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MELVILLE'S *BILLY BUDD* AND SECURITY IN TIMES OF CRISIS

*Daniel J. Solove**

INTRODUCTION

In war and in times of crisis, it has often been said that liberty must be sacrificed to further security. Throughout U.S. history, profound curtailments of rights have been carried out in the name of national security and wartime necessity. During the Civil War, President Lincoln suspended habeas corpus; during World War I, individuals who advocated resistance to the draft were prosecuted; during World War II, about 100,000 citizens of Japanese ancestry were rounded up and interned in camps;¹ during the Cold War, hundreds of people were subjected to interrogation and blacklisting for their communist beliefs. Courts often upheld these curtailments by reviewing them with great deference to the Executive Branch. When these curtailments were later viewed in hindsight, they turned out to be unnecessary overreactions. In short, during times of crisis, our leaders have made profound sacrifices in the name of security, ones that we later realized need not have been made.

History seems to be repeating itself. Since September 11th, the Bush Administration has made a series of significant curtailments of liberty. It has secretly rounded up and detained thousands of aliens living in the United States and refused to reveal their identities.² It has interned hundreds of individuals indefinitely in camps as “enemy combatants,” denying them hearings, representation by counsel, and even contact with the outside world.³ The Administration announced that it could hold secret military trials and even execute people.⁴

These events give Herman Melville's *Billy Budd* renewed relevance to our times. *Billy Budd* is a moving depiction of a profound

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¹ ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 38 (2001); see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

² David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-61 (2002).

³ Stephen Graham, *U.S. Frees 80 Afghan Detainees*, PHILA. INQUIRER, Jan. 17, 2005, at A12.

⁴ Cole, *supra* note 2, at 977. For President Bush's order authorizing the trials, see Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

sacrifice made in the name of security.⁵ When Billy Budd, a kind and innocent sailor, inadvertently strikes and kills an officer of the ship who has falsely accused him of mutiny, the ship's captain, Edward Fairfax Vere, convenes a secret military tribunal.⁶ Billy's adjudicators all believe his life should be spared because the killing was unintentional. However, the governing law, the Articles of War, appears to be strict and uncompromising—Billy caused the officer's death, and therefore, he must be condemned to death. At the trial, Vere delivers an eloquent speech to the adjudicators explaining that no matter how great the temptation to be more equitable, the law is strict and controlling, and the rule of law must be followed. This is especially true, Vere argues, during times of war, when maintaining discipline and order are imperative. Billy is convicted and is executed by hanging the next day.

Commentators have often viewed Vere as caught up in a difficult situation, where he is forced to choose between adhering to the rule of law or adopting a more equitable approach that would avoid the sacrifice of Billy Budd. Vere chooses to follow the law's unbending strictures. Many scholars view *Billy Budd* as a critique of overly steadfast adherence to the rule of law.

In his provocative book, *The Failure of the Word*, Richard Weisberg offers an interpretation of *Billy Budd* that cuts against much of the traditional view.⁷ Weisberg suggests that Vere was not simply caught up in the tension between the rule of law and equity; rather, Vere actively manipulates the law to place himself in this position.

In this Essay, I aim to build upon Weisberg's challenging interpretation of Vere. The implications of this reading of *Billy Budd* are profound. The novella is more than a critique of adherence to the rule of law—in fact, it is just the opposite. Vere does not adhere to the law. Therefore, the law is not the culprit—it is something in Vere that causes his failure. This reading of *Billy Budd* leaves us with a radical and unsettling set of insights about why our leaders often fail to do justice in times of crisis, and why our leaders, like Vere, choose to hang Billy Budd.

⁵ HERMAN MELVILLE, *BILLY BUDD, SAILOR (AN INSIDE NARRATIVE)* (Harrison Hayford & Merton M. Sealts, Jr., eds., 1962) [hereinafter *BILLY BUDD*]. The Hayford and Sealts edition of *Billy Budd* is widely known to be the definitive edition of the text. See, e.g., William Domnarski, *Law-Literature Criticism: Charting a Desirable Course with Billy Budd*, 34 J. LEGAL EDUC. 702, 704-05 (1984). Melville began writing *Billy Budd* between late 1885 and early 1886. The manuscript was unfinished at his death in 1891. See Harrison Hayford & Merton M. Sealts, Jr., *Editors' Introduction to BILLY BUDD*, *supra*, at 1-2. The manuscript was finally published in 1924. See *id.* at 12.

⁶ Daniel Kornstein has persuasively pointed out the similarities between the drumhead court used to try Billy Budd and the secret military tribunals of the Bush Administration. See Daniel J. Kornstein, *Life Imitates Art on Secret Tribunals*, 26 N.Y.L.J., Nov. 28, 2001, Perspectives, at 2.

⁷ RICHARD H. WEISBERG, *THE FAILURE OF THE WORD* (1984).

I. UNDERSTANDING *BILLY BUDD*A. *The Tragic Choice of Captain Vere*

Billy Budd takes place in 1797, during the Napoleonic Wars, aboard the *Bellipotent*, a mid-sized army ship in the English Navy. England had been at war with France since 1793. This was a time of great unrest for the English Navy; many soldiers served involuntarily, received meager wages, and suffered poor living conditions. As a result, two major mutinies occurred in summer of 1797, at Spithead and at Nore. The story begins when Billy Budd is drafted onto the ship. Billy Budd is a young sailor, twenty-one years old, who is unusually handsome for his profession.⁸ Billy has a “rustic beauty” and looks like Hercules.⁹ He is very popular, humble, and good natured. He is innocent and simple-minded, “one to whom not yet has been proffered the questionable apple of knowledge.”¹⁰ Although Billy is a specimen of beauty and physical perfection, he has a “vocal defect.”¹¹ Under pressure, he would often stutter.

Although practically everybody on the ship likes Billy Budd, John Claggart, the master-at-arms responsible for the ship’s police duties, has a hidden enmity for Billy. The reasons for Claggart’s hatred are unexplained. When the *Bellipotent* is at its furthest distance from the rest of the fleet, Claggart falsely tells the ship’s captain, Edward Vere, that Billy is plotting a mutiny. Vere does not believe him.¹²

Billy is summoned, and in front of Vere, Claggart repeats his accusation.¹³ Vere urges Billy to speak and defend himself, but, because of his vocal defects, Billy cannot. When Vere realizes that Billy has a speech impediment, he tries to soothe Billy by telling him to take his time. This only makes Billy struggle harder to speak.¹⁴ Instantly, Billy’s arm shoots out and hits Claggart on the forehead. Claggart drops dead.

Vere quickly orders that a drumhead court be summoned. A drumhead court is an impromptu military trial, named for the custom of using a drum as a table. Vere’s drumhead court consists of the first lieutenant, the captain of the marines, and the sailing master. This was

⁸ BILLY BUDD, *supra* note 5, at 51.

⁹ *Id.*

¹⁰ *Id.* at 52.

¹¹ *Id.* at 53.

¹² *Id.* at 95-96.

¹³ *Id.* at 98.

¹⁴ *Id.* at 98-99.

a departure from general custom, since these people were inexperienced in this type of trial.¹⁵

The court is held in the same cabin where the incident occurred.¹⁶ After Vere describes what happened, Billy testifies that he did not mean to kill Claggart. When Claggart lied to his face in front of Vere, Billy had to say something and “could only say it with a blow, God help me!”¹⁷ Vere says to Billy: “I believe you, my man.”¹⁸

Before the court deliberates over the verdict, Vere gives a summation. He explains that although he believes that Billy is “innocent before God,” the court must adhere to the law.¹⁹ The law appears to be clear in this case, as the Articles of War make striking an officer a capital crime.²⁰ Also, since this is a strict liability crime, Billy’s lack of intent to kill is irrelevant. Moreover, Vere argues that Billy must be convicted or else the other sailors might view the officers in charge to be cowardly, stirring up a mutiny.

Based on Vere’s argument, the court convicts Billy and sentences him to be hung at the yardarm in the early morning. Billy’s last words are: “God bless Captain Vere!”²¹ Later on, as Vere is dying from a mortal wound in battle, he murmurs “Billy Budd, Billy Budd.”²² However, the narrator notes that “these were not the accents of remorse.”²³

B. *Captain Vere and the Rule of Law*

A prevailing interpretation of *Billy Budd* understands the novella as a condemnation of legal formalism. Commentators have long characterized Vere as a man trapped in a tragic dilemma, a formalist

¹⁵ *Id.* at 104-05.

¹⁶ *Id.* at 105.

¹⁷ *Id.* at 106.

¹⁸ *Id.*

¹⁹ *Id.* at 110-11.

