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Abstract

For the American legal historian Robert Cover, the writing of *Justice Accused: Antislavery and the Judicial Process* was a political as well as a scholarly project. This study of nineteenth-century American judges who, despite their own opposition to slavery, ordered the return of escaped slaves in accordance with the Fugitive Slaves Act, provided an analogue for a contemporary conflict between law and conscience, the enforcement of compulsory military service in Vietnam. In his *Prelude to Justice Accused*, Cover offered a literary exemplum of this conflict: the story of Captain Vere in Melville's *Billy Budd*. He also proposed one of his "accused" judges, Lemuel Shaw, Chief Justice of Massachusetts and Melville's father-in-law, as a possible model for Vere. Since then, a number of legal-historical readings of *Billy Budd*, connecting Melville's narrative with the judicial practices of Shaw or his age, have been made. In this paper I review this line of interpretation, and then seek to develop it by focusing on shifts in the discourse of martial law.

SANCTIONED IRREGULARITIES: MARTIAL LAW IN *BILLY BUDD, SAILOR*

Kieran Dolin

For the American legal historian Robert Cover, the writing of *Justice Accused: Antislavery and the Judicial Process* was a political as well as a scholarly project. This study of nineteenth-century American judges who, despite their own opposition to slavery, ordered the return of escaped slaves in accordance with the *Fugitive Slaves Act*, provided an analogue for a contemporary conflict between law and conscience, the enforcement of compulsory military service in Vietnam. In his Prelude to *Justice Accused*, Cover offered a literary exemplum of this conflict: the story of Captain Vere in Melville's *Billy Budd*. He also proposed one of his "accused" judges, Lemuel Shaw, Chief Justice of Massachusetts and Melville's father-in-law, as a possible model for Vere. Since then, a number of legal-historical readings of *Billy Budd*, connecting Melville's narrative with the judicial practices of Shaw or his age, have been made. In this paper I review this line of interpretation, and then seek to develop it by focusing on shifts in the discourse of martial law.

The plot of *Billy Budd* has been well summarized by Robert A. Ferguson. Shortly after being press-ganged from his ship, the "Rights of Man", to a man-of-war, the "Bellipotent", "Billy Budd, innocence personified, kills the ship's master-at-arms, John Claggart, with a single impulsive blow when Claggart falsely accuses him of mutiny before their captain, Edward Fairfax Vere. Billy strikes because a stutter prevents him from speaking; he is then charged, tried, sentenced and hanged by Captain Vere and a drumhead court for the capital offence of hitting a superior."¹ The crux of the trial is the following passage in which Vere favours the letter of the law over what he calls "natural justice":

'How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so? ... Well I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. ... [In] receiving our commissions we in the most important regards ceased to be natural free agents.

... [S]uppose condemnation to follow the present proceedings. Would it be so much we ourselves that would condemn as it would the martial law operating through us? For that law, and the rigour of it, we are not responsible. Our vowed responsibility is in this: that however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.²

Cover argues that Vere's words represent a "positivist's condensation of a legal system's formal character", and discerns five aspects of that formalism: (1) an explicit recognition of the role character of the judges; (2) the source of law's obligation is neither nature nor conscience; (3) the law is readily identifiable in an imperial code, which governs situations of the type under consideration; (4) the will behind the law is uncertain, but clearly not that of the judges; (5) the judge is not responsible for the content, but only for the application of the law.³ Ferguson adopts Cover's reading, and sees in Captain Vere's canvassing and rejecting of the claims of "Nature" a recapitulation of the transition from Natural Law to Legal Positivism as the dominant legal theory in America during the nineteenth century. Brook Thomas offers a new historicist reading of Melville's novellas and Shaw's judgments.⁴ He links Captain Vere with Shaw's judicial conduct in the *Webster* murder case. The latter was a controversial trial in which Shaw's direction to the jury was censured for its general partiality in favour of the prosecution. Of specific concern was a departure from precedent in which he ruled that only the fact of murder need be established beyond reasonable doubt, and that the involvement of the accused need only be proved to the jury's reasonable satisfaction. Thomas connects this willingness to change the law to meet present needs with Vere's manipulation of the drumhead court. Vere most impresses the court by "his closing appeal to their instinct as sea officers" which canvasses the practical consequences of apparent leniency in "the year of mutinies" (p.390); he acts in effect as witness, prosecutor and judge during the trial; and he thereby ensures that the court's order reproduces his own initial "pre-judgment" of the case ("Yet the angel must hang" [p.378]). Thomas's analysis of the trial scene therefore emphasizes not the triumph of formalism and positivism (which, with some qualifications as to dates, he accepts), but the way in which formalism serves as a mask, covering the mutation of forms for political purposes.

