



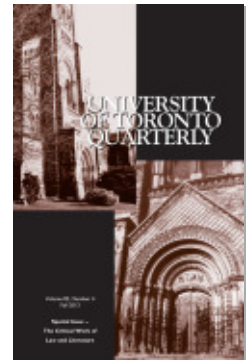
PROJECT MUSE®

The Hard Case: *Billy Budd* and the Judgment Intuitive

Gregg Crane

University of Toronto Quarterly, Volume 82, Number 4, Fall 2013, pp. 889-906
(Article)

Published by University of Toronto Press



➔ For additional information about this article

<https://muse.jhu.edu/article/534330>

GREGG CRANE

The Hard Case: *Billy Budd* and the Judgment Intuitive

ABSTRACT

This article explores the importance of a certain form of intuitive reasoning to hard cases, ambiguous situations, and problems that seem to resist the straightforward application of a clear rule. Certain aspects of the processes of judgment come into sharpest relief in those cases where justice seems to require that we bend, modify, or repress the applicable rules. Judges have often been judged not only by virtue of their adherence to the procedures and norms of law but also in regard to their ability to qualify or moderate or even subvert such rules. Melville's posthumous novel, *Billy Budd*, I argue, offers a revealing and even iconic instance of the necessity of intuitive reasoning to these more arduous and uncertain forms of judgment.

KEYWORDS: law and literature, intuition, Herman Melville, *Billy Budd*, judgment, law and narrative, Oliver Wendell Holmes

JUDGMENT STORIES

Viewed from a generic perspective, the kinship between law and fiction is not particularly surprising. Both discourses use narrative form to establish or challenge values, norms, and ideas of order (see [Weisberg, 'Coming' 121](#)). Robert Cover, law professor and activist, observes, 'No set of legal institutions exists apart from the narratives that locate it and give it meaning' ('[Nomos](#)' 95–96). Allan Hutchinson, also a legal scholar, expands on Cover's theme: 'We are never not in a story.' Human action and history take on meaning and intelligibility only within a narrative context. As storytelling enterprises, law and fiction offer ways to 'mediate our engagement in the world with others,' providing 'the possibilities and parameters of our self-definition and understanding' ([Hutchinson 13–14](#); see also [Delgado and Stefancic](#)). But the interconnection between law and fiction comes into sharper focus, I think, when one looks at novels centring on difficult legal choices.

Put simply, easy cases in which an unambiguous rule can be swiftly and surely applied to indisputable facts do not make either for good drama or for satisfying jurisprudential or ethical meditation. By contrast, hard cases in which an appreciation of the social order sustained and protected by

deference to established rules must compete with other values, interests, and jarringly particular factual scenarios seem more likely to engage the imagination of either the writer/reader of fiction or the judge/jury rendering a legal decision. We are intrigued, I think, by the decision-maker's capacity to adjust, modify, or ignore a rule under pressure from countervailing norms, values, or facts. Perhaps such moments of decisional agency reassure us of our capacity for democratic self-governance. Whatever the appeal of the hard case to jurists and novelists (and their readers), these groups clearly do not labour under the same responsibilities and constraints. Judges have to be highly circumspect in registering in the non-legal or ad hoc factors influencing their decisions lest they undermine the law's certainty and predictability. Free from such doctrinal and practical concerns, the literary narrative representing a difficult legal choice can more frankly and fully portray the complex and sometimes unsettling ways that moral, emotional, and psychological norms mix with principles and analytic procedures in such judgments.

In chapter 31 of *Huckleberry Finn* (1884), for instance, Huck famously wrestles with the question of whether to break the law and social convention by helping Jim escape slavery or to see that he is returned to his owner, Miss Watson. Huck's decision to help Jim escape elevates the affectionate relation he has created with Jim over the imperatives of law, social convention, and regional tradition. On the way to this hard-earned conclusion, Huck mulls over the possible consequences of various courses of action, wondering if Jim wouldn't be better off as Miss Watson's slave and anticipating the embarrassment Huck himself would suffer if it were to 'get all around that Huck Finn helped a nigger get his freedom.' In addition to potentially adverse practical and social consequences, helping Jim escape could land Huck in 'everlasting fire' (Clemens 168). Being 'ground' by his sense of conflicting duties and possible bad outcomes, Huck seeks to escape the judgment process altogether, wishing an indisputable answer would come from the heavenly sphere where all norms are bright-line and all dilemmas easily settled. He tries to pray, but 'the words wouldn't come' (168).

