it may, in fact, be a really republican text.

And yet, as we shall see, it is an answer with problems of its own. In particular, in his revulsion against the pseudo-scientific psychology of his day, Melville rejects a source of insight that, although not essential in resolution of the particular case he presents, would, if generalized, seriously undermine the insights that literature can offer law. In this Part, we take up each of these omitted readings in turn. Each, we shall see, is one aspect of Melville's argument with Plato; in each, Melville answers Plato on terms that take us beyond a conventional understanding of Plato to positions nevertheless completely consistent with, if not required by, Plato's *Republic*.

1. The Problem of Radical Evil in the Christian Scriptures and the Greco-Roman Classics

As we have seen, a principal challenge to leaders like Captain Vere and, more generally, to the law of the civilization they serve, is to protect innocents like Billy Budd from villains like Claggart. Had Vere seen Claggart for what he was, he might well have averted the fatal confrontation between him and Billy that precipitated his own crisis of conscience. He certainly mistrusted Claggart, as we have seen. But he did not fathom, until too late, if ever, the full depths of his depravity.

The reason for this oversight, the narrator implies, is that Claggart's character is not accessible by the means most ready to the hands of men like Vere. They, he has told us, have a wide, worldly knowledge

garnered from their own experience and supplemented with their eminently practical reading. That, the narrator says he himself once thought, should suffice: “knowledge of the world assuredly implies the knowledge of human nature, and in most of its varieties.”²³⁹ Here, however, he reports having been contradicted long ago by “an honest scholar my senior.”²⁴⁰ Scholars of Melville generally associate that anonymous scholar with Melville himself;²⁴¹ whoever Melville meant us to take him to be, he means for us to take his reply seriously. Here it is:

Yes, but a superficial knowledge of it [human nature], serving ordinary purposes. But for anything deeper, I am not certain whether to know the world and to know human nature be not two distinct branches of knowledge, which while they may coexist in the same heart, yet either may exist with little or nothing of the other. Nay, in an average man of the world, his constant rubbing with it blunts that finer spiritual insight indispensable to the understanding of the essential in certain exceptional characters, whether evil ones or good.²⁴²

His prime example is a worldly-wise lawyer: “In a matter of some importance I have seen a girl wind an old lawyer about her little finger.”²⁴³

How then, to fathom such exceptional—and exceptionally dangerous—characters? The old scholar’s suggestion raises as many questions as it answers, for his narrator and for Melville and his readers, as much for what he rejects and as for what he recommends. He declares himself “the adherent of no organised religion much less of any philosophy built into a system.”²⁴⁴ More than that, he rejects the pillars of English legal thought and looks beyond them to a most unlikely source of enlightenment: “Coke and Blackstone hardly shed so much light into obscure spiritual places as the Hebrew prophets. And [they were] [m]ostly recluses.”²⁴⁵ Only they, he comes close to saying, offer useful insights into such as this, insights inaccessible to the law’s Coke and Blackstone and to other sophisticated men of the world—men, presumably, like Vere’s revered Montaigne.

239. MELVILLE, BILLY BUDD, *supra* note 1, at 27.

240. *Id.*

241. See Hayford & Sealts, *Introduction*, *supra* note 14, at 38; see also Harrison Hayford & Merton M. Sealts, Jr., *Notes & Commentary on BILLY BUDD*, *supra* note 1, at 183 [hereinafter Hayford & Sealts *Notes & Commentary*].

242. MELVILLE, BILLY BUDD, *supra* note 1, at 27-28.

243. *Id.* at 28.

244. *Id.* at 27.

245. *Id.* at 28.

But Melville's narrator explicitly balks at the biblical, much less Calvinistic, comparison, noting that it will alienate the readers of his day.²⁴⁶ For their conviction, he insists, "one must turn to some authority not liable to the charge of being tinctured with the biblical element."²⁴⁷ That alternative authority is none other than Plato. "In a list of definitions included in the authentic translation of Plato, a list attributable to him, occurs this: 'Natural Depravity: a depravity according to nature.'²⁴⁸ Three things about this definition are notable. First, for all its purported authenticity, it is a mere attribution, and almost certainly a false one. As Hayford and Sealts point out, it does not appear in later nineteenth-century translations of Plato;²⁴⁹ it seems most likely a scholarly gloss, the importation into Plato of an idea alien to him.

This raises a second point: The pseudo-Platonic definition is, as a matter of form, decidedly circular, and hence non-Platonic. As other scholars have pointed out, the definition "'Natural Depravity: a depravity according to nature,'—is in fact, as F. B. Freeman points out, nothing but a tautology. Syntactically, the definition fulfills its function, but it is entirely empty of any cognitive information."²⁵⁰ This sort of circular definition, of course, is precisely the sort of reasoning that the Platonic Socrates constantly deflates and ridicules in the Dialogues.

And, even as the definition's form is anti-Platonic, so, even more significantly, is the substance of what it attempts to define. That brings us to the third and final point: The natural depravity that Melville shows us in Claggart is not only lacking in the Platonic canon;²⁵¹ it is, itself, ultimately anti-Platonic, the very reverse of the virtue commended most particularly in the *Republic* for both the individual and the commonwealth. The narrator not only declares Claggart to be "the direct reverse of a saint"; he also shows him to be the antithesis of a

246. See *id.* at 28 ("[O]ne must turn to some authority not liable to the charge of being tinctured with the Biblical element."); *id.* at 29 ("savor of Holy Writ . . . little will it commend these pages to many a reader of to-day."). See also Eric Goldman, *Bringing Out the Beast in Melville's Billy Budd: The Dialogue of Darwinian and "Holy" Lexicons on Board the Bellipotent*, 37 *STUD. IN THE NOVEL* 430, 438 (2005) ("Melville opens a quarrelsome dialogue with his readers about the proper language with which to describe his characters."). For Goldman, this quarrel is between the traditional, transcendental language of free will and the modern, Darwinian language of scientific determinism; for me, this debate is between the Hebraic and Platonic conceptions of radical evil.