²⁰ The Articles of War were the British Royal Navy’s regulations for misconduct by sailors. The provision at issue in *Billy Budd* is Article 12, *quoted in* WEISBERG, *FAILURE OF THE WORD*, *supra* note 7, at 148, which provides:

If any officer, mariner, soldier, or other person in the fleet, shall strike any of his superior officers, or draw, or offer to draw, or lift any weapon against him, being in the execution of his office, on any pretense whatsoever, every such person being convicted of such offense, by sentence of a court martial, shall suffer death.

²¹ BILLY BUDD, *supra* note 5, at 123.

²² *Id.* at 129.

²³ *Id.*

torn between adherence to the rule of law and his own heart and conscience. One commentator writes that Vere “struggles with the conflict between his own inner belief in the sailor’s innocence and his adherence to formal legal rules. Unable to set aside the law governing his military court, Vere believed he had no choice but to sentence Billy Budd to death.”²⁴ *Billy Budd*, another scholar observes, “embodied the most brilliant representation of the clash between natural justice and the rule of law in all of Nineteenth Century American literature.”²⁵ *Billy Budd* “show[s] the human heart trapped in the cage of the law,” writes another commentator.²⁶ Charles Reich observes: “Clearly . . . *Billy Budd* is designed to give us a case where compromise is impossible, and where Vere, and we, are forced to confront the imperatives of law. As Melville presents the case, there is no escape for Vere.”²⁷

Under this interpretation, *Billy Budd* examines a vexing jurisprudential issue that has persisted for centuries—should judges adhere to abstract legal rules or disregard them to achieve a more equitable outcome for the particular case?

In Vere’s speech to the drumhead court, he states that he perceives in his co-adjudicators a crisis, a “troubled hesitancy” caused by “the clash of military duty with moral scruple—scruple vitalized by compassion. For the compassion, how can I otherwise than share it?”²⁸ Vere stresses that despite their feelings, his co-adjudicators should be “mindful of paramount obligations.”²⁹ “For that law and the rigor of it, we are not responsible,” Vere declares. “Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.”³⁰ Vere counsels that although the adjudicators might feel mercy and compassion toward Billy, they should “let not warm hearts betray heads that should be cool.”³¹ The heart must be “ruled out.”³²

Perhaps if Vere had not banished emotion from the court’s judgment of Billy Budd, the outcome of the trial would have been different. Some scholars argue that emotions, such as empathy, should become more central to the judicial process, and that the law should not

²⁴ Steven Wilf, *The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic*, 32 CONN. L. REV. 1675, 1675 (2000) (citations omitted).

²⁵ Richard P. Cole, *Orthodoxy and Heresy: The Nineteenth Century History of the Rule of Law Reconsidered*, 32 IND. L. REV. 1335, 1368 (1999).

²⁶ Steven D. Jamar, *As Through a Prismatic Gem: A Book Review of Trial and Error: An Oxford Anthology of Legal Stories*, 42 HOW. L.J. 129, 130 (1998).

²⁷ Charles A. Reich, *The Tragedy of Justice in Billy Budd*, 56 YALE REV. 368, 379 (1967).

²⁸ BILLY BUDD, *supra* note 5, at 110.

²⁹ *Id.*

³⁰ *Id.* at 110-11.

³¹ *Id.*

³² *Id.*

be so remote and detached from the individuals it judges.³³ According to these scholars, had Vere adhered less to the rigidity of the rule of law, allowing for equity and emotion to play a greater role, a just outcome might have been reached in Billy's trial.

Robert Cover suggests that *Billy Budd* is an allegory for the condemnation of fugitive slaves during the Antebellum era.³⁴ Melville's model for Vere was his father-in-law, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court. "The Chief Justice was a noted, strong opponent to slavery and expressed his opposition privately, in print, and in appropriate judicial opinions. Yet, in the causes celebres involving fugitive slaves, Shaw came down hard for an unflinching application of the harsh and summary law."³⁵ Cover notes several similarities between the drumhead court and proceedings under the Fugitive Slave Act: "The drumhead court was a special and summary proceeding; so was the fugitive rendition process. In both proceedings, the fatal judgment was carried out immediately."³⁶ Billy's flaw was his inability to speak. Under the Fugitive Slave Act, alleged fugitives had no right to speak. When applying the Fugitive Slave Act, the judiciary often "paraded its helplessness before the law; lamented harsh results; intimated that in a more perfect world, or at the end of days, a better law would emerge, but almost uniformly, marched to the music, steeled themselves, and hung Billy Budd."³⁷

Under this interpretation, Vere is confronted by a difficult choice between adhering to a strict, unjust law and attempting to reach an equitable resolution that would spare Billy's life. Richard Weisberg, however, suggests an alternative reading of Vere that is particularly illuminating—and deeply troubling.³⁸

³³ See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1650 (1987) ("[E]mpathic narrative can and should be a proper and influential part of legal discourse."); Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); see also Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988). For a good critical response to Getman's article, see Mark G. Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988). See generally Symposium, *Reason, Passion, and Justice Brennan*, 10 CARDOZO L. REV. 1 (1988), for a discussion about the debate between reason and emotion in the law.

³⁴ ROBERT M. COVER, *JUSTICE ACCUSED* 1-7 (1975).

³⁵ *Id.* at 4.

³⁶ *Id.* at 5.

³⁷ *Id.* at 3.

³⁸ I am not attempting to dispute the interpretations raised above. Part of the beauty of reading a great literary text is that it can exist on many levels and raise a number of different interpretations.

II. RETHINKING *BILLY BUDD*A. *Weisberg's Interpretation of Vere*

Richard Weisberg reads Vere in a different and radical way. According to Weisberg, Vere does not fail because he is trapped in a tragic choice between the rule of law and mercy. Instead of Vere being a victim caught in an intractable jurisprudential dilemma, Weisberg tells another story: Vere is a manipulator of the law, orchestrating the trial to ensure that Billy is convicted and executed. Indeed, Vere made up his mind that Billy must be executed even before Billy's trial. After Billy Budd strikes Claggart, "Captain Vere was now again motionless, standing absorbed in thought. 'Struck dead by an angel of God! Yet the angel must hang!'"³⁹

Weisberg points out a series of procedural oddities about the proceedings. Vere uses people inexperienced in trials. Typically officers presided at drumhead courts, and it was naval custom for there to be at least five judges of at least captain or higher in rank.⁴⁰ But Vere chooses only three judges, including the captain of the marines, who is not even a naval officer.⁴¹ Even more troubling, two of the judges that Vere chooses are inappropriately trained for the task. The narrator notes that for the first lieutenant and sailing master, "their intelligence was mostly confined to the matter of active seamanship and the fighting demands of their profession."⁴²

Moreover, Vere's dominating role in the trial—he was a witness and gave the final summation—is unprecedented, and even Vere himself is uneasy about it.⁴³ Normally, individual captains did not conduct court martials—this was only done in extraordinary circumstances.⁴⁴ Vere uses court procedures for "summary" courts, but there were no summary powers granted in the Articles of War.⁴⁵ Instead of immediately convening a drumhead court, Vere should have waited until his ship rejoined the rest of the fleet and referred the case to the Admiral.⁴⁶ The captain must report to the Admiral before carrying

³⁹ BILLY BUDD, *supra* note 5, at 101.

⁴⁰ WEISBERG, *supra* note 7, at 150. An earlier version of Weisberg's ideas on *Billy Budd* compares Vere's use of rhetoric to Justice Rehnquist's. See 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).

⁴¹ WEISBERG, *supra* note 7, at 150.

⁴² BILLY BUDD, *supra* note 5, at 105.

⁴³ WEISBERG, *supra* note 7, at 151-52.

⁴⁴ *Id.* at 149.

⁴⁵ *Id.* at 150-51.

⁴⁶ *Id.* at 149.

out death sentences (except in mutiny cases).⁴⁷ Leniency was customarily given despite the strictness of the Articles.⁴⁸ As Weisberg notes, “whatever the wording of the [Articles of War] provision, its legislative and practical history indicate a strong actual bias against execution.”⁴⁹

Weisberg’s analysis suggests that Vere’s rush to judgment and his procedural shortcuts result in the needless execution of Billy Budd. Had the proper procedures been followed, an equitable resolution may have been possible, but Vere decides to hastily convene a secret military tribunal, foreclosing many options which may have spared Billy’s life. Weisberg’s reading of *Billy Budd* suggests that it is not just about a person caught up in the tension between the rule of law and equity, but about a person who sets things up so that it appears he is forced into the choice. Weisberg observes: “Melville carefully suggests that one who calls loudest for a purely formal analysis of a phenomenon may be one who must subtly conceal some private animus.”⁵⁰ Vere uses the law as a tool. He is not constrained by it but uses its appearance of constraint to justify his actions and absolve himself of responsibility. As Weisberg sums it up: “Captain Vere is less a tragic adjudicator than an eloquent outlaw.”⁵¹

B. *Moving Beyond Appearances*

Weisberg’s interpretation of Vere has generated significant controversy.⁵² His most notable critic, Judge Richard Posner, writes:

⁴⁷ *Id.* at 152-53.