While contemporary readers not sympathetic to Miss Watson's claim to her human property may not agonize as Huck does over his dilemma, they do, I think, closely and sympathetically follow the halting progress of Huck's moral meditations and the rise and fall of his various lines of speculation. After writing a letter to Miss Watson to let her know where Jim is, Huck hesitates, 'trembling' between two options. He 'studie[s] a minute' more, then says to himself, 'All right, then, I'll go to hell,' and tears the letter to pieces (169). The key to this scene and the depiction of judgment leading to it lies in Huck's ability to weigh not only the various moral, social, and legal issues at stake in the case but also the reality of his connection with Jim, the concrete particulars of their relationship, until the

right result, the right action can come to him: not the kind of unambiguous, absolute knowledge ascribed to God but the tremulous, hedged conviction of a flawed human being who gambles on an ethical hunch according to his best lights. Any action Huck takes is going to cost somebody something, and it is important to Mark Twain's literary portrait of judgment that we see that Huck knows those costs feelingly – not just intellectually but affectively. Huck's ability to persist in feeling his way intuitively through keenly felt but conflicting obligations and various known or imagined factual scenarios constitutes a reassuring index of Huck's (and, by implication, our own) hybrid and uncertain moral reasoning process.

In *To Kill a Mockingbird* (1960), Harper Lee's lawyer-hero, Atticus Finch, offers another iconic example of this holistic and consequentialist type of judgment. When Scout, unhappy about school, asks her father if she can stay home 'like Burris Ewell,' she receives a lesson from Atticus about how rules and facts are thoughtfully considered by moral agents trying to make out and do the right thing. 'Sometimes,' Atticus tells her, 'it's better to bend the law a little in special cases. In your case, the law remains rigid. So to school you must go' (33). The Ewells are so far outside the bounds of Maycomb's version of civilized existence that the law does not apply to them in the same way that it does to Scout and Jem. Clearly, the Ewells should not live as they do – Bob Ewell should not hunt and trap out of season or drink the proceeds of the family's relief checks, but 'he'll never change his ways' (34). And out of the community's awareness of this reality comes an exception to the normal application of the relevant rules to what would otherwise be an easy and clear-cut case. In the balancing procedure Atticus models for Scout, strict deference to the rule of law competes with other issues and facts, potentially affecting the scope and application of the pertinent rules. The result is a fluid and situational approach to social and legal norms.

In the final drama of Lee's novel, Bob Ewell is killed when he attacks Scout and her brother, Jem. Convinced that Jem may be responsible, Atticus initially presses Sheriff Tate to adhere strictly to the proper procedure in investigating the case and not to make any exception on Jem's behalf. Atticus's sense of the choice before him is transformed by learning that the actor in question is not Jem but Boo Radley. Instead of fearing that his son will labour under the shadow of having had a proper investigation set aside out of the sheriff's deference to the Finch family, Atticus confronts the spectre of the pathologically shy and mentally disabled Radley being drawn into public view for no other purpose than a rigid compliance with the procedural requirements of the law. Eventually, Atticus yields to Tate, implicitly agreeing to look the other way as the actual details of this event are swept away and replaced with the fiction that Ewell fell on his own knife (317).

As Atticus is an officer of the court, this is and should be a particularly provocative moment for the reader, and one recent commentator has critiqued Atticus's inconsistent adherence to the rule of law (advocating it to the jury at the close of Tom Robinson's trial but setting it aside in regard to Boo Radley's killing of Bob Ewell) (Dare). Atticus's decision not to put Boo Radley through the usual investigative process is neither reconciled to any particular rule nor even played out as the result of a closely reasoned analysis. Instead, as in Huck's decision to help Jim, protecting Boo from an investigation in this case just feels like the right thing to do – a conclusion one reaches through an intuitional sense of the entire situation; the alternative, as Scout famously remarks, showing Atticus that she understands, would be 'like shootin' a mockingbird' (317).