247. MELVILLE, *BILLY BUDD*, *supra* note 1, at 28.

248. *Id.*

249. Hayford & Sealts, *Notes & Commentary*, *supra* note 241, at 162.

250. JOHNSON, *supra* note 2, at 94 (internal citations omitted).

251. NICOMACHEAN ETHICS, *supra* note 86, bk. VII, at 176 ("In fact, Socrates was completely opposed to the view (that a man may know what is right but do what is wrong) . . .").

philosopher.²⁵² The hallmark of his depravity, the narrator tells us, is this:

[T]hough 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.²⁵³

Precisely this is the case with Claggart, "in whom was the mania of an evil nature, not engendered by vicious training or corrupting books or licentious living, but born with him and innate, in short 'depravity according to nature.'"²⁵⁴

The narrator's "old friend" does a double duty. On the one hand, he distances the narrator himself from the taint of a theory both alien to classical Platonism and offensive to modern sensibility: Augustinian Christianity's doctrine of radical evil. On the other hand, however, he puts the narrator formally in the very most orthodox of Platonic positions: dialogue with a friend about things that really matter, human good and its opposite. And, in so doing, Melville brings the two great Western normative traditions into active dialogue with each other.

That dialogue dramatically introduces a metaphysical notion, radical evil, that is a notoriously significant theme for Melville,²⁵⁵ a theme the re-discovery of which he himself attributes to the work of his mentor, Hawthorne, a likely source for his narrator's "old scholar."²⁵⁶ But, having seen this "metaphysical" difference between Plato and Melville, we are left with an obvious epistemological problem: How do we know Melville is right? As we have seen, Melville's narrator invokes the Hebrew prophets, and the western religious tradition more generally, as evidence of the existence of radically evil rational natures. But that is more by way of introduction than proof. He purports to supplement that, for "modern" tastes, with Plato; as we have seen, though, this is very dubious Plato indeed.

What we are left with is a strange but significant double source. Within the story, the narrator tells us that he came to appreciate radical evil only—very significantly—in dialogue with an older, wiser friend. It

252. See MELVILLE, BILLY BUDD, *supra* note 1, at 27-29.

253. *Id.* at 28.

254. *Id.* at 29.

255. *Id.* at 27-28.

256. In commenting on Hawthorne's work, Melville had observed, "in certain moods, no man can weigh this world, without throwing in something, somehow like Original Sin, to strike the uneven balance." Hayford & Sealts, *Notes & Commentary*, *supra* note 241, at 143 (citing Melville's essay "Hawthorne and his Mosses" (1850)).

was that friend, in turn, who pointed him to the peculiar insights of the Hebrew prophets. But that friend himself did not rely, ultimately, on those very prophets. Instead, he confirmed their findings with his own experience; he saw a mere girl deceive a worldly-wise lawyer, the paragon of sophisticate insight into human nature. But that, in turn, raises a final question: Why was the old friend's experience a better source of insight than the lawyer's? Because, we are led to assume, he was himself like the prophets, not like the lawyer. He, like the prophets, was a recluse, an acute observer of the world at a proper degree of remove, not one whose sensitivity has been dulled by too much rubbing up against that very world.

Outside the story, as readers of the story, we ourselves have just such a source. We have the narrator, informed by his dialogue with his old friend, informing us of his old friend's insights. This, of course, is the structure of every Platonic dialogue; someone who purports to have had the conversation within the dialogue—sometimes Socrates himself, sometimes one of his interlocutors—purports to relate the content of that dialogue to us. We are, as James Boyd White has pointed out, invited to engage, in our turn, with that narrator in a dialogue of our own, in which he stands to us as Socrates does to his interlocutors within the dialogue.²⁵⁷ But, of course, it is Plato who “really” recounts the dialogue, even as, in the novella *Billy Budd*, it is Melville who is telling us the story through the fictitious narrator. What he tells us, ultimately, is what Plato, through his dialogues, also tells us: You must credit these things on the basis of the narrative itself; “the resumed narrative must be left to vindicate, as it may, its own credibility.”²⁵⁸ When he tells us that, however, he has presented us with a very distinctive narrative indeed.

2. Melville's Novella, Plato's Dialogues, and the Banning of “Poets.”

But this raises an even more fundamental problem: Melville's own medium, fiction. Enlightenment doesn't come to Vere from his two preferred sources, factual narratives and “worldly” philosophy. And it comes to the narrator through two other sources, one outside the Classical tradition, and one very much within it: on the one hand, the Bible; on the other, a dialogue with an old friend and scholar. It comes to

257. See cf. James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 870-71 (1983) (contrasting rhetoric, which carries as its goal persuasion, to dialectic, which carries as its goal “to engage each person at the deepest level”).

258. MELVILLE, BILLY BUDD, *supra* note 1, at 29; see also *id.* at 49 (directing readers to determine the issue of Vere's sanity “by such light as this narrative may afford”).

us, however, through a third medium, which is neither accessible to Verne nor apparently palatable to Plato: narrative fiction. For any writer who is engaged, as Melville clearly was, with the deep sources of Western culture, the ultimate anxiety of influence is not directed within, intramurally, toward one's fellow "poets," in his case, masters like Hawthorne.²⁵⁹ It is, rather, directed extra-murally toward philosophy, ultimately, toward Plato's banning of the poets from his republic in Book X of *The Republic*.

In this Subpart, then, we need to see how Melville engages Plato on matters of form as well as substance, epistemology as well as metaphysics. As we shall see, Melville may not so much refute Plato's ban on poets from the Republic as present the kind of poetry that shores up, rather than undermines, the Republic itself. What saves *Billy Budd* from the ban of Book X is precisely what saves the *Republic* itself from its own prohibition of poets.

