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**HERMAN MELVILLE'S *BILLY BUDD*:
WHY THIS CLASSIC LAW AND LITERATURE NOVEL
ENDURES AND IS STILL RELEVANT TODAY**

Rodger Citron *

I. INTRODUCTION

Professor Sam Levine graciously invited me to speak at this conference on Jewish and American Law. His invitation sent me back to the work of Yale Law School Professor Robert Cover, who helped forge the path that Sam not only follows but extends and enlarges in his two-volume book.¹

Cover wrote Justice Accused: Antislavery and the Judicial Process, which explores the conflict between morality and positive law in the context of the dilemma faced by certain judges in the North before the Civil War² These judges faced an excruciating dilemma in cases in which they asked to enforce the fugitive slave laws and return slaves to the South. As Cover details, many of these judges applied the Act despite their deep personal opposition to slavery. The decision to enforce the fugitive slave laws was agonizing for these judges. Nonetheless, their commitment to the law compelled them to obey the law rather than conscience.³

Cover sets the stage for this conflict through an intriguing discussion of Herman Melville's *Billy Budd, Sailor (An Inside*

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¹ This dynamic is perhaps best illustrated in *Samuel J. Levine, Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998).

² ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984).

³ *Id.*

Narrative).⁴ ‘Melville, the author of *Moby Dick*, or *The Whale*, is one of our nation’s greatest writers. When he died in 1891, however, Melville had only a modest literary reputation.

In fact, he “had been out of public view for so long that *The New York Times* identified him as Henry Melville,” writes Professor Christopher Benfey.⁵ Early in the 20th century, Melville’s reputation enjoyed a revival. A century later, he continues to enjoy a prominent place on the syllabus of 19th century American literature courses.

Why, more than 200 years after Melville was born, should we continue to read ‘*Billy Budd*? Because, as Cover recognized, *Billy Budd* explores perhaps the most fundamental question in legal philosophy: when, if ever, may a legal official not follow the text of the written law in order to pursue a more just outcome?

This article examines the jurisprudential question at the heart of *Billy Budd*. It begins with a brief summary of the novel, considers the conflicting interpretations, and concludes with some thoughts on why *Billy Budd* continues to be relevant today.

II. BILLY BUDD: A SYNOPSIS

“The manuscript of *Billy Budd* as Melville left it at his death in 1891 may be most accurately described as a semi-final draft,” according to Harrison Hayford and Merton M. Sealts, Jr., the editors of the 1962 edition that is still widely used today. The manuscript was not published until decades after Melville’s death in 1924.⁶ Hayford and Sealts say that Melville wrote *Billy Budd* in three phases.⁷

The first phase focused on Billy Budd. Billy is a handsome and able sailor, conscripted from a merchant ship – the Rights-of-Man – to serve in the English Navy on the Bellipotent. It’s 1797, and England is at war with France. Billy is young, innocent, and handsome; his only “occasional liability” is a “vocal defect” that occasionally causes him to stutter or renders him speechless.⁸

⁴ HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Harrison Hayford & Merton M. Sealts, Jr. eds. 1962).

⁵ Christopher Benfey, *The Loved One*, *THE NEW YORK REVIEW OF BOOKS* (May 10, 2018) <https://www.nybooks.com/articles/2018/05/10/billy-budd-the-loved-one/>.

⁶ Editors’ Introduction, *Billy Budd* *supra* note 4 at 12.

⁷ *Id.* at 1-3.

⁸ *Billy Budd*, *supra* note 4 at 53.

In the second phase of his writing, Melville introduced John Claggart, the Bellipotent's master-at-arms. Claggart is described as "a man about five-and-thirty, somewhat spare and tall, yet of no ill figure upon the whole" with the "brow of the sort phrenologically associated with more than average intellect."⁹

Unlike the rest of his shipmates, Claggart despises Billy and conspires against him by falsely accusing Billy of planning a mutiny. The ship's captain, Edward Vere, does not believe Claggart and summons Billy so that the accusation can be made to his face. Told of the charge, Billy is unable to respond. Instead, "quick as the flame from a discharged cannon at night," Billy's right arm shoots "out, and Claggart [drops dead] to the deck." Captain Vere sends for the ship's surgeon, who confirms that Claggart is indeed dead. "Struck dead by an angel of God!" Vere exclaims. "Yet the angel must hang."¹⁰

In the third phase of his work, Melville developed the character of Captain Vere. Vere is a "sailor of distinction," with a "certain unaffected modesty . . . [that] suggests a virtue aristocratic in kind." Occasionally the captain reveals "a certain dreaminess of mood."¹¹

In response to Claggart's death, Vere assembles a tribunal, known as a drumhead court, and explains what has happened. As described in the novel, the governing law, the Mutiny Act, holds that it is irrelevant that Billy was provoked by Claggart or that Billy did not intend to kill him. Equitable defenses or exceptions are not available because of the risk of mutiny – a very real risk when the novel is set. Vere adheres to a strict interpretation of the Act. Billy is convicted and hanged the next morning.¹²

The novel does not end with Billy's execution. Subsequently, while returning to the English fleet, the Bellipotent battles an enemy ship. Vere is mortally wounded. His last words, "inexplicable to his attendant," are "Billy Budd, Billy Budd."¹³

III. THE CLASSIC VIEW: CAPTAIN VERE AS A TRAGIC FIGURE

Billy Budd engages many classic literary themes. For example, Billy is associated with nature, on the one hand, and Vere with

⁹ *Id.* at 64.

¹⁰ *Id.* at 101.

¹¹ *Id.* at 60-61.

¹² *Id.* at 114, 122-24.