Before concluding the trial narrative with the formal conviction and sentence, the narrator digresses to compare the "harassed frame of mind" of Billy's judges with that of the Commander of the USS *Somers*, who in 1842 executed three men for conspiring to mutiny (p.390). Melville's brother-in-law, Guert Gansevoort, was an officer on the *Somers* and a member of the drumhead court on that occasion. As many critics have noted, the *Somers* case was "reopened" by journalists during the late 1880's when Melville was working on *Billy Budd*, and it is a major source of the novel's legal action.⁵

The narrator avoids expressing an opinion on the case: "History, and here cited without comment"; but compares the subjective perceptions of the two courts in such a way as to leave open the question of over-reaction: "But the urgency felt, whether well-warranted or otherwise, was much the same" (p.391).

The Somers case became a *cause célèbre*, not least because one of those executed, Philip Spencer, was the son of a cabinet minister. The issues were therefore openly debated in judicial, political and cultural forums, in contrast to the abbreviated and misleading "considerate" notice of Billy's hanging. Thomas argues that this silence, together with Billy's defective speech, functions as a political metaphor for the powerlessness of the seamen who are unable to protest against their own oppression. A crucial scene for Thomas is the disciplinary flogging which Billy witnesses the day after his impressment. He resolves that "never through remissness would he make himself liable to such a visitation" (p.346). Thomas suggests that Billy is rendered easily controllable by "the accepted forms and usages of the navy", and that his silence in the face of this law signifies a general inability to resist this unjust regime.⁶ The stutter, therefore, is a "flaw" in moral and political terms, signifying a fatal willingness to let others, especially Vere, speak on his behalf. In retelling the story of Billy Budd as victim, Melville challenges Vere's law by means of what Thomas calls "subversive indirection".⁷ This is a complex and subtle argument, which takes account of the narrative form as well as the legal content of *Billy Budd*. Thomas's phrase, "the accepted forms and usages of the navy", covers two kinds, two sources of law, however: the formal prescriptions of a statute ("forms"), and the unwritten customs, the traditional practices, of naval punishment ("usages"). For the flogging scene differs from Billy's trial through its radical substitution of language with force. Although the "cat-o'-nine-tails" was prescribed for summary punishment under the Articles of War, it was not so much a modern formalist system of discipline as a customary spectacle of overwhelming monarchical power imposed on the bodies of recalcitrant sailors. Foucault, on whose distinction I am relying here, also draws attention to the *relationship* between military orders and the emergence of disciplinary modes of control: "While jurists or philosophers were seeking in the [social contract] a primal model for the construction or reconstruction of the social body, the soldiers and with them the technicians of discipline were elaborating procedures for the individual and collective coercion of bodies."⁸ In *Billy Budd* the dual inscription of legalism and the lash, the mutual dependence of law and violence, takes place under the rule of martial law. To comprehend and represent this mutuality, I shall argue, Melville employs various structures of exchange in his plot and narration.

The legal-historical reviews of Billy's trial reveal so many departures

from the requirements of the Articles of War that Vere's justice is accused of being a mask for illegal force. Richard H. Weisberg finds a series of significant errors, including: (1) only squadron or fleet commanders, not individual ship commanders like Vere were commissioned to conduct courts-martial; (2) a capital offence could not be tried or sentenced without the complaint being referred to the Admiral; (3) at least five judges were required to constitute a court; (4) summary trial was only allowable for trivial offences; (5) Vere acts as sole witness and prosecutor, and has a commanding influence over the court; (6) a capital sentence could not be executed without reference to the Admiral; (7) while hanging is the sole penalty prescribed for Billy's crime, leniency was usually offered and a lesser punishment imposed; and (8) courts-martial were required to be held in the most open part of the ship, and not in secret.⁹ Doubts about the regularity of Vere's proceedings and about his rationality are focussed through the surgeon, who wonders, "Was he unhinged?" (p.379).