Plato's famous banning of the poets,²⁶⁰ remember, is provisional: If they can prove, philosophically, why they should not be banned, then they will be welcomed back into his regime, where philosophers are kings and philosophy, law.²⁶¹ The reason for the banishment is twofold. Poetry has two related failings, one mostly descriptive, the other mostly normative: It is untruthful and it is corrupting. We need to look next at Melville's implicit answer to each objection.

a. Fiction and Truth

The first objection that Socrates raises to "poetry" is a descriptive failing: What poets show us is thrice removed from reality, essentially only a picture of a reflection of the real.²⁶² And yet, of course, Plato's own dialogues have, paradoxically, just such a fictional form. Just as Plato recounts the conversation with Socrates in an unmistakably fictional form, so Socrates himself, within the dialogue, narrates accounts that are themselves not factually true. Indeed, immediately

259. *But cf.* HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* 8 (1973) (focusing on "intra-poetic relationships as parallels of family romance.").

260. PLATO, *supra* note 54, bk. X, at 277-91; *see also id.* bk. II, at 61 (forbidding speeches about the gods); *id.* bk. III, at 70 (forbidding certain speeches about bad human beings "for fear that they sow a strong proclivity for badness in our young.").

261. *Id.* bk. X, at 291 ("All the same, let it be said that, if poetry directed to pleasure and imitation have any argument to give showing that they should be in a city with good laws, we should be delighted to receive them back from exile, since we are aware that we ourselves are charmed by them.").

262. *Id.* bk. X, at 278-82.

after defending the ban on fiction in Book X, Socrates goes on to recount the transparently non-historical "Myth of Ur."²⁶³

For the *Republic* itself to survive this objection, raised in the *Republic* itself, Plato must be doing implicitly what Aristotle spells out explicitly in his *Poetics*, namely, showing how, in the latter's words:

[P]oetry is something more philosophical and more highly serious than history, for poetry tends to express universals, history particulars. By universal is meant what a man of a certain sort will say or do, either probably or inevitably; and this is what poetry aims at, despite the particular names it employs.²⁶⁴

What makes fiction more philosophical is its ability to show us characters and events in their essence and according to their types, not limited by the messy accidents of their actual development and occurrence. In their greater freedom to create their own characters and situations, poets can create, as it were, laboratory examples or models of what they would have us see.

There is another potential advantage of fiction over history, much advanced by the contemporary law and literature movement. Historical accounts tend to be "external" accounts (or, in the case of autobiography, notoriously tendentious); fiction can take us inside its characters, allowing us to inhabit their lives as if they were our own.²⁶⁵ Significantly, Melville subtitled *Billy Budd* "An Inside Narrative." There is, of course, an Aristotelian analogue here, his notion in the *Poetics* that a vital function of tragedy is catharsis, an identification with the characters' suffering that lets us purge ourselves of our own emotions.²⁶⁶ But it is important to distinguish the Aristotelian catharsis from the contemporary law and literature movement's emphasis on empathy. As we shall see in the next Subpart, empathy may be much more compatible with Plato's more basic stricture on poetry: not only that it is inaccurate, but also that it is corrupting.

263. *Id.* bk. X, at 297-303. In Bloom's translation, the story begins with the most basic fictional self-disclosure: "Once upon a time . . ." See *id.* bk. X, at 297.

264. ARISTOTLE, THE ART OF POETRY 302 (Philip Wheelwright trans., Odyssey Press 18th prtg. ed. 1977) (335 B.C.E.) [hereinafter ART OF POETRY]. Melville also reminds us, rather mischievously at the end of the novella, that fiction may be more historical than history, at least official history. In the case of the official account of the incident aboard the *Bellipotent*, guilt and innocence are again reversed, with Claggart vindicated and Billy Budd vilified. See MELVILLE, BILLY BUDD, *supra* note 1, at 70.

265. See Rob Atkinson, *What Is It Like to Be Like That? The Progress of Law and Literature's "Other" Project*, 43 STUD. L. POL. & SOC'Y 21, 35-39 (2008) [hereinafter Atkinson, *What Is It Like to Be Like That?*].

266. ART OF POETRY, *supra* note 264, at 296.

b. Fiction and Education.

Here, then, is a deeper philosophical challenge. Plato objects to poetry only secondarily and derivatively because it is inaccurate or counterfactual; he objects primarily and ultimately because it is corrupting, and corrupting of precisely the audience, leaders of the republic, whom he believes it ought to be strengthening. So, even as Aristotle challenges Vere's attitude toward literature within the book, as a character in the novella whom spurns fiction, so Plato challenges Melville's attitude outside the book, as a would-be educator of republican leaders whom deals in fictitious narratives.

Plato is quite explicit about how the descriptive limitations of poetry lead to its more basic normative failure. Poets do not see the real essence of human experience; they only see the superficial, particularly the actual importance people attach to pleasure and pain, and they make that the norm, implying that we not only tend to, but should, seek pleasure and avoid pain. Unable to see more deeply into the human condition, they satisfy themselves with depicting what is easier both to see and to imitate: the experience of pleasure and pain.²⁶⁷ In so doing, they work a double harm: on the one hand, awaking and nourishing that part in us that is sensitive to pleasure and pain, even as, on the other hand, they weaken the more discerning, rational part.²⁶⁸

This latter is the very faculty, according to Plato, that reveals to philosophers the ultimate moral truth, the truth that poets miss: The real harm that befalls humans is not to suffer the painful accidents of fate, but to do injustice. In so doing, poets weaken the very capacity to see beyond pleasure and pain to the truer essence of goodness and virtue.²⁶⁹ Worst of all, poets corrupt the best of humans, by making them feel the pain of the virtuous depicted as the ultimate bad, and to praise that depiction as the highest art.²⁷⁰

i. Good Models and Bad

All this, it is important to see, is ironically reversed in Vere's case: He "veers" away from, not toward, the pleasurable. Rather than associating the good with pleasure, the path the poets recommend, he associates the good, or at least the morally right course, with pain. But this involves a basic misunderstanding: If pain and pleasure are things accidental, not essential, to virtue, then neither the absence of one nor

267. PLATO, *supra* note 54, bk. X, at 290.

268. *Id.* bk. X, at 288-90.