⁴⁸ *Id.* at 152.

⁴⁹ *Id.* (citations omitted).

⁵⁰ *Id.* at 159. Although I agree with Weisberg’s view of Vere’s manipulation of the laws, I diverge with Weisberg in understanding the implications of this fact. Weisberg argues that the novella chronicles the clash between paganism (represented by Billy Budd) and Christianity. He points out a number of similarities between Claggart and Christ. For an interesting discussion of Weisberg’s views, see James McBride, *Revisiting a Seminal Text of the Law & Literature Movement: A Girardian Reading of Herman Melville’s Billy Budd, Sailor*, 3 MARGINS 285, 318-20 (2003). Weisberg also contends that Vere executes Billy because he associates Billy with Admiral Nelson, a charismatic admiral in the British navy who fought many heroic battles: “Vere thus contrives through an unlawful proceeding to dampen the Billy-Nelson heroic impulse and to install forever a regime of repression, covertness, and citified artificiality.” RICHARD WEISBERG, *POETICS AND OTHER STRATEGIES ON LAW AND LITERATURE* 106 (1992). In contrast, as I will contend, I interpret *Billy Budd* to be more unresolved about Vere.

⁵¹ WEISBERG, *supra* note 50, at 106.

⁵² See Robert P. Lawry, *Justice in Billy Budd*, in *LAW AND LITERATURE PERSPECTIVES* 181, 188 (Bruce L. Rockwood ed., 1996) (“While exceedingly clever and provocative, I find Weisberg’s deconstructive reading of the text as ‘implausible’ as Judge Richard Posner does.”); ROGER SHATTUCK, *FORBIDDEN KNOWLEDGE: FROM PROMETHEUS TO PORNOGRAPHY* 156-57 n.* (1996) (“Weisberg’s exposé of Vere’s hidden motives and dark ambition comes to sound like an exemplification of the counter proverb: To understand is to condemn.”).

“Even if Weisberg were correct about eighteenth-century law and practice, his interpretation of the novella would be refuted by the absence of any suggestion in the text—nor could the reader be assumed to know from other sources—that the court-martial and execution of Billy were illegal.”⁵³

However, the text repeatedly suggests that Vere is acting improperly. Indeed, the narrator explicitly notes: “In associating an officer of marines with the sea lieutenant and the sailing master in a case having to do with a sailor, the commander perhaps deviated from general custom.”⁵⁴

In a short chapter right before the extensive chapter about the drumhead court, the story pauses to discuss the surgeon’s thoughts. This is an unusual interruption in the natural progression of events, as we are anticipating the commencement of the trial. The surgeon believes that convening the drumhead court is unwise: “The thing to do, he thought, was to place Billy Budd in confinement, and in a way dictated by usage, and postpone further action in so extraordinary a case to such time as they should rejoin the squadron, and then refer it to the admiral.”⁵⁵ But the surgeon keeps quiet because to argue with Vere’s order would be “insolence.”⁵⁶ Furthermore, when the surgeon explains the events to the lieutenants and captain of the marines, “[t]hey fully shared his own surprise and concern. Like him, too, they seemed to think that such a matter should be referred to the admiral.”⁵⁷ Although Melville does not explicitly condemn Vere’s actions as improper, he deliberately raises the suggestion that Vere is deviating from the appropriate procedures.

The most interesting part of the surgeon’s thoughts about Vere is that the surgeon speculates that Vere has lost control over himself. The surgeon “recalled the unwonted agitation of Captain Vere and his excited exclamations, so at variance with his normal manner. Was he unhinged?”⁵⁸ The surgeon’s thoughts evoke an earlier passage describing Claggart, where the narrator pauses from the narrative and engages in a digression about why Claggart dislikes Billy Budd. The narrator recalls a conversation long ago with “an honest scholar, my senior,” who explained that it is nearly impossible to enter the “labyrinth” of another person’s mind and to know human nature: “I am not certain whether to know the world and to know human nature be not

⁵³ RICHARD A. POSNER, *LAW AND LITERATURE* 166 (2d ed. 1998).

⁵⁴ BILLY BUDD, *supra* note 5, at 104.

⁵⁵ *Id.* at 101.

⁵⁶ *Id.* at 101-02. For a discussion of Vere’s becoming “unhinged,” see Jami K. Elison, *The Prosecution of Billy Budd (Ultra Vires of Positive Law)*, 35 WILLAMETTE L. REV. 57, 68-73 (1999).

⁵⁷ BILLY BUDD, *supra* note 5, at 102.

⁵⁸ *Id.* at 101-02.

two distinct branches of knowledge.”⁵⁹ In particular, the scholar tells the narrator that “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.”⁶⁰

The scholar then observes that there are some people who have a “depravity according to nature.”⁶¹ Often, these people are not criminals, and many “have no vulgar alloy of the brute in them, but invariably are dominated by intellectuality.”⁶² What is more, although people can appear to have an even temper and seem reasonable, they can have occasional lunacy. This tendency is often not visible. On the outside, these people seem rational.⁶³ The narrator engages in a lengthy discussion of “hidden nature” which is worth quoting at length:

Though the man’s even temper and discreet bearing would seem to intimate a mind peculiarly subject to the law of reason, not the less in heart he would seem to riot in complete exemption from that law, having apparently little to do with reason further than to employ it as an ambidexter implement for effecting the irrational. That is to say: Toward the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane, he will direct a cool judgment sagacious and sound. These men are madmen, and of the most dangerous sort, for their lunacy is not continuous, but occasional . . . it is to the average mind not distinguishable from sanity, and for the reason above suggested: that whatever its aims may be—and the aim is never declared—the method and the outward proceeding are always perfectly rational.⁶⁴

This passage, when linked up to the surgeon’s speculation that Vere is agitated and has become “unhinged,” suggests that perhaps Vere is also being described in this passage.⁶⁵ Indeed, like Claggart, Vere is intellectual, civilized, and articulate.

The idea that one could appear rational yet harbor a concealed occasional madness reflects a theme that pervades the entire novella—the contrast between outward appearances versus inner realities. For example, Billy Budd has no visible defect, but he does have a vocal defect which, as with hidden madness, emerges only occasionally. Claggart conceals his hatred of Billy and treats him nicely, even when Billy spills soup as Claggart is walking by. We are repeatedly invited to

⁵⁹ *Id.* at 74-75.

⁶⁰ *Id.* at 75.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 76.

⁶⁴ *Id.*

⁶⁵ *Id.* at 102.

question what we observe, and are informed that appearances are deceiving, that things are not what they seem.

In light of this theme, *Billy Budd* suggests that we must be suspicious of law's outward appearances. Indeed, the very law condemning Billy Budd to death refuses to look inside at Billy's mental state. Only the outside—the actual acts—are considered. Yet everybody who judges him knows that he lacked a malicious intent. They know that focusing merely on Billy's acts is not sufficient to judge him justly. But Vere declares: "War looks but to the frontage, the appearance. And the Mutiny Act, War's child, takes after the father. Budd's intent or non-intent is nothing to the purpose."⁶⁶

The novella suggests not only that the law fails to look beyond outward appearances, but that Vere's adherence to the law is also merely a frontage. Well before the legal realists, Melville recognized one of their central insights—that formalistic adherence to rules may mask other aims. Indeed, legal realist Judge Jerome Frank noted that the judges who are most prejudiced by their emotions are often those "who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules."⁶⁷ To use the words of the passage quoted above about "hidden nature," the "method and outward proceeding" of Billy's trial and execution appear "perfectly rational," but this is merely a façade.

In further keeping with the theme of the deceptiveness of outward appearances, the novella is subtitled an "inside narrative." The narrator tells us that he is focusing on the "inner life" of the ship.⁶⁸ The "inside narrative" is contrasted to the external accounts, such as a news article written in a naval chronicle and a poem at the end of the novella.