Weisberg and C.B. Ives pursue this explanation of his misuses of law.¹⁰ These readings properly particularize the character of Vere and the circumstances of this case, but they do not provide a sufficient explanation for the historical data which they present. For example, they demonstrate that independently of what the Articles of War prescribed, naval commanders customarily exercised a wide disciplinary discretion, that the maximum summary penalty of twelve lashes was usually exceeded, and that the mandatory sentence of death for striking an officer was by no means always imposed. Ives explains this widespread latitude by reference to naval custom, which viewed sceptically the attempts by politicians and the Admiralty to regulate life at sea. Consequently, "a captain of a man-of-war was godlike and might exercise his disciplinary discretion, or even his disciplinary whims freely with little expectation of reproof."¹¹

Vere's departure from the letter of the law may be seen, then, as a sign of naval usage, of professional habits of thought and action. Melville's record of his own "man-of-war experiences and observations" aboard an American frigate during 1843-4, *White-Jacket*, speaks of the "notorious lawlessness" of Commanders in terms of a sailors' proverb, "*the law was not made for the Captain*".¹² The experiences of witnessing a flogging and of hearing the monthly public reading of the Articles of War lead to passionate, but well-informed, protests against the Articles as a legal regime. The burden of *White-Jacket's* argument is that this law is adapted from the British statute of the same name, and consequently that its provisions are inconsistent with the fundamental tenets of American democracy. For example, by preserving a general disciplinary discretion in the Captain it vests the powers of legislator, judge, and executive in one person; by exempting officers from some of its penal clauses it violates the principle of equality before the law; and by retaining flogging as the normal summary penalty it is comparable with "the

penal laws that prevailed in England some sixty years ago", in that it makes no distinction between trivial and serious crimes. *White-Jacket* acknowledges that "the necessities of navies warrant a code for its government more stringent than the law that governs the land; but that code should conform to the spirit of the political institutions of the country that ordains it" (p.498). The explanation of this "monstrous grafting of tyranny upon freedom" is historical: "they are an importation from abroad, even from Britain, whose laws we Americans hurled off as tyrannical, yet retained the most tyrannical of all" (p.662).

This robust rhetoric is supported by detailed citation from the Articles of War and an informed discussion of constitutional and jurisprudential theories. Relevant historical examples and quotations from the best-known legal writers, such as Justinian, Coke, Hale and Blackstone, produce one of the most articulate evocations of legal culture in nineteenth-century literature. With confidence, indeed normative fervour, he declares, "it is for America to make precedents, and not to obey them. ... And we Americans are ... the Israel of our time; we bear the ark of the liberties of the world" (p.506). The reformism of *White-Jacket* is animated by an idealistic zeal to fulfil the promise of the Declaration of Independence. It is derived from the same Jeffersonian tradition that oversaw the incorporation of the Bill of Rights into the American Constitution, the protections of which *White-Jacket* seeks to extend to sailors. Melville finished work on *Billy Budd* in 1891, the centenary of incorporation of the Bill of Rights. By setting his novella in 1797, he invokes an historical context in which liberty is curtailed by war, as signified by Billy's conscription from the *Rights of Man* to the *Bellipotent*, and in which the Old World is the negation of the New World defined by *White-Jacket*. Indeed, one of the latter's favourite contrasts, between American constitutionalism and the tyranny of the Russian czars, is implicitly repeated in *Billy Budd* when the narrator compares the secrecy of the murder and trial with "the policy adopted in those tragedies of the palace which have occurred more than once in the capital founded by Peter the Barbarian" (p.381).

White-Jacket can only compare the "severity and unusualness" of the Articles of War to the multiplication of mandatory death sentences in the "Bloody Code" of England "some sixty years ago". During the monthly reading of the statute the repetition of the phrase, "*shall suffer death*", at short intervals reminds him of a "minute-gun" exploding in the ears of the assembled crew. This transformation of legal discourse into an effect of war has a "defamiliarizing" effect, enabling *White-Jacket* to see through the Articles' normative pretensions to the essential lawlessness of its excessive force: "Murderous! But then, in time of peace they do not enforce these blood-thirsty laws?" He answers this rhetorical question by alluding to the Somers case, and concludes with a parodic oath: "By the main-mast! then, ... I am subject to the cut-throat martial law" (p.659). Melville turns to the

Gothic mode, embodying the law first as monster and then as a means of torture:

Afloat or wrecked the Martial Law relaxes not its gripe [sic]. And though ... for some offence ... you were indeed to 'suffer death,' even then the Martial Law might hunt you through the other world, and out again at its other end ... like an endless thread on the inevitable track of its own point, passing unnumbered needles through (p.661).