269. *Id.* bk. X, at 290-91.

270. *Id.*

the presence of the other will necessarily indicate the way to either virtue or vice. This is, of course, a sophomoric sort of mistake, one that Socrates's most conscientious interlocutors make very near the beginning of the Republic. In Book II, they point out to Socrates that the multitude sees virtue as a kind of drudgery value for its results but bothersome in itself; Socrates is at pains to show them that virtue is not that sort of thing at all.²⁷¹ They learn that lesson in the rest of the Republic; they become prototypes of properly educated leaders. Vere, in Melville's story, does not learn that lesson, and his leadership results in great and unnecessary harm, to himself and to another.

His story, then, does not show us what Plato objects to in poetry, the hero experiencing accidental loss, and the attendant pain, as the ultimate harm, and the poet inviting us to indulge with the hero in his grief. Rather, Melville shows us, on our analysis in Part III, a leader who fails because he fundamentally misunderstands the meaning of virtue, life according to reason, not pleasure and pain, and the way that that meaning is ascertained, through reasoned dialogue with one's philosophic friends, those who share mutual concern for the virtue of each other's souls.

Melville, then, turns the poet's error on its head. His philosopher-king, Captain Vere, suffers, not from extraneous catastrophes, but from a disaster that is, at bottom, his own failure as philosopher-king qua philosopher-king. Billy Budd's death is not an accident; it is the product of Vere's own failed leadership. What we have in his case, then, is not a hero brought low by "the slings and arrows of outrageous fortune," but by his own fundamental failure as a philosopher king, his failure to live and govern by the light of dialogic reason.

Beyond that, Vere's story also answers Plato in four other significant ways, ways equally consistent with Plato's own position. The first of these has to do with the role of the feminine in matters of governance, the second with the absolutely fundamental role of dialogue in discerning the path of virtue, the third with the relationship between truthfulness and other virtues, and the fourth with the relationship of proper republican poetry and its rivals.

ii. The Female, the Effeminate, and the Ideal

On the first point, the role of the feminine, Melville offers a reconciliation of Plato's gender egalitarianism in Book V and his apparent misogyny in Book X. In the former passage, Plato insists that

271. *Id.* bk. II, at 36.

women with the proper virtues should rule the republic alongside similarly-constituted men;²⁷² in the latter, Plato objects to the poets' making the republic's rulers womanishly emotional.²⁷³

As other commentators have argued, Vere's failure to "be in touch with his feminine side" contributes significantly to his failure of leadership. By relegating the universal human inclinations of mercy and individuated justice to the stereotypically suspect feminine side, Vere effectively eliminates their potentially benign influence in Billy's case. At trial, he is very specific about this, and very negative: "Well, the heart here, sometimes the feminine in man, is as that pitious woman [who bewails the fate of a kinsman at trial], and hard though it be she must here be ruled out."²⁷⁴

What the narrator has us imagine in Vere's final interview with Billy, however, is a very different image of masculinity, the loving, empathetic father as opposed the stern military disciplinarian. And, as we have seen, it is precisely as that kind of father that Vere first responded to Billy's striking of Claggart; only is it when the stern military disciplinarian displaces that kind of fatherliness that Vere makes his tragic veer. It is that rigorous, inflexible, stereotypical masculinity that Vere himself elevates over the equally stereotypical soft and emotionally overwrought feminine. His oral argument at to the court recommends the former over that latter; by that time, however, his own unthinking, reflexive turn from a more nuanced masculine role has led him into precisely this false dilemma.

Had he been more menschly and less macho, he would have made a much better captain; what he had properly to fear was not the truly feminine, but the stereotypically effeminate. Had he been a better balance of the properly masculine and feminine, more fatherly, he might have decided better. (And, of course, we are free to believe that his martial domain would gain, rather than lose, from female officers, even as Plato foresaw for his republic, with its female philosopher-kings.)

iii. The Centrality of Dialogue

With respect to the role of dialogue, Melville's implicit answer to Plato goes even closer to the heart of Vere's problem. As we have seen, at every pivotal point in Vere's related "veers" from virtuous decision-making, he closes himself off in a private reverie of thought; at none of these points does he discuss his dilemma with anyone else. As James

272. PLATO, *supra* note 54, bk. V, at 129-36.

273. *See generally id.* bk. X, at 289.

274. MELVILLE, BILLY BUDD, *supra* note 1, at 55.

Boyd White points out in analyzing Plato's *Gorgias*, most Platonic dialogues end in a failed dialogue that shows us, the readers of the dialogue, how things might have gone better.²⁷⁵ In *Billy Budd*, dialogue fails at an even deeper level; it never occurs at all, it never gets a chance to go awry, to wrongly veer, because it never gets underway in the first place. Part of Vere's damaging, damning tropism is his inclination, at precisely the point of vital decision, to "veer" from dialogue into reverie, from friendly discourse to private reflection.

This, in turn, seems the most significant and troubling part of his tropism: When it comes to the hardest decision, how to decide, he automatically takes the most lonely, and presumably most apparently difficult, route. His tropism, that is, takes him not only to bad decisions, but to the very kind of process that is likely to produce substantively bad decisions. In fact, the worst aspect of Vere's flaw is that it takes him away from reasoned dialogue. As the narrator's remembered dialogue with his old friend reminds us, it might have been otherwise; dialogue can turn one from a dangerous wrong course to a truer and better one.