The "naval chronicle" of the events charges that Billy "vindictively stabbed" Claggart with a knife.⁶⁹ Claggart is described as "respectable and discreet."⁷⁰ The chronicle also states: "The promptitude of the punishment has proven salutary. Nothing amiss is now apprehended aboard H.M.S. *Bellipotent*."⁷¹ A poem at the end, "Billy in the Darbies," is another account of the events, but it, too, is wanting. All of the external accounts of Billy's trial fail to capture what went on.⁷² Most noticeably, Vere is absent from the official narrative or the poem, but as we learn from reading *Billy Budd*, it is in Vere where the true story lies.

⁶⁶ *Id.* at 112.

⁶⁷ JEROME FRANK, *LAW AND THE MODERN MIND* 134 (1930).

⁶⁸ BILLY BUDD, *supra* note 5, at 54.

⁶⁹ *Id.* at 130.

⁷⁰ *Id.*

⁷¹ *Id.* at 131.

⁷² Karl E. Zink, *Ironic Social Commentary in Billy Budd*, in *READINGS ON BILLY BUDD* 102-03 (Laura Marvel ed., 2003).

C. *Rethinking Vere*

Once we focus on the theme of appearances, the novella can be seen in a different light. The rule of law does not lead to Billy's execution. Indeed, the law is not even strictly followed. The locus of the problem is Vere. Why does Vere actively try to orchestrate Billy's execution?

1. Wartime Necessity

It is important to remember that *Billy Budd* takes place during wartime, in an unstable and treacherous environment. The novella begins with an extensive background about war and mutiny. Billy is transferred from a merchant ship named the *Rights of Man* to a war ship named the *Bellipotent*, which means "powerful in war."⁷³ As James McBride observes, "Billy Budd moves from the new order that respects civil liberties to the old order, mired in the authoritarian ways of war."⁷⁴ The wartime environment of *Billy Budd* should not be overlooked, because while half of Vere's summation at trial involves an argument about following the rule of law, the other half involves a discussion of wartime necessity.

When speaking before the court, Vere makes two different arguments. First, Vere makes an argument for the tribunal to adhere to the rule of law, banish their instincts for equity, and set aside their compassion for Billy. This is the rule of law argument that many critics focus upon. However, the three judges are "less convinced than agitated by the course of an argument troubling."⁷⁵ Vere perceives this, and "abruptly changed his tone."⁷⁶ Thus, when his legal argument fails, Vere retools his argument to appeal to policy.⁷⁷

Vere argues that clemency for Billy Budd could lead to mutiny. It would be difficult to explain to the sailors the "arbitrary discipline."⁷⁸ "You know what sailors are," Vere explains. "Will they not revert to the recent outbreak at the Nore. Ay. . . . Your clement sentence they

⁷³ See HERMAN MELVILLE, *BILLY BUDD, SAILOR* 91 n.10 (Cyrus R.K. Patell ed., 1999). Melville originally named the ship, *Indomitable*, which connotes courage. Later on, he changed the name to *Bellipotent*. See *id.*

⁷⁴ McBride, *supra* note 50, at 286.

⁷⁵ BILLY BUDD, *supra* note 5, at 111.

⁷⁶ *Id.*

⁷⁷ Richard A. Hocks, *Captain Vere: Nineteenth Century Tragic Hero*, in *READINGS ON BILLY BUDD*, *supra* note 72, at 77, 81; POSNER, *supra* note 53, at 171 ("But Vere does not just invoke the letter of the law. He also argues policy, as a lawyer would say—the danger of mutiny.").

⁷⁸ BILLY BUDD, *supra* note 5, at 112.

would account pusillanimous.”⁷⁹ Vere argues that anything less than the strictest sentence for Billy Budd would appear cowardly.

Instead of being torn between the rule of law and equity, perhaps Vere is caught between the competing demands of security and justice in a time of crisis. The narrator describes Vere as “no lover of authority for mere authority’s sake.”⁸⁰ Vere thus sacrifices Billy Budd to promote security. According to Richard Posner:

The command of a major warship in a major war is an awesome responsibility; upon its proper discharge may depend many lives. When the most popular sailor kills the most hated petty officer in circumstances of provocation that do not, however, extenuate the capital nature of the offense under the Articles of War, the commander, a sensitive man and not a martinet, finds himself torn between private feeling and public duty. Vere chooses the latter. We are not meant to think he had no choice; but neither are we meant to think he was acting illegally or out of envy.⁸¹

Posner views Vere’s decision as justifiable to deal with the danger of mutiny: “The law enforced by Vere was harsh but, in the desperate circumstances in which it was invoked, not vicious.”⁸²

In contrast, some commentators criticize Vere’s utilitarian sacrifice of Billy Budd for the greater good of the ship. According to Richard Hocks, Vere’s utilitarianism overrides his intuitive sense of justice.⁸³ *Billy Budd* is thus a critique against utilitarian decisions to harm individuals for the greater good. One commentator suggests that *Billy Budd* reflects Melville’s ambivalence toward the Civil War: “The aftermath of the war . . . seemed to Melville to confirm his darkest fears about the perils of seeking to abolish one wrong by means of another Melville repudiated radical Reconstruction, with its punitive measures against the South.”⁸⁴ Is it justifiable to sacrifice an innocent person for the greater good?

Billy Budd, however, transcends the traditional utilitarian debate. Returning to the theme of appearances, Billy Budd is not sacrificed because he himself poses a threat, but because of how sparing his life would appear to the rest of the crew. He is sacrificed for the sake of appearances. The sacrifice of Billy Budd has the quality of a ritual slaughter. Since ancient times, people have offered up objects of value (including animals and human beings) as a way to appease the gods, to

⁷⁹ *Id.* at 113.

⁸⁰ BILLY BUDD, *supra* note 5, at 104.

⁸¹ POSNER, *supra* note 53, at 170.

⁸² *Id.* at 172.

⁸³ Richard A. Hocks, *Captain Vere: Nineteenth Century Tragic Hero*, in READINGS ON BILLY BUDD, *supra* note 72, at 77.

⁸⁴ Carolyn L. Karcher, *Melville and Revolution*, in MELVILLE’S SHORT NOVELS: A NORTON CRITICAL EDITION 344, 346 (Dan McCall ed., 2002).

protect against catastrophes, and to stem epidemics. Often, the thing sacrificed was a symbol of innocence or was an object of great beauty. One Aztec ritual, in an interesting parallel to *Billy Budd*, was to sacrifice a young boy who “had to be physically without blemish.”⁸⁵ The purpose of sacrifice is to make people feel safer in a treacherous world; as Susan Mizruchi notes, sacrifice is “a ritual of control, a symbolic stage for the defusion or placation of superhuman powers.”⁸⁶ Although it takes place in a civilized society, rather than in a primitive pagan culture, Billy Budd’s execution is nevertheless a human sacrifice. Since Billy Budd is hung in a public ceremony, his execution has the trimmings of a ritual. Vere, of course, knows that Billy Budd himself poses no threat—he is simply an innocent object of beauty. The sacrifice is for the benefit of the crew, for the appearance of discipline.

One might contend that the sacrifice would have been justified if maintaining the appearance of strict discipline was necessary to avert a mutiny. The government readily makes sacrifices primarily for appearances. After September 11th, liberty was sacrificed to make it appear as though we were becoming more secure. As Jeffrey Rosen observes, we “continue to demand ever-increasing levels of surveillance and exposure for an illusory and emotional feeling of security.”⁸⁷ According to Rosen, after September 11th, our leaders—and the general public—were frequently willing to “acquiesce in the destruction of privacy without getting anything tangible in return.”⁸⁸ What is achieved by such sacrifices is a sense of security, which, although illusory, still serves a function by making us feel better. In the end, these sacrifices may be counterproductive since it is unclear that we are better off if we falsely feel more secure. Thus, sacrifice is not merely a primitive rite, but in fact a ritual we routinely perform when we feel insecure and powerless.

At the end of the trial scene, the narrator speculates on why the drumhead judges reached their verdict. The narrator notes that the judges were heavily influenced by Vere’s policy argument: “[H]is closing appeal to their instinct as sea officers” and his discussion of the “practical consequences to discipline, considering the unconfirmed tone of the fleet at the time, should a man-of-war’s man’s violent killing at

⁸⁵ NIGEL DAVIES, HUMAN SACRIFICE IN HISTORY AND TODAY 209 (1981).

⁸⁶ SUSAN L. MIZRUCHI, THE SCIENCE OF SACRIFICE: AMERICAN LITERATURE AND MODERN SOCIAL THEORY 90 (1998); see also BRENDA RALPH LEWIS, RITUAL SACRIFICE: AN ILLUSTRATED HISTORY 1-2 (2001). Melville was quite interested in pagan sacrificial rituals, see MIZRUCHI, *supra*, at 89, and he was no stranger to such rituals, having written extensively about his travels in the South Pacific in *Typee* and *Omoo*. See HERMAN MELVILLE, TYPEE: OR A PEEP AT POLYNESIAN LIFE (1846); HERMAN MELVILLE, OMOO: A NARRATIVE OF ADVENTURES IN THE SOUTH SEAS (1847).