¹³ *Id.* at 129.

civilization. Religious imagery abounds, with Billy described as Adam before the fall and sacrificed, like Jesus Christ some say, for a greater good. Claggart, by contrast, is associated with the serpent. Yet another school of thought explores the extent to which the novel is homoerotic.

For law and literature scholars, the central theme is the conflict between strictly adhering to the letter of the law or disregarding it in order to reach a just outcome. They focus on Captain Vere's dilemma. Vere likes Billy, does not believe that he planned a mutiny, and knows that he struck Claggart involuntarily, without intending to kill him. Nonetheless, Vere concludes that he has no choice but to follow the Mutiny Act. Billy must be convicted and must hang.

The classic interpretation of Vere is that he is a tragic figure. Former Yale Law School professor Charles Reich articulated this view in a 1967 essay, aptly titled, "The Tragedy of Justice in Billy Budd."¹⁴

As noted earlier, Professor Cover, elaborated on the notion of Vere as a tragic figure in *Justice Accused*. Vere, according to Cover, may be seen as a depiction of Melville's father-in-law, Lemuel Shaw, who served as chief justice on the Massachusetts Supreme Court and wrestled with whether to enforce the Fugitive Slave Act in the 1850s.¹⁵

My view accords with the classic interpretation. The tragedy of Vere is highlighted by the penultimate chapter of the novel, which sets out a garbled account of the events a few weeks after they occurred in a "naval chronicle of the time." This published story reports that Claggart uncovered a plot and "was vindictively stabbed to the heart by the suddenly drawn sheath knife of Billy Budd," the "ringleader." After reporting that Budd "paid the penalty of his crime," the article concludes that his prompt punishment "has proved salutary. Nothing amiss is now apprehended aboard H.M.S. Bellipotent."¹⁶

Captain Vere knowingly requires Billy to hang in order to prevent rumors of unrest from spreading because such rumors could foster mutiny. And this story, published in "an authorized weekly publication," suggests that Vere's decision was warranted because order has been maintained on the Bellipotent. Of course, having read the *Inside Narrative*, we know that this account is false. Vere's tragedy

¹⁴ CHARLES REICH, THE TRAGEDY OF JUSTICE IN BILLY BUDD (1967)

¹⁵ Robert Cover *supra* note 2.

¹⁶ Billy Budd *supra* note 4 at 131.

is exacerbated by the fact that truth has been sacrificed in this account, along with Billy.

IV. OTHER INTERPRETATIONS OF CAPTAIN VERE

It is a testament to the brilliance of Melville's novel that it has inspired conflicting interpretations. Former Judge Richard Posner – author of *Law and Literature*, just one of his many books – has written that Captain Vere properly followed the law and, consistent with his duty of commanding a major warship, justifiably sacrificed Billy Budd.¹⁷

Other law professors see Vere in a much more sinister light. Professor Richard Weisberg contends that Captain Vere is not constrained by the Mutiny Act but, rather, manipulates the law to bring about the unjust execution of Billy Budd.¹⁸

Professor Steven Winter extends this argument while returning to Professor Cover's suggestion that Vere may be seen as Chief Justice Shaw. Winter argues that Melville intended to identify Vere with Shaw. Moreover, according to Winter, "the judgment of Vere/Shaw is plain: he is a tool, a tool of violence. Nothing more."¹⁹

While I do not fully subscribe to any of these interpretations – either that of Posner or those of Weisberg and Winter – all of them are plausible. The latter two are as creative as they are provocative.

V. THE CONTINUING RELEVANCE OF BILLY BUDD

Billy Budd is relevant today because we – lawyers, judges, society – continue to wrestle with whether to follow the literal text of the law when doing so may sacrifice justice in a specific case.

During the confirmation hearings for then-Judge Neil Gorsuch for appointment to the Supreme Court, for example, much was made of his dissent in *TransAm Trucking, Inc. v. Administrative Review Board, United States Department of Labor*²⁰, which became known as "the Case of the Frozen Trucker."

¹⁷ RICHARD POSNER, *LAW AND LITERATURE* (1st ed. 1998), at 155-65.

¹⁸ See, e.g., Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

¹⁹ Steven Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 CARDOZO L. REV. 2471, 2494 (2005).

²⁰ 833 F.3d 1206.

The United States Court of Appeals for the Tenth Circuit summarized the facts:

Alphonse Maddin was employed as a truck driver by . . . TransAm. In January 2009, Maddin was transporting cargo through Illinois when the brakes on his trailer froze because of subzero temperatures. After reporting the problem to TransAm and waiting several hours for a repair truck to arrive, Maddin unhitched his truck from the trailer and drove away, leaving the trailer unattended. He was terminated for abandoning the trailer.²¹

Subsequently, an administrative law judge concluded that Maddin was wrongfully terminated, a decision that ultimately was upheld by the Tenth Circuit.

Gorsuch dissented. His statement of the facts began: “A trucker was stranded on the side of the road, late at night, in cold weather, and his trailer brakes were stuck. He called his company for help and someone there gave him two options . . . [including the option to] sit and wait for help to arrive.” The trucker did not do that, Gorsuch wrote, but instead decided “to unhook the trailer and drive his truck to a gas station.” TransAm subsequently fired him for “disobeying orders and abandoning its trailer and goods.”²²

Gorsuch added, “It might be fair to ask whether TransAm’s decision was a wise or kind one. But it’s not our job to answer questions like that. Our task is only to decide whether the decision was an illegal one.”²³

The disagreement between the Tenth Circuit judges in the majority and Judge Gorsuch in his dissent echoes the debate inspired by Captain Vere’s decisions to try, convict, and hang Billy Budd. More than two hundred years after Melville’s birth, his last novel still resonates today.

²¹ *Id.* at 1208.

²² *Id.* at 1215 (Gorsuch, J., dissenting).

²³ *Id.*