And yet this very failure, or meta-failure, of dialogue within the text, as James Boyd White shows elsewhere,²⁷⁶ tends to produce a double dialogue outside the text, about the text, between us and Vere on the one hand and between us and Melville on the other. In the first, we take up Billy's case against Vere; in the second, we take up, in dialogue with the narrator, Vere's own case. *Billy Budd*, of course, has generated the most spirited of such dialogues for three-quarters of a century.

iv. The Subordination of Truth to Justice

One basic truth that that sort of dialogue reveals, in both the *Republic* explicitly and *Billy Budd* implicitly, is the relationship of truth-telling to other virtues. As we have seen, Plato objects to fiction because it tends to misstate the truth about human experience, to present experiencing pleasure and avoiding pain as the twin goals of human existence. It is important to recall, however, the nature of Plato's objection to this alleged untruth. For one thing, it is accidentally untrue; it is not so much a lie as a mistake, an error. For another, it is objectionable not so much in itself, as for what it causes: poor training of those who might otherwise become proper philosopher-kings. What Plato explicitly allows, and what Melville implicitly practices, is the reversal of these two objectionable elements of fiction: Telling literal untruths to instill genuine virtue in the leaders of the republic.

275. See White, *supra* note 257, at 870-71.

276. *Id.* at 871.

Plato proposes precisely this possibility in the early section of the *Republic* explicitly devoted to the education of its guardians. To train proper leaders, to enlist them in a genuinely meritocratic aristocracy, we must, Socrates says, tell them an admittedly dubious myth about the random “natural” distribution of talents.²⁷⁷ What makes this myth acceptable, despite its admitted lack of factual foundation, is exactly the criterion that makes poetry suspect: Its educational effect on the guardian class. On the one hand, the Republic’s “meritocratic” myth is presented as essential to producing philosopher-kings; on the other hand, what Socrates objects to in conventional poetry is that it demoralizes those very philosopher-kings.²⁷⁸ More generally, Plato is quite clear that the guardians themselves must sometimes lie to protect the republic,²⁷⁹ even as we have said Vere should have lied both to avert mutiny and save Billy Budd.

Here again, then, Melville with *Billy Budd* doubly reflects Platonic strictures. In the novella, he gives future Veres an edifying cautionary tale of how not to make fundamental decisions, decisions about justice. Inside the novella, he shows how the more just course would have involved a virtuous lie, a cover-up of the real truth about Claggart’s death. This is the very sort of lie that Plato himself recommends to his guardians to use in just such a situation; this the very sort of story that the *Republic* itself is.

v. Proper Poetry Over Its Rivals

Finally, as a more purely formal matter, Melville seems to affirm another of Plato’s challenges to his poetic opponents. As we saw at the outset of this subsection, Plato’s banning of the poets is only provisional; if they can show how they can meet his standards for republican poetry, they will be welcomed back. And he also allows for “friends of poetry” to make a case for poetry, in their own, non-metrical idiom.

Melville, as we have seen, has done the latter, even as Plato himself does it in the *Republic* itself. But Melville, no mean poet himself, may have done the former as well, in Plato’s words, “made an apology in lyrics or in some other meter.”²⁸⁰ *Billy Budd* ends with a faux-naïf ballad that presents a thoroughly saccharine account of Billy’s death, an

277. PLATO, *supra* note 54, bk. III, at 93-94.

278. *Id.* bk. X, at 289.

279. *Id.* bk. III, at 67 (“Then, it’s appropriate for the rulers, if for anyone at all, to lie for the benefit of the city . . .”).

280. *Id.* bk. X, at 291.

account to match the common sailors' treatment of the very yardarm from which he was hanged as if it were the true cross itself. In this account Captain Vere, the philosopher-king, is utterly absent; in this account emotions, even the most mawkish sentimentality, are given full play.

What is more, there is good external evidence to indicate that Melville began *Billy Budd* as a sort of folk ballad with an accompanying prose sketch.²⁸¹ Perhaps frustrated by the limitations of that medium, he wrote the novella in which that ballad is now embedded. Ontogeny, as they say, recapitulates phylogeny.

In *Billy Budd*, Melville not only makes Aristotle's point in favor of fiction over history; he also, and much more significantly, turns on Plato himself, Plato's own objection to poetry. Melville answers Plato's objection, in Plato's own terms: Here is the kind of poetry Socrates calls for in the *Republic*; here, at least in part, is the proper education for a philosopher-king.

And precisely here, I'm afraid, Melville tries to prove too much. He wants to make "spiritual insight" a source of knowledge that supplants abstract, Platonic reasoning. There he attempts to close a door that Plato left open, excluding profoundly important light from empirical social science. As we shall see, "such light as this narrative may afford"²⁸² is not enough for the general needs of law, though it may be enough for this particular kind of case.

C. *Insights from Social Science.*

In subsection A, we saw Melville convincingly re-introduce an element of biblical darkness into the rosy world of Platonic rationalism through the medium of narrative fiction; in Subpart B, we saw him answer, in Plato's own terms, Plato's supposed rejection of just such fiction. On these accomplishments alone, *Billy Budd* would deserve a position of honor in the law and literature canon.

In this subsection, however, we must take up a serious problem with that embrace: Melville seems to have meant to accomplish both these tasks at the expense of social science, and this deep distrust of social science neatly meshes with an early and still vigorous interest of the law and literature movement. We need to see that Melville's manifest distaste for social science need not be read as global, that any tendency toward wholesale dismissal would, in fact, be a weakness, not a strength, of both the novella and the law and literature movement. On a

281. Hayford & Sealts, *Introduction*, *supra* note 14, at 2.

282. MELVILLE, *BILLY BUDD*, *supra* note 1, at 49.

more nuanced reading, *Billy Budd* nicely complements a more healthy relationship between literature and social science, a relationship that is itself thoroughly republican.