Of course, this mode of reasoning is not unfamiliar to real-life judges and lawmakers. Clear-cut rules are sometimes set aside in the light of particular facts and opposing values. For instance, 'in the enforcement of a contract,' as Karl Llewellyn (a leading force behind the Uniform Commercial Code), contended, 'the facts that a defendant is illiterate, poor with little or no bargaining power or choice, that the terms of the contract were fixed and not open to negotiation [would be] relevant to a judge's consideration of whether it is equitable and fair to enforce strictly the terms of the contract' (Twining 216).¹ As is the case with Maycomb's

1 Indeed, Atticus's reasoning process is comparable to Judge Skelly Wright's implementation of the unconscionability doctrine in *Williams v. Walker-Thomas Furniture Company*. The named appellant, Ora Lee Williams, entered into a printed form contract for the purchase of furniture on instalment. The contract provided that title would remain with the seller until all of the items purchased under the contract had been fully paid for, and, in the event of a default in the payment of any monthly instalment, Walker-Thomas could repossess all of the items being purchased under the contract. In Williams's case, all of the items she had purchased from Walker-Thomas were repossessed under the terms of the contract despite the fact that she had paid \$1,400 of the total purchase price of \$1,800 (447). When Williams entered this contract, Walker-Thomas knew that she had to support herself and seven children on a monthly government stipend of \$218 (448). The trial court granted summary judgment for the seller. On appeal, Williams contended that the instalment contract was unenforceable due to the unconscionability of the terms, citing the unconscionability section of the Uniform Commercial Code (UCC §2-302). Writing for the Court of Appeals, Judge Wright noted that the case raised an issue of first impression, but he disagreed with the lower court that it 'lacked the power to refuse enforcement to contracts found to be unconscionable,' citing common law precedent holding that unconscionable contracts are not enforceable as well as UCC §2-302 (which was adopted in the relevant jurisdiction after Williams's contract was made). '[W]here the element of unconscionability is present at the time a contract is made,' Wright held, 'the contract should not be enforced' (449). The usual rule is that courts enforce the unambiguous bargains parties make, but that rule can, Wright says, be set aside if there are facts indicating 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' Such facts include 'the gross inequality of bargaining power' of the parties, the relative disparity of the parties' education, and the consideration whether 'important terms were hidden in a maze of fine print' (449–50).

handling of Burris Ewell's truancy or Bob Ewell's hunting out of season, the unconscionability doctrine permits the court to defer to its sense of fairness or equity in refusing to enforce an otherwise unambiguous contract. Judges may occasionally acknowledge that their decisions in such cases turn on a non-analytic hunch about the equities involved. However, in the judicial context, playing a hunch sounds pretty risky, introducing chance, personal feeling, and mystery into a process that many litigants (and average citizens) might prefer to resemble the analytic purity and predictability of a mathematical calculation or scientific taxonomy. Consequently, it is not surprising that the intuitional aspect of judicial decisions largely remains implicit. Literary depictions, by contrast, often do not hesitate to delve into this vague yet potent part of the judgment process.

BILLY BUDD AND JUDGMENT

An iconic 'law and literature' text, [Herman Melville's *Billy Budd, Sailor* \(An Inside Narrative\)](#), as much as any other literary work I know of, induces readers to think about the workings of judgment.² However, in sharp contrast to Twain's and Lee's tales, Melville's novel does not recommend a form of judgment through a sympathetic depiction of a central character struggling with a difficult decision; instead, it generates a vicarious judgment process in the reader, who is thinking about and reacting to the decision rendered by the story's judge: Captain Vere. As [Barbara Johnson](#) rightly notes, 'Judgment, however difficult, is clearly the central preoccupation of Melville's text, whether it be the judgment pronounced by [Vere] or upon him' (591–2).

- 2 Published posthumously in 1924, Melville's final major literary work began as a headnote to a ballad about a sailor sentenced to death for mutiny, 'Billy in the Darbies.' Billy is introduced to readers aboard 'a homeward-bound English merchantman,' the *Rights-of-Man*, where he is well liked by officers and crew alike (Melville 1354). The plot of Melville's tale can be reprised briefly. A lieutenant from the British warship *Bellipotent* boards the *Rights*, seeking to impress able-bodied seamen into service in the British Navy. A simple and virginal character, Billy labours under a single physical defect, a stammer that worsens when he's under pressure. As Billy takes up his new duties as foretopman on board the *Bellipotent*, something about his beauty and innocence provokes the master-at-arms, John Claggart, who as a type of shipboard chief of police helps to maintain order and watch for signs of mutiny. Claggart schemes to frame Billy, instructing subordinates to implicate him in mutinous conversation. Claggart levels a charge of mutiny against Billy to Captain Vere. When the incredulous Vere arranges to have Claggart repeat this accusation in Billy's presence, Billy's stammer prevents him from answering. Unable to speak, Billy strikes his accuser, killing him with one blow. Vere immediately convenes a shipboard trial – the drumhead court. Acting as chief witness, prosecutor, and judge, he orchestrates Billy's conviction and execution.