⁸⁷ JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE 7 (2004).

⁸⁸ *Id.* at 193.

sea of a superior in grade be allowed to pass for aught else than a capital crime demanding prompt infliction of the penalty.”⁸⁹ The narrator then relates in a telling passage:

Says a writer whom few know, “[f]orty years after a battle it is easy for a noncombatant to reason about how it ought to have been fought. It is another thing personally and under fire to have to direct the fighting while involved in the obscuring smoke of it. Much so with respect to other emergencies involving considerations both practical and moral, and when it is imperative promptly to act.”⁹⁰

This passage, and Vere’s argument to sacrifice Billy for the greater good of maintaining security, resemble many arguments that have been made to justify curtailments of liberty in times of crisis. Richard Posner writes:

The events of September 11 revealed the United States to be in greater jeopardy from international terrorism than had been believed by most people until then. . . . It stands to reason that such a revelation would lead to our civil liberties being curtailed.⁹¹

“If the Constitution is not to be treated as a suicide pact,” Posner asks, “why should military exigencies not influence the scope of the constitutional rights that the Supreme Court has manufactured from the Constitution’s vague provisions?”⁹² Likewise, Chief Justice Rehnquist argues that the “laws will thus not be silent in times of war, but they will speak with a somewhat different voice.”⁹³ In times of war, the argument goes, law must yield to security needs. Vere is not operating entirely outside of the law—rather, he is operating in its shadows. Whereas the substantive law appears strict, the procedural law is quite malleable. Vere deviates from regular legal procedures to use a quick secret proceeding to dispose of Billy Budd. Vere uses the law to justify his actions, and the law certainly is pliable to the task. Ironically, the law fails in *Billy Budd* not because it is uncompromisingly strict, but because it can readily be manipulated by Vere.

Indeed, during times of crisis, the law has often failed to stop government officials from making painful sacrifices. This failure has frequently been justified by courts, legislators, and executive officials, with similar reasoning to that of the “writer whom few know.” For example, during World War I, in *Schenck v. United States*,⁹⁴ the Supreme Court upheld the conviction of individuals who published leaflets advocating that people resist the draft against a First

⁸⁹ BILLY BUDD, *supra* note 5, at 113.

⁹⁰ *Id.* at 114.

⁹¹ RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 298 (2003).

⁹² *Id.* at 294.

⁹³ WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 225 (1998).

⁹⁴ 249 U.S. 47 (1919).

Amendment challenge: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁹⁵ Likewise, in *Abrams v. United States*,⁹⁶ the Court upheld convictions of individuals who printed circulars advocating a general strike by workers.

During World War II, in *Korematsu v. United States*,⁹⁷ the Supreme Court upheld the internment of Japanese-Americans against a challenge that it violated the Equal Protection Clause. The Court’s reasoning closely echoes the reasoning of the “writer whom few know”:

[Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.⁹⁸

The Court concluded that “the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”⁹⁹ In another case dealing with the Japanese Internment, the Court deferred to the Executive and Congress: “[I]t is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.”¹⁰⁰ The Court noted:

In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.¹⁰¹

After September 11th, the Bush Administration indefinitely detained hundreds of people, labeling them as “enemy combatants.”¹⁰² Because of this “legal” designation, these individuals have not been

⁹⁵ *Id.* at 52.

⁹⁶ 250 U.S. 616 (1919).

⁹⁷ 323 U.S. 214 (1944).

⁹⁸ *Id.* at 223 (emphasis omitted).

⁹⁹ *Id.* at 223-24.

¹⁰⁰ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

¹⁰¹ *Id.* at 95.

¹⁰² *Graham*, *supra* note 3, at A12.

accorded regular legal process—no hearings, no trials, no lawyers.¹⁰³ Nor have they been granted the rights ordinarily given to prisoners of war.¹⁰⁴ In *Hamdi v. Rumsfeld*,¹⁰⁵ the Supreme Court held that it was within the President's power to detain Yassar Hamdi, an American citizen captured during military operations in Afghanistan, as an "enemy combatant."¹⁰⁶ The Court concluded that executive power is limited by the Due Process Clause, which requires that enemy combatants be afforded some degree of individual process.¹⁰⁷ However, the Court stated that the amount of process accorded is not akin to that regularly provided. For example, an enemy combatant can challenge her designation as an enemy combatant, but "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria."¹⁰⁸ Thus, although people detained as enemy combatants are protected by some "core rights," the Court noted that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting."¹⁰⁹ The Court left open the question of whether an enemy combatant could be tried by a military tribunal.¹¹⁰ Once again, the law has been compromised and manipulated in the name of security. Although not as deferential as in *Korematsu*, the Court has permitted a watered-down version of due process.

One interpretation of *Billy Budd* is that the novella agrees with the argument that the law must bend in the name of security. The passage by the "writer whom few know" appears to suggest that in times of crisis, government officials must make sacrifices to promote security, and we should be cautious about second-guessing their wisdom in making these decisions. William Domnarski argues: "For Vere there was no choice because the wartime environment and threat of mutiny forced him to act as he did."¹¹¹ Edwin Yoder contends:

[C]ommand authority requires [Vere's] lucid recognition that larger "justice" for the many requires a more severe, indeed pitiless, brand of literal justice to the solitary defendant. Sacrifice is integral to

¹⁰³ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 23 (2003).

¹⁰⁴ *Id.*

¹⁰⁵ 124 S. Ct. 2633 (2004).

¹⁰⁶ *Id.* at 2640.

¹⁰⁷ *Id.* at 2644-49.

¹⁰⁸ *Id.* at 2649.

¹⁰⁹ *Id.* at 2650. A related case, involving the detention of an American citizen arrested within the United States, was remanded by the Supreme Court on jurisdictional grounds without reaching the merits. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

¹¹⁰ *Hamdi*, 124 S. Ct. at 2651-52.

¹¹¹ Domnarski, *supra* note 5, at 707.

warfare and the severest penalties for insubordination [are] part of “the price of admiralty”; and for countless generations, in many societies, such has been the considered judgment of the necessities of military law.”¹¹²

Yoder concludes: “[O]f one thing we may be reasonably confident: Melville, in the end, was on Captain Vere’s side.”¹¹³

But if we return to the theme of the appearances, we must recall that the novella repeatedly indicates that appearances are deceiving, that they do not tell the true story. Thus, perhaps we should not readily accept Vere’s policy argument that Billy needed to be sacrificed to preserve the appearance of strict discipline and avert any mutinous ideas from brewing amongst the crew. The text gives us very little reason to conclude a mutiny will likely occur if Billy Budd is acquitted. The narrator notes that onboard the *Bellipotent*, there was “very little in the manner of the men and nothing obvious in the demeanor of the officers [that] would have suggested to an ordinary officer that the Great Mutiny was a recent event.”¹¹⁴ Although it is true that the narrator notes that mutinies occurred unexpectedly,¹¹⁵ and that appearances can be deceiving, there is little outward evidence to justify Vere’s asserted fear of a mutiny. As Bruce Franklin argues: “Vere’s action, and his entire argument to his drumhead court, is based on a fear of an imminent mutiny. But we readers of this ‘Inside Narrative’ never see the faintest hint of any such possibility. Discipline is only breached *after* Billy’s execution.”¹¹⁶ Charles Reich also aptly observes: “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.”¹¹⁷ Billy was loved by the crew. Indeed, aboard his former ship, Billy was known as the “peacemaker,”¹¹⁸ and by all indications, he was having similar effects on the crew aboard the *Bellipotent*. Given how Vere understood that the ordinary person’s instinct is for leniency for Billy, wouldn’t the rest of the crew likewise feel the same? Why does Vere distrust the crew to come to the same enlightened understanding of the facts that he and the adjudicators have?

Vere’s legal arguments are suspect, so why should we trust his policy arguments? In fact, Vere only resorts to the argument that not executing Billy will stir mutinous thoughts after he realizes that his

¹¹² Edwin M. Yoder, Jr., *Fated Boy: Billy Budd and the Laws of War*, 31 J. MAR. L. & COM. 615, 620 (2000).

¹¹³ *Id.* at 621. For Yoder’s subsequent ruminations on *Billy Budd*, see Edwin M. Yoder, Jr., *Melville’s Billy Budd and the Trials of Captain Vere*, 45 ST. LOUIS L.J. 1109 (2001).

¹¹⁴ BILLY BUDD, *supra* note 5, at 59-60.