1. The Apparent Rejection of Social Science

On its face, Melville's novella seems to share a deep distaste for social science with a broad current of the law and literature movement. The distaste on the part of the law and literature movement, traceable to the emerging dominance of law and economics in the 1970s and 1980s, is well documented; it would be tendentious, but not entirely inaccurate, to see the law and literature movement, and the law and humanities movement more generally, as a reaction to the colonization of law and legal academia by social scientists, especially economists. What we need to examine closely here is an apparently parallel mistrust in the novella.

To appreciate that mistrust, we must first recall that a central question posed by the novella is Captain Vere's state of mind, in particular, whether he was in any sense mentally disturbed. Consider, against the background of that question, this passage:

By the way, can it be the phenomenon, disowned or at least concealed, that in some criminal cases puzzles the courts? For this cause have our juries at times not only to endure the prolonged contentions of lawyers with their fees, but also the yet more perplexing strife of the medical experts with theirs? But why leave it to them? Why not subpoena as well the clerical proficient? Their vocation bringing them into peculiar contact with so many human beings, and sometimes in their least guarded hour, in interviews very much more confidential than those of physician and patient; this would seem to qualify them to know something about those intricacies involved in the question of moral responsibility; whether in a given case, say, the crime proceeded from mania in the brain or rabies of the heart. As to any differences among themselves these clerical proficient might develop on the stand, these could hardly be greater than the direct contradictions exchanged between the remunerated medical experts.²⁸³

In the Hayford and Sealts text, now generally accepted as definitive, this long, damning paragraph is omitted, along with the separate chapter heading under which it appeared: "Lawyers, Experts, and Clergy, An Episode." But, as even the proponents of these omissions concede, the likely reason for Melville's dropping the passage is not that his views on the subject had changed. Rather, he seems, here

283. BILLY BUDD (Freeman ed.), *supra* note 224, at 188 (editor's footnotes omitted). For the reasons given by Hayford and Sealts for their omission, see Hayford & Sealts *Introduction*, *supra* note 14, at 19.

as in several other critical omitted passages, simply to have worked the sentiment of the omitted “aside” more seamlessly into the dramatic elements of the story itself.²⁸⁴ In the case of the omitted paragraph quoted above, the questions raised by the narrator there are, in the more dramatic later version, placed in the mouths of various members of the drumhead court.²⁸⁵ On this view, then, the omission of the aside about experts reflects formal, rather than substantive, considerations. And thus Melville’s intent was not to eliminate the substantive point, but rather to make it more powerfully by presenting it in a more aesthetically appropriate way.

This view is further supported by the fact that, in indisputably “final” passages, Melville’s narrator expressed the same cynicism. Thus, for example:

But in some supposed cases [of sanity or insanity], in various degrees, supposedly less pronounced [than with their polar opposition], to draw the exact line of demarcation few will undertake though for a fee becoming considerate some professional experts will. There is nothing nameable but that some men will or undertake to do it for pay.²⁸⁶

But where, if medical experts are to be rejected, even mocked, are we to look for enlightenment? By what metric are we to mark the line between such subtle mental states as sanity and insanity? In the single-sentence paragraph that follows the passage quoted immediately above, Melville’s narrator tells us: “Whether Captain Vere, as the Surgeon professionally and privately surmised, was really the sudden victim of any degree of aberration, every one must determine for himself by such light as this narrative may afford.”²⁸⁷

On its face, this seems an astounding declaration not only of literature’s independence from, but also of its superiority to, other modes of discourse. On the strongest possible reading, the narrator is directing us to put aside all other disciplines. This may have been one of the original appeals of *Billy Budd* to the emergent law and literature movement. But, as we say in the law, that would be much too broad a holding. On the one hand, it would raise a dangerous risk of abuse; on the other hand, the relationship of social science to literature, in the novella itself, can be explained much more satisfactorily. We must take up both these prospects in turn.

284. Hayford & Sealts, *Introduction*, *supra* note 14, at 35-37.

285. *Id.* at 36-37.

286. MELVILLE, BILLY BUDD, *supra* note 1, at 49.

287. *Id.*

2. The Overbroad Reading

Melville in his day, like the early proponents of the law and literature movement, had good reason to mistrust the overweening claims of social science. He wrote over a decade before the earliest Freud, when pseudo-sciences like phrenology and physiognomy²⁸⁸, at least in America, were widely credited. Even in our own time, with its comically absurd “twinkie defense”²⁸⁹ and its tragically egregious “recovered memory syndrome,”²⁹⁰ it is not hard to sympathize with Melville’s skepticism. Indeed, Melville’s condemnation of dueling scientific experts strikingly anticipates contemporary debates, up to the Supreme Court itself, about just how to define “science” in the context of expert testimony in the “hard” as well as the social sciences.²⁹¹

But, of course, to accept that, in Melville’s time as in our own, some social science is bad or bogus is not, logically speaking, grounds for rejecting it all, for throwing out the baby with the bathwater. As the cultural studies strand of the law and humanities movement has argued, social science has an important role to play in a truly critical, necessarily interdisciplinary, analysis of law.²⁹²

Beyond that general baby-with-the-bathwater concern, there is a more particular one that we need to note here, one that involves a long-standing, core claim of the law and literature movement. From the movement’s beginning, its proponents have claimed to be able to give us something social science cannot: Insights into what it is like to be another, the experiences of other people from their own perspective, from the subjective “inside” of the others themselves, not just the objective “outside” of science.²⁹³

It is one thing, however, to say that literature can show us what it might be like to be someone else, or “other”; it is quite another to say that it shows us what it really *is* like. Empathize though we may with Faulkner’s Benjy, at the end of *The Sound and the Fury* we are still left with a nagging question: What is it *really* like to be profoundly intellectually disabled? We do not, of course, doubt that some people

288. See Tyrus Hillway, *Melville’s Use of Two Pseudo-Sciences*, 64 MOD. LANGUAGE NOTES 145, 145 (1949).

289. See generally *People v. White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981); see also Robin L. Barton, *Understanding the So-Called ‘Twinkie’ Defense*, CRIME REPORT (Oct. 4, 2017), <https://thecrimereport.org/2017/10/04/understanding-the-so-called-twinkie-defense>.