Scholarly accounts of *Billy Budd*'s representation of judgment and its conception of justice are acutely divided; indeed, few other major literary works have produced such a polarized reception. Emphasizing the shift from the antebellum period's romanticism and idealism to a particularly skeptical form of realism predominant in the waning decades of the nineteenth century, one vein of *Billy Budd* criticism locates a biographical correlative to this generational change in the downward turn of Melville's personal fortunes (having failed in his youthful dream of making a living as a writer, Melville had to settle for the humble position of customs inspector) (Rogin 288, 292). Chastened by his personal difficulties, the horrific sacrifices of the Civil War, and the general failure of reform to improve American society, Melville, these critics argue, wrote *Billy Budd* out of a deep and abiding skepticism about idealistic schemes for the world's betterment. Bidding farewell to what he had called in *Pierre* the 'beautiful illusions of youth,' Melville's last novel is thus best read as a 'testament of acceptance' that law is nothing better or higher than the will of the king (i.e., the state). Moral abstractions and idealized notions of justice yield perforce to society's need for secure and predictable forms of organization and regulation. From this angle, Captain Vere, despite his sympathy for Billy and his sense of Billy's essential innocence, must choose head over heart, law over moral feeling, professional duty over private conscience. These accounts tend to read Vere as Melville's alter ego and to portray both as resembling Justice Oliver Wendell Holmes Jr., who, having witnessed the sacrifice of the nation's 'best citizens' in the Civil War, accepted the disjunction between law and morality and rejected the reformer's appeal to conscience as a delusional and potentially destructive form of sentimentalism (see, e.g., Rogin 293, 299–300; Trachtenberg 201, 205; Gilmore 495, 507; Delbanco 312; Ferguson 288–90; McWilliams 74).

By contrast, the 'testament of resistance' line of *Billy Budd* criticism reads the narrative ironically, separating Vere from Melville and finding continuity between the author's younger and older selves, such that his final work continues to express the younger man's 'fierce commitment to everything in the world that resists confinement and oppression and opposes injustice' (Spanos 33; see also Franklin, Loosemore, Schiffman, and Zink). Vere's commitment to the letter of the law and professional duty is, in these accounts, comparable to the immoral legalism of northern judges enforcing the fugitive slave law despite their ethical and religious objections to the institution of slavery and the law itself (Cover, *Justice* 1–6). For these critics, *Billy Budd* resembles Melville's earlier works, such as 'Benito Cereno,' which are subversive of the authoritarianism and exceptionalism underwriting unjust domination at home and abroad, and Vere's choice of professionalism and legal form over sympathy and moral feeling is Melville's way of attacking the entire legal system as an instrument of class oppression (see Spanos 7, 24, 32–33; Thomas 212).

Adapting a fitting comment by Andrew Delbanco, one might say that scholars with high 'regard for constituted authority' in difficult times tend to view Vere 'as a heroic figure who, with tragic awareness of his responsibilities, sacrifices an innocent for the sake of the state,' but those suspicious of 'established power' see Vere as 'a despot whose callous commitment to the letter of the law, "however pitilessly" it grinds the innocent, is ultimately no different from Ahab's doctrinaire will' (Delbanco 313). However, despite their divergence, these critical opponents seem to agree on a key point – one must choose between the tale's various oppositions (either head or heart, law or morality). While disagreement may be had as to whether Vere chooses nobly or ignobly, there is no serious critical dispute that he must choose.