¹¹⁵ *Id.* at 55.

¹¹⁶ H. Bruce Franklin, *Melville Condemns the Tyrannical Vere*, in READINGS ON BILLY BUDD, *supra* note 72, at 70, 73.

¹¹⁷ Reich, *supra* note 27, at 384.

¹¹⁸ BILLY BUDD, *supra* note 5, at 47.

obedience to law argument has failed to convince the drumhead judges. Vere's policy argument is based on the urgency of the situation, but this urgency exists more in the mind of Vere than in reality. The passage by the "writer whom few know" is invoked to explain why the drumhead judges are convinced by Vere's argument rather than to justify Vere, who is repeatedly described as agitated and unhinged. The narrator notes that "a sense of the urgency of the case overruled in Captain Vere every other consideration."¹¹⁹ When Vere says at the outset of the trial that Claggart's motives are irrelevant, the drumhead judges think that his statement involves "a prejudgment on the speaker's part."¹²⁰ The narrator also notes that this "served to augment a mental disturbance previously evident enough."¹²¹ The novella gives us significant reason to be suspicious of Vere. Indeed, by including the surgeon's thoughts, *Billy Budd* invites us to second-guess Vere. The problem with the drumhead judges is that they failed to do just this, despite their uneasiness over Vere's behavior. The narrator notes that the judges were "without the faculty, hardly . . . the inclination, to gainsay one whom they felt to be an earnest man, one too not less their superior in mind than in naval rank."¹²²

Apologists for Vere, such as Posner, readily succumb to Vere's beguiling policy arguments—just as the drumhead judges do. To the contrary, we should be suspicious of Vere; we should not only avoid accepting his rhetoric about the law, but also remain skeptical of his rhetoric about military necessity.¹²³ Moreover, the narrator raises doubts about the propriety of conducting Billy's trial in secret. "Here

¹¹⁹ *Id.* at 104.

¹²⁰ *Id.* at 108.

¹²¹ *Id.*

¹²² *Id.* at 113.

¹²³ Harrison Hayford and Merton Sealts note that many of the passages raising skepticism about Vere were late revisions by Melville: "The cumulative effect—whatever the intention—of his subsequent deletions and insertions, however, was to throw into doubt not only the rightness of Vere's decision and the soundness of his mind but also the narrator's own position concerning him." BILLY BUDD, *supra* note 5, at 34. Alfred Konefsky points out that Melville was deeply skeptical of hasty military justice and unbridled executive power. Alfred S. Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFFALO L. REV. 1179, 1245-49 (2004). Melville's first cousin (Guert Gansevoort) was involved in the investigation and ultimate hanging of three sailors during the Somers mutiny of 1842. *Id.* at 1247. The soldiers were executed after a drumhead court, and one of them included an eighteen-year old. This episode sparked a significant public debate over "whether [the commander of the *Somers*] acted precipitously in peacetime without due regard for appropriate procedure; or whether he prejudged the outcome." *Id.* Konefsky also points to a telling quote by Melville in *White Jacket*: "If there are any three things opposed to the genius of the American Constitution, they are these: irresponsibility in a judge, unlimited discretionary authority in an executive, and the union of an irresponsible judge and an unlimited executive in one person." *Id.* at 1276 n.110 (quoting HERMAN MELVILLE, *White Jacket or the World in a Man-of-War*, in 5 THE WRITINGS OF HERMAN MELVILLE 143 (Harrison Hayford et al. eds, 1970)).

[Vere] may or may not have erred,” the narrator states.¹²⁴ The narrator then discusses how later on some officers criticized Vere on this point.¹²⁵ Even more tellingly, the narrator states that keeping the tribunal secret bore “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.”¹²⁶

Billy Budd can be read as a powerful demonstration of why we should resist our tendency to readily accept arguments by our leaders that we must make certain sacrifices in times of crisis. Throughout U.S. history, there have been numerous instances when the government has curtailed liberty during wartime. Much later, however, we have come to realize that these were grave errors. The United States government has apologized for the Japanese Internment.¹²⁷ The *Abrams* case has long since been repudiated, with Justice Holmes’ dissent winning the day. The McCarthy-era fear of Communists has widely been acknowledged to have been a significant overreaction,¹²⁸ and recently released evidence suggests that McCarthy may have deliberately misled the public about the threat posed by Communists in the United States.¹²⁹ Even more recently, the U.S. government abruptly released Yassar Hamdi after holding him for almost three years in solitary confinement without any criminal charges, stating that he no longer “pose[d] a threat to the U.S. and our allies.”¹³⁰

Billy Budd demonstrates that the law is often compromised or manipulated to legitimize severe sacrifices in times of crisis, which are often unnecessary. The novella also suggests that these actions are often justified by the argument that leaders must make hard decisions in times of crisis, and that it is difficult to second-guess these choices. However, *Billy Budd* also indicates that those making these decisions may be “unhinged.” Although Melville seems to excuse the drumhead judges, he does not allow us to excuse Vere. Instead, the text invites us to judge him. How should we judge Vere? The answer to this question is one of the most challenging and provocative aspects of *Billy Budd*.

¹²⁴ BILLY BUDD, *supra* note 5, at 103.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See GEORGE MILLER, U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS: REPORT FOR THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS (U.S. G.P.O., Supt. of Docs., 1992).

¹²⁸ ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 359-415 (1998); TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 546-47 (2003).

¹²⁹ See, e.g., Sheryl Gay Stolberg, *Transcripts Detail Secret Questioning in 50’s by McCarthy*, N.Y. TIMES, May 6, 2003, at A1.

¹³⁰ Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1 (quoting government spokesperson Mark Corallo).

2. Judging Vere

a. Vere's Flaw

Commentators are often quick to point out flaws in Vere. Perhaps Vere was too remote, too conservative, too authoritarian. They suggest that something must clearly be amiss with Vere, and this can readily explain why he fails to do justice to Billy Budd.

Robert Lawry postulates that Vere's decision to try Billy stemmed from fear of recent mutinies.¹³¹ According to Lawry: "It is in character that Vere was ultimately deficient: he lacked courage and moral imagination."¹³² Vere was too captivated by his own anxiety over a potential mutiny to reach a more equitable resolution of Billy's case. He lacked the creativity of thinking of ways in which a more lenient and just outcome might be reached.

In another interpretation, *Billy Budd* has been read to be a critique of the Burkean temperament.¹³³ Indeed, this is explicitly alluded to when Billy Budd leaves the ship, *The Rights of Man*, to board the *Bellipotent*. *The Rights of Man* was Tom Paine's reply to British conservative philosopher Edmund Burke, who died, coincidentally, in 1797—the same year the events in *Billy Budd* take place. Burke rejected radical political change and was a vehement critic of the French Revolution.

The events in the book take place shortly after the French Revolution, and the times during which Melville wrote were quite turbulent. Melville began writing *Billy Budd* in 1886 and left it unfinished at his death in 1891.¹³⁴ During this time, the Civil War was not long past; the nation was undergoing an industrial revolution; and there was significant labor unrest. Between 1870 and 1900, there were thousands of strikes and demonstrations, many of which were violent.¹³⁵ Perhaps Melville was evoking the end of the eighteenth century as a parallel to the end of the nineteenth.

Some suggest that Vere's Burkean views lead him to fear Billy Budd as a dangerous and subversive element on the ship. Brook Thomas observes that Vere's arguments resemble those of "Edmond Burke and other conservatives in their response to the French

¹³¹ See Robert P. Lawry, *Justice in Billy Budd*, in *LAW & LITERATURE PERSPECTIVES* 181, 181 (Bruce L. Rockwood ed., 1996).

¹³² *Id.* at 186.

¹³³ See Brook Thomas, *Billy Budd and the Untold Story of the Law*, 1 *CARDOZO STUD. IN L. & LITERATURE* 49, 55 (1989).

¹³⁴ *BILLY BUDD*, *supra* note 5, at 2-3.

¹³⁵ Larry J. Reynolds, *Billy Budd and American Labor Unrest: The Case for Striking Back*, in *NEW ESSAYS ON BILLY BUDD* 21, 21-22 (Donald Yannella ed., 2002).