After this temporary plunge into the solitary dark, he turns lawyer, quoting the rationalist prose of legal authority against this irrational system: "may we subscribe to the saying of Sir Matthew Hale in his History of the Common Law, that *'the Martial Law, being based upon no settled principles, is, in truth and reality, no law, but something indulged rather than allowed as a law.'*" A longer version of this passage from Hale, which dates from before 1676, is quoted in the *Oxford English Dictionary* as part of its history of the phrase, "martial law". The quotation continues, "the Necessity of Order and Discipline in an Army is that only which can give those Laws a Countenance." The two elements mentioned by Hale, the lack of settled principles and the governance of the military, were to split apart in the next two hundred years. By the time Wellington addressed Parliament in 1851 with the words, "Martial Law was neither more nor less than the will of the general", the phrase had acquired its modern sense of the suspension of civil law by military power. The rules governing the army and navy came to be called "military law", a phrase which the *O.E.D.* finds in the *Encyclopaedia Britannica* of 1883. With the development of the ideology of the rule of law during the eighteenth and nineteenth centuries, the use of arbitrary force masked as law came to be regarded as abhorrent, even in the military sphere. Martial law was pronounced by Blackstone and subsequent writers to be contrary to English law. Despite this, it was imposed on the civilian populations in the colonies of Ireland, India, Jamaica and South Africa at periods of crisis during the nineteenth century. When Melville came to write *Billy Budd* the modern sense of the phrase had become accepted usage, and even those lexicographers - like P. Austin Nuttall in *Routledge's Pronouncing Dictionary* (first edition, 1863) - who retain the old sense employ the pejorative language of modern legal discourse in doing so:

Martial law: in military service, an arbitrary law, regulated by expediency (my emphasis).

When Captain Vere describes Billy's case as one "under martial law practically to be dealt with", and the pronouncement of sentence as "'martial law operating through us'", he uses the older meaning, for which "Articles of War" is a synonym.¹³ However, he invokes the phrase in the course of an argument that, as we have seen, purports to adduce the binding, impersonal authority, the "measured forms", of statute law. As a historical fiction, *Billy*

Budd is able to put into dialogue the discourse of martial law current in its era of representation and that current in its era of production. The contradictions that *White-Jacket* exposes through argumentation are implicit in Vere's language when he applies modern notions of legitimacy to the "Act [that] resembles in spirit the thing from which it derives - War" (p.388-9).

Whereas *White-Jacket* was able to characterize the Articles of War as a graft from "Albion's fatal tree" which could be excised from the native sapling of American liberty, *Billy Budd* leaves open the relationship between past and present, Europe and America. Read retrospectively, the story of Billy's death is a "tragedy of justice" which a true commitment to the rule of law might have averted. Read prospectively it portends that liberty will be sacrificed to the violent workings of a dubious "necessity" in the New World as well as in the Old. Melville represents martial law as the vehicle of "military necessity", as the "practical" or expedient considerations of maintaining the crew in a state of efficient readiness to kill or be killed take precedence over normative demands for procedural correctness, an understanding of the nature of the crime, and an appropriate penalty. In this process of normative compromise the law is by no means an unwilling victim. The narrative records how the Lord Chief Justice judicially upholds the custom of impressment (p.337), and the secret practice of freeing prisoners before the expiration of their sentences to man the fleet. The civil authorities, who in constitutional theory control the military, subvert their own legal system whilst purporting to defend it. What the narrator calls "sanctioned irregularities" (p.344) result: breaches of the law committed by the authorities, civil or military, in meeting the exigencies of war. When the war is prosecuted on such a premise of normative compromise, the "necessity" of Billy's summary execution follows *a fortiori*. When the agents of "sanctioned irregularities" board the *Rights of Man*, Melville dramatizes the transformation of martial law from its old to its new sense, as its influence begins to extend from the military to the civil sphere.

The pervasive operation of "sanctioned irregularities" subverts Captain Vere's formalist credo. "With mankind', he would say, 'forms, measured forms are everything; and this is the import couched in the story of Orpheus with his lyre spellbinding the wild denizens of the woods.' And this he once applied to the disruption of forms going on across the Channel" (p.404). This articulation of the need for "measured forms" follows immediately upon a "variance from usage". The drum beat to quarters is ordered immediately after the burial of Billy's corpse, one hour early. This is one of two commands given to quell the crew's emotional responses to Billy's death: in each case an involuntary, collective utterance and movement signifies their common revulsion, but the expression of such pre-military humanity is checked by the word of command: "ere the murmur had time to wax into clamour, it was met by a strategic command, the more telling that it came with abrupt

unexpectedness" (p.403). The men "[yield] to the mechanism of discipline" (p.403), and the Foucauldian overtones of this formulation are more strongly heard in the narrator's meditation on the second incident: "True martial discipline superinduces in average man a sort of impulse whose operation at the official word of command much resembles in its promptitude the effect of an instinct" (p.404). The discourse of "measured forms" is called forth by incipient discontent. Discipline is maintained through forms in increased measure, forms out of time. The preservation of order, like the conduct of the war, depends on forms and their disruption. Consequently, the contrast between England and France, metonymically expressed through their flags, "the flag of founded law and freedom defined, [and] the enemy's red meteor of unbridled and unbounded revolt" (p.333), collapses.