In what follows, I contend that Melville's tale ultimately pushes us to reject such either/or choices between competing values when it comes to handling an exceptional moral or legal dilemma. Vere fails morally and legally not because he makes the wrong choice but because he thinks he must make a choice between opposed values when the most difficult and best form of judgment in cases such as Billy's requires that he balance ostensibly contrary ideals – law and morality, head and heart. To choose, as Vere does, is to abbreviate the protracted, uncertain, and often messy and compromised nature of the more arduous forms of judgment. This essay intrudes into the Vere-centred studies of the novel so common in 'law and literature' scholarship the presence of a different reasoner, that of the reader. To look at the way the novel focuses the reader's attention on judgment is to pay as much attention to our own reflections as to Vere's. By positing evidence and support for both sides of any given opposition or by blurring the line of distinction between contrasting terms, Melville's narrative keeps his readers, if not Vere, in the middle of a matrix of various competing values, interests, and facts. The tale stirs us to imagine replacing Vere's precipitous, single-minded, and altogether too certain conclusion with a more deliberate, complex, or 'many-minded' balancing of concerns and norms. A particular type of intuition proves to be crucial to working through this less sure process of sustaining the many values and interests in order to arrive at the best possible decision.

From the outset, the tale involves the reader in a process of balancing various oppositions or contradictions. For instance, with Billy's impressment, the story asks readers to compare and weigh the competing claims of an individual's natural rights and the societal interest in a system of law and order, embodied in the British Navy, which protects 'free' society from the 'red meteor of unbridled and unbounded revolt' (Melville 1364). Each position has appeal. We sympathize, I think, with Billy's (unironic) farewell to the '*Rights-of-Man*' and with the narrator's description of the British Navy as the last defence against the spread of the French Revolution's chaos and destruction (1358, 1364). Any argument that Melville is

ultimately a revolutionary Paine-man or a counter-revolutionary Burke-man cannot adequately address the fact that the narrative offers support for both positions.

As readers, we are asked not only to balance such competing values as the individual's claim to fundamental natural rights and society's need for stability and order, but also to struggle with the narrative's many epistemological ambiguities and contradictions. For instance, the story both posits and withdraws evidence of the threat of mutiny. The narrator tells us that 'anxiety' about a recurrence of mutiny was natural given the closeness in time of the Nore mutiny and notes that 'precautionary vigilance was strained against relapse,' but he also tells us that on the *Bellipotent* 'nothing obvious ... would have suggested that the Great Mutiny was a recent event' (1368).³ Apparently, there is and there isn't reason to worry. A legitimate general anxiety about the possibility of mutiny can realistically coincide with a sense that there doesn't seem to be any imminent threat. Such allowance for contradiction must extend to individuals who possess divergent personality traits. Vere is 'intrepid to the verge of temerity,' but he is also dreamy and meditative (1369–70). Vere's love of reading includes 'unconventional writers like Montaigne, who, free from cant and convention, honestly and in the spirit of common sense philosophize upon realities,' suggesting a genuine open-mindedness, even an experimental outlook, yet Vere's reading and reflection have led him to 'settled convictions,' forming a 'dike' against 'novel' social and political opinion (1371).

As Eric Sundquist's landmark reading of 'Benito Cereno' suggests, Melville was intrigued by the suspension of opposed ideas in an unresolved tension, a dialectic without synthesis. 'Unlike irony, which by deception, insinuation, or bald presumption revolts against the authority of one meaning to proclaim the authority of another, [Melville's] tautology,' says Sundquist, 'asserts the virtual equivalence of potentially different

3 Melville's novel is very much a creature of history. The narrative is set in 1797 during the Revolutionary-era war between Britain and France, a period of widespread unrest in the Royal Navy. Mounting frustration with impressment, poor living conditions, inadequate pay, and the protracted war with France fuelled mutinies at Spithead and Nore (two anchorages in England) as well as a number of smaller incidents in the Mediterranean in 1797. In addition, Melville drew aspects of *Billy Budd*'s storyline from the shipboard trial and execution of suspected mutineers aboard the USS *Somers* in 1842. This event had personal significance for Melville as his first cousin, Guert Gansevoort, was a first lieutenant aboard the *Somers* and participated in the mutiny investigation. Finally, *Billy Budd* was composed during an era of considerable economic turmoil and labour unrest in the United States, epitomized by the Haymarket riot and the subsequent trial of eight anarchists for conspiracy (1886–87). Taken together, these conflicts between the ruled and their rulers form a many-layered historical backdrop to Melville's narrative. For a reading of *Billy Budd* in relation to the *Somers* Mutiny, see Rogin 288–316. On the relation of *Billy Budd* to the Haymarket affair, see Trachtenberg 203.