Revolution and Paine's *The Rights of Man*."¹³⁶ Thomas Scorza argues that Vere is a "Burkean conservative" and "the epitome of the Burkean politician."¹³⁷

Vere is described by the narrator as having conservative opinions: "His settled convictions were as a dike against those invading waters of novel opinion social, political, and otherwise, which carried away as in a torrent no few minds in those days, minds by nature not inferior to his own."¹³⁸ The narrator notes that while "other members of that aristocracy" were angered by innovators because they threatened—"the privileged classes," Vere did not oppose them for this reason.¹³⁹ Vere resisted them "not alone because they seemed to him insusceptible of embodiment in lasting institutions, but at war with the peace of the world and the true welfare of mankind."¹⁴⁰

Vere does not hold firm to his older convictions for self-serving class-based reasons. He seems to believe that they are tried-and-true. Indeed, Vere, "in illustrating of any point touching the stirring personages and events of the time . . . would be as apt to cite some historic character or incident of antiquity as he would be to cite from the moderns."¹⁴¹ Vere's allusions were often "alien" and "remote" to most people.¹⁴² The narrator further notes that Vere failed to consider that he was out-of-touch; he was "unmindful" of this; and "considerateness in such matters is not easy to natures constituted like Captain Vere's."¹⁴³ Vere clings to the old and reliable. "'With mankind,' he would say, 'forms, measured forms, are everything.'"¹⁴⁴ He is out-of-touch, and he manifests old customs and old ways of thinking.¹⁴⁵

Another reading of Vere views him as attempting to repress the feminine.¹⁴⁶ Throughout the novella, Billy is described in feminized terms. Maybe Billy Budd is a feminine presence that is dangerous to Vere's more conservative values? Cyndy Hendershott contends: "Vere's execution of Billy violently reinscribes the binary opposition which privileges masculine over feminine."¹⁴⁷

¹³⁶ See Thomas, *supra* note 133, at 55 (citations omitted).

¹³⁷ Thomas J. Scorza, *Vere Represents Aristocratic Virtue*, in READINGS ON BILLY BUDD, *supra* note 72, at 62, 68-69.

¹³⁸ BILLY BUDD, *supra* note 5, at 62.

¹³⁹ *Id.* at 62-63.

¹⁴⁰ *Id.* at 63.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 128.

¹⁴⁵ *But see* Reynolds, *supra* note 135, at 43 ("In Melville's eyes, Vere thus demonstrates a right response to popular violence, when the times are revolutionary.").

¹⁴⁶ See Judith Schenck Koffler, *The Feminine Presence in Billy Budd*, 1 CARDOZO STUD. IN L. & LITERATURE 1, 3 (1989).

¹⁴⁷ Cyndy Hendershot, *Polar Views of the French Revolution as a Theme in Billy Budd*, in READINGS ON BILLY BUDD, *supra* note 72, at 144, 148.

Additionally, Vere urges the drumhead judges to suppress their emotions, which he deems as feminine: “Well, the heart here, sometimes the feminine in man, is as that piteous woman, and hard though it be, she must here be ruled out.”¹⁴⁸ Robin West argues that “it might be *because* Vere banishes the feminine voice that the masculine Vere commits such a grave injustice.”¹⁴⁹

In a related interpretation, Vere is motivated by a desire to repress homosexual impulses. Scholars have argued that Claggart’s enmity toward Billy Budd stems from hidden homosexual desires for Billy.¹⁵⁰ Likewise, Vere “displays an attraction to Billy” and “is drawn to Billy as Claggart is.”¹⁵¹ Robert Martin contends: “*Billy Budd* enacts the destruction of the beautiful young man by a system of power that cannot allow for the subversion of the erotic.”¹⁵² Kathy Phillips writes: “Trained to define and then shun ‘effeminacy,’ Claggart and Vere apparently worry that if they associate with Billy, they too will be seen as feminine.”¹⁵³ Under this interpretation, Vere is attempting to eradicate a dangerous and subversive element on the ship, one that threatens his traditional notions of masculinity.

b. The Enigma of Vere

Although it is tempting to locate a deficiency in Vere with which to explain away his actions, I believe that doing so fails to appreciate the magnitude of Vere’s failure. There is little evidence in the text to indicate that Vere bore ill-will toward Billy. There is no suggestion that Vere is malicious or evil. The text suggests that Vere likes Billy Budd and does not bear a secret animus toward him; Vere is in “agony” when he leaves the meeting with Billy Budd.¹⁵⁴

Vere’s apparent lack of malice complicates our ability to judge him. This is what makes Vere such a challenging character. Once we know Claggart’s simplistic nature, it is easy to judge him. Likewise, it is easy to judge Billy Budd given his simplistic nature. But Vere is far more complex. Unlike Billy Budd and Claggart, Vere is not described according to his nature. He is much too nuanced to be a character type.

¹⁴⁸ BILLY BUDD, *supra* note 5, at 111.

¹⁴⁹ Robin West, *The Feminine Silence: A Response to Professor Koffler*, 1 CARDOZO STUD. IN L. & LITERATURE 15, 16 (1989) (citations omitted).

¹⁵⁰ Kathy J. Phillips, *Billy Budd is Anti-Homophobic*, in READINGS ON BILLY BUDD, *supra* note 72, at 149.

¹⁵¹ *Id.* at 154.

¹⁵² Robert K. Martin, *Melville and Sexuality*, in THE CAMBRIDGE COMPANION TO HERMAN MELVILLE 186, 197 (Robert S. Levine ed., 1998).

¹⁵³ Kathy J. Phillips, *Billy Budd is Anti-Homophobic*, in READINGS ON BILLY BUDD, *supra* note 72, at 156.

¹⁵⁴ BILLY BUDD, *supra* note 5, at 115.

Richard Fogle describes Vere as composed of “balanced oppositions.”¹⁵⁵ Vere is “allied to the higher nobility,” yet achieved his success through merit and was always “mindful of the welfare of his men.”¹⁵⁶ He was courageous—“intrepid to the verge of temerity”—but “never injudiciously so.”¹⁵⁷ Vere was modest and “undemonstrative.”¹⁵⁸ Although Vere was “practical enough,” he also had a “certain dreaminess of mood.”¹⁵⁹ Vere, Fogle observes, “represents a golden mean.”¹⁶⁰ Vere is described as a perfectly balanced commander, a mix of courage and prudence, practicality and pensiveness.

One might argue that with more sensitivity to the situation, Vere could have made the correct choice. However, it is unlikely that arguments for more empathy and more attention to context would have changed Vere’s mind. Vere fully understands the situation, and he feels tremendous compassion for Billy. He understands Billy and Claggart. As Carolyn Karcher observes, Vere has an “intuitive distrust of Claggart” and an “acuteness in divining Billy’s ‘liability to vocal impediment.’”¹⁶¹ Vere is a capable judge of others. The narrator observes that “something exceptional in the moral quality of Captain Vere made him, in earnest encounter with a fellow man, a veritable touchstone of that man’s essential nature.”¹⁶² Vere does not fail for lack of understanding Billy Budd. Vere’s judgment seems wise and accurate. He is able, through observation and intuition, to comprehend Billy.

Therefore, Vere’s failure seems quite inexplicable. In all descriptions of Vere, his only fault seems to be a bit of remoteness. Melville’s narrator deliberately leaves the “truth” about Vere ambiguous: “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.”¹⁶³ The text counsels us against quick and tidy resolutions. The narrator notes:

The symmetry of form attainable in pure fiction cannot so readily be achieved in a narration essentially having less to do with fable than with fact. Truth uncompromisingly told will always have its ragged

¹⁵⁵ Richard Harter Fogle, *Billy Budd Follows the Form of Classical Tragedy*, in READINGS ON *BILLY BUDD*, *supra* note 72, at 105.

¹⁵⁶ *BILLY BUDD*, *supra* note 5, at 60.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 61.

¹⁶⁰ Fogle, *supra* note 155, at 105.

¹⁶¹ Carolyn L. Karcher, *Melville and Revolution*, in MELVILLE’S SHORT NOVELS, *supra* note 84, at 344, 349.

¹⁶² *BILLY BUDD*, *supra* note 5, at 96.

¹⁶³ *Id.* at 102.

edges; hence the conclusion of such a narration is apt to be less finished than an architectural finial.¹⁶⁴

Although Claggart and Billy Budd are black-and-white, Vere's character is shaded in hues of gray.