290. See Frederick C. Crews, *The Revenge of the Repressed*, 41 N.Y. REV. BOOKS, no. 19, 1994, at 1-3; Frederick C. Crews, *The Revenge of the Repressed: Part II*, 41 N.Y. REV. BOOKS, no. 20, 1994, at 1-3.

291. See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995).

292. See BINDER & WEISBERG, *supra* note 3, at 462-539.

293. See Atkinson, *What Is It Like to Be Like That?*, *supra* note 265, at 26-27, 38-39.

live with the handicap of profound retardation, or that they have some sort of real and valid interior life. But we cannot really know if Faulkner has really got that mode of being "right."

And there is an even deeper problem raised by a very different kind of "interior" account: Could the experiences portrayed in this account ever have happened at all? Think of the proliferation of alien abduction accounts; imagine the political impact of *The Autobiography of an Aborted Fetus*. We have good reason, then, to worry about overgeneralizing Melville's narrator's invitation to judge his account on its internal merits alone, without validation from other, external sources.

3. The Narrower Holding

How, then, can *Billy Budd* work as well as I claim, despite these epistemological lapses? Several factors work together here. First, as we have already seen, Melville's narrator himself, within his narrative, points to sources that are outside both his own reported experience and the domain of narrative fiction; he relies on his conversations with a worldly-wise friend, who in turn invokes the insights of the Hebrew prophets. Melville asks us to rely, not just on his narrative, but more precisely on "such evidence as this narrative may afford."

What is more, the insistence of Melville's narrator on limiting the evidentiary record is quite specific; we need not reject the insights of social science everywhere, but just here, in assessing the credibility of this particular story. And it is the credibility of the story, not its factual accuracy, that we are asked to assess. We know, from the outset, that it is fiction; we are looking, with Aristotle, not for whether these events actually occurred, but for whether people like this would have acted this way, whether people like this do act this way. Within that story, all three of the "exceptional" characters—Billy, Claggart, and Vere—are plausible; they are tied into either our own experience, or the recorded experience of credible others: The narrator himself, in the case of "handsome sailors" like Billy Budd; the darker but nevertheless resonant texts of Scripture, in the case of Claggart and most importantly, ourselves, or our intimates, in the case of Captain Vere. This is neither an alien abduction narrative nor the autobiography of an aborted fetus.

Furthermore, two of the three "exceptional" characters, though essential to the story, need not be understood "from the inside" for the story to work in the way that we have outlined. This is not a tale told by the angelic Billy or the diabolical Claggart, any more than it is a tale told by an idiot. We only need to believe that there could be characters like Claggart and Billy; we don't need to know what it is like to be them, although we do get a fairly strong sense of that in both their cases.

Indeed, in the case of the handsome sailor, we don't really need to believe in his kind at all; the narrator himself tells us he is a vanishing breed by the middle of the nineteenth century. He is needed in the story only as a plausible proxy of innocence in need of protection. We need, similarly, to believe that radically evil characters like Claggart exist; we do not, however, need to believe that the source of their evil is unfathomably inaccessible to social science, or a product of "nature" as opposed to "nurture." And nowhere are we asked, in essence, to make his dark desires and designs even empathetically our own.

On the other hand, the one whose interior life we really do need to experience vicariously is Vere, and he is the one we are likely to recognize most readily. Moreover, in recognizing Vere from the "inside," as us, we have to validate his external reality in the most vital possible way; we know such people as he exists, with such problems as he manifests, because we have seen it in ourselves. We have met the problem, and it is us, or people very like us, the lawyers and others in positions of leadership and responsibility who, before our very eyes, make the Vere veer every day. We are pressed back, then, to the ultimate Socratic maxims: *Know thyself; the unexamined life is not worth living*. We need to see that Vere does not follow that maxim, and cannot, because he does not read books like Melville's or Plato's. And we need to see that there, but for the grace of such books, go we.

That insight, in turn, helps makes sense of the novella's subtitle, *An Inside Narrative*, which has long puzzled critics. Most take it to mean that the narrator is an insider within Vere's microcosmic shipboard world.²⁹⁴ But here we have another inside dimension: We are being shown, not just the inside of Vere's world, but the inside of a world that is, or may well be, our own.

And that brings us around to a deeper, if different, relationship between Melville's narrative and social science, a relationship that reaches both back to Plato and forward to Freud. As James Boyd White has pointed out, the Platonic dialogues ideally work on us, as readers of the dialogue, the way Socrates's conversations work on his interlocutors within the dialogue. Just as they come to see themselves as fundamentally in need of normative reorientation in their conversation with Socrates, so we see ourselves in our reading of Plato's dialogue, as we enter, through that dialogue we are reading, into a dialogue with Plato about the issues Socrates raises within that dialogue. And so, in reading Melville's "inside" account of Captain Vere, we are invited to

294. Hayford & Sealts, *Notes & Commentary*, *supra* note 241, at 134.

see his tropism, his tendency to veer toward the harder course as a proxy for the wiser, as our own.