"The flag of founded law and freedom defined" is a phrase of Orphic sonority and normative eloquence. Much of its power lies in its use of *chiasmus*, the rhetorical figure of "syntactic reversal or symmetrical crossing".¹⁴ Through its reversal of syntax, it creates a tension between its primary parallelism - the established laws and freedoms of England - and a possible antithesis derived from the ambiguity of the word, "defined" - established laws and limited freedoms. *Chiasmus* is one of several structures of exchange which appear throughout *Billy Budd* as evidence of Melville's attempt to apprehend in narrative form the deceptive interplay between law and war. The most prominent example of such a structure occurs in the narrator's reflection on the central event, the blow which strikes and kills Claggart: "in the jugglery of circumstances ... and in the light of that martial code whereby it was formally to be judged, innocence and guilt personified in Claggart and Budd in effect changed places" (p.380). Barbara Johnson argues that here the narrator lays bare the exchange structure of the entire plot.¹⁵ The legal-historical review of the trial and of "that martial code" invited by the text operates as a kind of "reversal on appeal", casting Captain Vere, not Billy Budd, as the "enemy within", the representative of "justice accused". The novella presents itself as a discursive exchange with the naval version of Billy's story printed in the "News from the Mediterranean". Writing cannot undo the effects of martial law. However, Douglas Hay has written of another naval case that, "law's violence disappears behind stories of law's justice". Having traced the suppressed contradictions of Vere's invocation of martial law, we might justly reverse Hay's aphorism, and summarize *Billy Budd* as a story of law's injustice which exposes law's violence.¹⁶

NOTES:

¹ Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), p.288.

² Herman Melville, *Billy Budd, Sailor and Other Stories*, ed. Harold Beaver (Harmondsworth: Penguin, 1967), pp.387-8. This edition reprints the text of *Billy*

Budd established by Harrison Hayford and Merton Sealts. All subsequent references are incorporated parenthetically in the body of the paper.

³ Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process*, "Prelude: Of Creon and Captain Vere", pp.2-3.

⁴ Brook Thomas, *Cross-Examinations of Law and Literature* (New York: Cambridge University Press, 1987), chapters 9 and 10.

⁵ See, for example, Charles Robert Anderson, "The Genesis of Billy Budd", *American Literature* 12 (1940): 329-46; Thomas, *Cross-Examinations*, pp.206-14; and Michael Paul Rogin, "The Somers Mutiny and Billy Budd: Melville in the Penal Colony", in *Herman Melville: Modern Critical Views*, ed. Harold Bloom (NY: Chelsea House, 1986), pp. 197-221.

⁶ *Cross-Examinations*, p.220.

⁷ *Ibid.*, p.222.

⁸ Michel Foucault, *Discipline and Punish*. Trans. Alan Sheridan (London: Penguin, 1977), p.169.

⁹ See Richard H. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*. (New Haven: Yale University Press), pp.147-59.

¹⁰ C. B. Ives, "Billy Budd and the Articles of War" *American Literature* 34 (1962): 31-8; Weisberg, p.163ff.

¹¹ Ives, "Billy Bud and the Articles of War", p34.

¹² Herman Melville, *Redburn, White-Jacket and Moby-Dick*, ed. G.Thomas Tanselle (New York: Library of America, 1983), p.666. Subsequent references appear parenthetically in the paper.

¹³ Weisberg, *The Failure of the Word*, pp.155-7, discusses the two meanings of "martial law", but does not differentiate them historically.

¹⁴ Jules Law, "Chiastic Exchange in *The Mill on the Floss*," in *Rewriting the Victorians*, ed. Linda M. Shires (London: Routledge, 1992), p.55.

¹⁵ Barbara Johnson, "Melville's Fist," in *Herman Melville's Billy Budd, Benito Cereno and Bartleby the Scrivener*, ed. Harold Bloom (New York: Chelsea House, 1987), p.51.

¹⁶ Douglas Hay, "Time, Inequality and Law's Violence," in Austin Sarat and Thomas R. Kearns (eds.), *Law's Violence* (Ann Arbor: University of Michigan Press, 1992), p.169.