Joyce Adler suggests that *Billy Budd* is a critique of civilization, and a call to a more "primitive basis" for assessing right and wrong.¹⁶⁵ Early on in the novella, the narrator states:

[I]t is observable that where certain virtues pristine and unadulterate peculiarly characterize anybody in the external uniform of civilization, they will upon scrutiny seem not to be derived from custom or convention, but . . . transmitted from a period prior to Cain's city and citified man. The character marked by such qualities has to an unvitiated taste an untampered-with flavor like that of berries, while the man thoroughly civilized, even in a fair specimen of the breed, has to the same moral palate a questionable smack as of a compounded wine.¹⁶⁶

Adler suggests that "[w]hat we have seen in Vere is that his human nature has been so tampered with that he believes he is 'not authorized' to determine matters on the 'primitive basis' of 'essential right and wrong.'"¹⁶⁷ As Karl Zink observes, *Billy Budd* suggests that "[c]ivilization has come to compromise men's cherished natural integrity."¹⁶⁸

The narrator suggests that pre-civilization, people's character was more simple and pure. According to the narrator, the "Handsome Sailor[s]" that harken from a bygone era were easy to judge because their "moral nature was seldom out of keeping with [their] physical make."¹⁶⁹ But the civilized world is far more complicated. This brings us back to the theme of the deceptiveness of appearances. In contrast to the Handsome Sailors, there is often a significant disjunction between outward appearance and inner character with many people. With the exception of his vocal defect, Billy's inner nature matches his outward appearance. Indeed, early on in the novella, Billy Budd is likened to Adam before eating the apple of knowledge.¹⁷⁰ When Adam eats the apple, he covers his genitals. He suddenly begins to care about appearances and about concealing aspects of himself. The modern world, the novella suggests, is a world of moral complexity and ambiguity, a world where outward appearances fail to reflect the truth,

¹⁶⁴ *Id.* at 128.

¹⁶⁵ Joyce Sparer Adler, *From Billy Budd and Melville's Philosophy of War*, in MELVILLE'S SHORT NOVELS, *supra* note 84, at 356, 358.

¹⁶⁶ BILLY BUDD, *supra* note 5, at 52-3.

¹⁶⁷ Adler, *supra* note 165, at 358.

¹⁶⁸ Karl E. Zink, *Ironic Social Commentary in Billy Budd*, in READINGS ON BILLY BUDD, *supra* note 72, at 96, 103.

¹⁶⁹ BILLY BUDD, *supra* note 5, at 44.

¹⁷⁰ *Id.* at 52.

and where what is most important remains concealed. Throughout the novella, we learn that critical facts are concealed: Billy's trial is conducted in secret; Claggart conceals his animus toward Billy Budd; and the novella suggests that something in Vere is also hidden.

Understanding this theme provides an explanation for why, throughout the novella, the characters' inner thoughts are never revealed. During the trial of Billy Budd, Vere states to the adjudicators that the mystery of Claggart's iniquity is for "psychologic theologians."¹⁷¹ The narrator does not provide us with access to Claggart's thoughts or motives—or Vere's. The narrator merely reports on outward appearances.

Moreover, the narrator does not tell us what happens during a critical scene where Vere meets privately with Billy Budd to inform him about his conviction and sentence. Instead, the narrator says that "what took place at this interview was never known."¹⁷² Interestingly, the narrator then proceeds to speculate as to what happened, noting that:

It would have been in consonance with the spirit of Captain Vere should he on this occasion have concealed nothing from the condemned one—should he indeed have frankly disclosed to him the part he himself had played in bringing about the decision, at the same time revealing his actuating motives.¹⁷³

The narrator then speculates that Billy would have been understanding of "such a confession."¹⁷⁴ The words chosen by the narrator are interesting, for the narrator uses the word "confession," and speaks of Vere revealing his "actuating motives."

The irony in *Billy Budd* is that the inside narrative does not give us answers; it raises more questions. The external accounts make the case open-and-shut, but the inside narrative is enigmatic. We get a closer view, but we do not learn Vere's "actuating motives."

Why does the text refuse to tell us more of Vere's motives? Why are Vere's thought processes concealed from us? Why does the crucial meeting with Billy Budd occur off stage? We are deliberately shown the surface of things, but the narrator suggests to us that the truth exists beneath the surface.

Billy Budd can be read to suggest a rather fatalistic and pessimistic message. If we cannot understand why Vere acted the way he did, then we are bound to continually sacrifice Billy Budd. Rehnquist views the question of whether "occasional presidential excesses and judicial restraint in wartime are desirable or undesirable" as "largely

¹⁷¹ *Id.* at 108.

¹⁷² *Id.* at 114.

¹⁷³ *Id.* at 115.

¹⁷⁴ *Id.*

academic.”¹⁷⁵ He observes: “There is no reason to think that future presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors.”¹⁷⁶

The message is one of inevitability. Human nature is human nature. Law cannot really help us, as it will be bent and manipulated during times of crisis. This is just how it is. Charles Reich observes that “[h]uman law must accept the fact that the mind is largely unknowable; that motives can seldom be ascertained.”¹⁷⁷ Returning to the passage of the scholar discussing human nature with the narrator, the scholar says:

I have seen a girl wind an old lawyer about her little finger. Nor was it the dotage of senile love. Nothing of the sort. But he knew law better than he knew the girl’s heart. Coke and Blackstone hardly shed so much light into obscure spiritual places as the Hebrew prophets.¹⁷⁸

The scholar’s focus on lawyers, jurists, and legal philosophers in this passage is particularly interesting. The scholar suggests that the study of law does not help us in shedding light into human nature. The law fails in *Billy Budd* because it does not have a deep enough understanding of human nature. It is no match for the crafty Vere, and *Billy Budd* suggests that turning to the law will not prevent our leaders from sacrificing Billy Budd in times of crisis.

Billy Budd refuses to afford us easy answers, but this is what gives the text its power. The text demonstrates that too often we seek easy answers. We frequently distort things, like the external narrative does, to give us a sense of closure and of complete knowledge of a situation. What makes *Billy Budd* so troubling is that Vere is decent, intelligent, and wise—and yet he still fails. In the passage about hidden madness, the narrator suggests that our ability to judge others based on our perceptions of their external behavior is poor. The narrator notes that those who act “[t]oward the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane” may appear in all respects to be acting coolly and normally.¹⁷⁹ The “method and the outward proceeding are always perfectly rational.”¹⁸⁰ It is quite troubling to think that Vere, underneath the façade, temporarily becomes a seething madman. The novella deliberately leaves this a mystery. We think that we know Vere, but we do not. This is the stark message of *Billy Budd*—that despite the manifest virtues of leaders such

¹⁷⁵ REHNQUIST, ALL THE LAWS, *supra* note 93, at 224.

¹⁷⁶ *Id.*

¹⁷⁷ Reich, *supra* note 27, at 376.

¹⁷⁸ BILLY BUDD, *supra* note 5, at 75.

¹⁷⁹ *Id.* at 76.

¹⁸⁰ *Id.*

as Vere, despite all the outward appearances, we may be failing to peer behind the veneer.¹⁸¹

The novella, however, is not one of despair or hopelessness. If so, then we might come away from *Billy Budd* with the same conclusion that Rehnquist draws—that it is inevitable that our leaders will overreact in times of crisis—it is just human nature. But the narrator suggests we can learn about human nature and improve our ability to judge what lies in the human heart. For example, the Dansker can read Claggart accurately and warns Billy Budd that Claggart dislikes him.¹⁸² The law does not help us, and the task is difficult, but the text suggests that it is possible. We just have not really begun to look beneath the surface. The inside narrative tells us that we cannot, in contrast to the outside narratives, avoid a penetrating look at Vere. The novella strips away the veneer, revealing Vere's desperate attempts to wrap his actions in the fabric of legal and policy rationalizations. When we examine Vere, however, we do not see an evil man. To see Vere as evil would certainly be more comforting, as we could dismiss his actions as those of deranged tyrant. Instead, Vere, a well-educated and temperate person, the most highly-civilized person on the ship, succumbs to an unshakeable impulse to engage in a primitive and brutal ritual of human sacrifice.

Today, our society is not beyond such rites of sacrifice. *Billy Budd* suggests that we must strive to be more aware of the impulse to make such sacrifices; it demonstrates how our leaders attempt to conceal these more primitive urgings in the language of law and policy. We must appreciate the challenge—and the necessity—of moving beyond appearances and scrutinizing the sacrifices our leaders make in the name of security.

¹⁸¹ The theme of the difficulty in understanding people's motivations is portrayed brilliantly in Melville's story, "Bartleby, The Scrivener." The story depicts an enigmatic copying clerk, Bartleby, who is hired by a Wall Street attorney. Bartleby soon refuses to do certain tasks, stating that he would "prefer not to." Bartleby seems inconsolably melancholy. The lawyer seeks to understand Bartleby and asks him questions about his past, but Bartleby merely says that he would prefer not to answer. In the end, Bartleby dies, and the narrator realizes that his practical and reasoned approach to understanding the mysterious Bartleby has failed. See Herman Melville, *Bartleby, The Scrivener*, in MELVILLE'S SHORT NOVELS, *supra* note 84, at 3-34.

¹⁸² BILLY BUDD, *supra* note 5, at 71.