This is also, of course, the classic dynamic of Freudian psychoanalysis.²⁹⁵ The analysand must come to see his or her neurosis, not from the outside, but from the inside, not as “one’s” problem, but as “my” problem. Only in that way is the patient genuinely able to overcome the problem, to transcend the neurosis.²⁹⁶

On this view, then, *Billy Budd* operates not so much as a critique of the faux social and mental sciences of his day, but as an anticipation of the insights of clinical psychology very much in the air in the fin de siècle Atlantic world. And he is able to anticipate these developments not only because he is a shrewd if self-taught psychologist himself, but also because he is practicing, in his own form of dialogue, the kind of Socratic self-examination that Freud, too, took as both methodologically and normatively fundamental.

V. CONCLUSION: TOWARD REPUBLICAN LAW AND LITERARY CRITICISM

In Part III we read *Billy Budd* as Melville’s offer of a way, within the law broadly understood, to save both Billy Budd and the fleet, albeit at the sacrifice of full administrative transparency.²⁹⁷ This reading is republican in two related senses: Its placement of individual life and public safety above the telling of literal truth, and, more generally, its insistence on substantive justice, not just literal legality, as the proper focus of the law and its agents.

In Part IV we read *Billy Budd* as Melville’s response to Plato’s basic challenge to literature and, more generally, as Melville’s reconciliation of fundamental divisions in western culture traceable back to Plato himself.²⁹⁸ On this reading, Melville, along with Plato, acknowledges the fundamental educational role of “poetry” in the training of leaders, for better and for worse. To be sure, he takes issue with Plato, or at least the rationalist tradition of Plato, on three basic points: the presence of elemental and irrational evil in humanity; the positive possibility of using “poetry” to educate philosopher-kings; and the role of rationalistic social science in understanding the deeper, darker workings of the human psyche. On each point, however, we can find

295. See SIMON O. LESSER, *FICTION AND THE UNCONSCIOUS* 92-93 (1957) (suggesting that reading *Billy Budd* may help resolve psychological conflicts).

296. *Id.*

297. See *supra* Part III.A.2.e.

298. See *supra* Part IV.

Melville reconciling his position with the imputedly Platonic, even as, in Part III, we found that Melville offered a broadened understanding of law that incorporated justice into legality. Thus the reading of *Billy Budd* offered in Part IV, like that in Part III, is “republican.”

These republican readings, though, suggest a final, tantalizing question: Are they what Melville actually intended? What Melville meant, as we have seen, is a question that literary scholars have long asked, and it is a question that, perhaps, their analytic tools well suit them to answer. But their long and continuing disagreement suggests a very real, if pessimistic, prospect: We may never have a definitive answer. In conclusion, we must see why that uncertainty about Melville’s intent neither undermines Melville’s achievement nor this analysis of that achievement. And we must also see what implications this, in turn, has for our understanding of law and literary criticism.

The basic point is this: For purposes of our analysis, plausibility is more important than actual, final “proof.” What matters more, ultimately, is not what Melville meant to say, but what readings we can give his text without doing it violence, without distorting the meanings that we can, by standard canons of interpretation, legitimately find there. This position is something of the converse of Wimsatt’s analysis of the intentionalist fallacy. According to Wimsatt, we must judge writers not by what they mean to achieve, but by what they actually do achieve.²⁹⁹ Just because someone can be seen to have intended a great thing is not relevant to our assessment of how well they pull it off; aiming high is hardly an excuse for missing, and certainly no virtue in its own right.

If discernable ambition is irrelevant to measuring literary merit, though, we can also make a peculiar converse point, about the absence of discernable intention: We should give a writer credit for what he, in fact, does achieve whether or not that was, or can be proved to be, his actual or conscious or “real” intent. If we can show that he has done something great, we must credit that on its own merit. If, then, I am right that Melville has answered both the law and Plato in their own terms—and, beyond that, in ways that expand those very terms—then we must credit Melville for that achievement, whether or not he had it consciously in mind.

We should also notice that what we credit Melville lies outside of, and hence expands, any “purely” or “strictly” literary standard of achievement: He has showed us a bigger, better understanding of law; he

299. W.K. Wimsatt Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 477 (“[T]here is danger of confusing personal and poetic studies; and there is the fault of writing the personal as if it were poetic.”).

has showed us a way to resolve, at least some of the time, some of the deepest divides in western culture. For us to appropriate those lessons, however, we must already have had a very sophisticated understanding of law, and a very broad knowledge of culture. *Billy Budd* points us, at bottom, not so much to the reading we must someday do, as to the reading we must have already done.

Literary scholars, we have said, must have a deeper understanding of law if they are to see what Melville offers to tell us about law. On this view, their tendency to derive a pessimistic estimation of the capabilities of law from the text of the novella is quite possibly not the fault of the novella, or of the law, but of their critical apparatus. On this view, literature has at least as much to learn from law as to teach it, precisely because *Billy Budd* is a legal, not just a literary, text.

The corresponding message for legal scholars and legal education, however, is no basis for self-congratulation. It is, rather, a severely damning indictment, on republican grounds, of the law, and especially the legal education, of our time. If we lawyers, like Vere, are limited in our readings, we risk not just diminishing our own lives but, on account of that very diminution, literally destroying the lives of others. We have seen that, if literary criticism does not know law, including the subtler aspects of jurisprudence, it cannot know the republican lessons of *Billy Budd*. But what are we to say if law schools graduate a generation of leaders who know neither literature nor jurisprudence? In republican terms, we cannot expect our republic to be governed well—more precisely, we cannot expect to govern our republic well.

There is, thankfully, a more promising possibility, and a final and more fundamentally republican reading of *Billy Budd*. We can take Melville's novella as a dialogue, as an invitation to engage with others—with every available voice in our culture and our history—in a continuing discourse about justice, about the commonwealth, *res publica*—about, in a word, the Republic.

And so may it be.