authorities or meanings,' 'by bringing two meanings into such approximation as to collapse the distinction between them without literally doing so' (83, 91). In a similar vein, Sharon Cameron argues that the power of *Billy Budd* derives from the contradictory imperative to maintain and erode lines of distinction (183). In determining whether Vere's intensity in rushing Billy's trial and predetermining its outcome is a sign of sanity or insanity, the reader is expressly given a task comparable to distinguishing the colours in a rainbow: 'Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the first one blendingly enter into the other? So with sanity and insanity' (Melville 1407). For Cameron, the figure of the rainbow suggests that 'opposites – sanity and insanity and honor and ignominy – are ... indistinguishable' (185). But this gloss passes over an ambiguity in the passage and consequently pushes the interpretation too far in one direction. Does the phrase 'the colors' refer to violet and orange or the other colours of the rainbow? When looking at an actual rainbow or colour spectrum of light refracted through a prism, there really isn't any problem seeing that violet and orange are markedly different. For one thing, violet and orange are on opposite ends of the spectrum; other colours stand between them. But maintaining that clarity of distinction while moving from violet to orange is a different matter. That is to say, while it's not hard to see the opposed extremes, it is impossible to mark a clear and absolute barrier between any of the intervening colours, which do enter 'blendingly' into each other. The colours are on a gradient: violet blends into blue, blue into green, green into yellow, yellow into orange. So, while violet and orange (or sanity and insanity) are clearly at opposite ends of the gradient, Melville's figure suggests that there is no unambiguous line of demarcation between the colours though the two are visibly different. Differentiation and indistinguishability are thus both present in Melville's figure, which suggests thereby that the reader, who must judge Vere's mental state, has to keep in mind both the difference between opposites and the way that one can subtly and imperceptibly meld by degrees into the other.⁴

The deliberative process is thus both categorical (good is good; evil is evil) and non-categorical (some things can be, despite logic, one thing and the opposite at the same time). For example, while we know Billy is fundamentally honest, we also know that he is not above lying so as not to be a snitch (when asked by the drumhead court whether he has any

4 Noting the fact that violet and orange appear at the opposite ends of the spectrum, Thomas Claviez reads the rainbow as a figure for the clear demarcation of Vere's madness – a 'pronounced case' (36). In my view, the figure of the rainbow does not support a choice between indistinguishability (Cameron) or exact demarcation (Claviez) but insists on the coexistence of both concepts as essential to judgment.

awareness of 'aught savoring of' mutiny, Billy answers in the negative rather than play the part of an 'informer' [1411]). We reject, I think, the categorically rigorous judgment that Billy is dishonest because he is not wholly forthcoming with the drumhead court. While such a conclusion might be true in the world of logical exclusions, it is not particularly useful in the compromised world of human existence. Billy's honesty meets our pragmatic expectations. We can depend on him to be generally truthful, though not without exception.

At several points in the narrative, Melville suggests that the comprehension of characters and events necessary to the deliberative process requires something more than or different from mere analytic reason: we're told, for instance, that 'something else than mere shrewdness is perhaps needful for the due understanding of such a character as Billy Budd's' (1396). And, by way of explaining what seems inexplicable, the hatred motivating Claggart's scheme against Billy, the narrator says that 'to pass from a normal nature [such as the reader's] to him [Claggart] one must cross "the deadly space between"' (1382). The phrase 'the deadly space between' is a quote from 'The Battle of the Baltic' by Thomas Campbell (1744–1844), a poem commemorating one of Admiral Nelson's famous sea victories. In Campbell's poem the warring ships rush over 'the deadly space between' to engage in battle. Here the spatial image is turned into a figure for inquiry and deliberation but one that retains the warlike sense of conflict and uncertainty as one moves between antitheses (such as sanity/insanity, right/wrong, and just/unjust).

To amplify how one navigates this uncertain and hazardous 'space between' so as to understand a difficult character or a mystifying act such as the master-at-arms's false accusation, Melville quotes an 'honest scholar' 'now no more' (1382). The scholar opines 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' (1382). By 'spiritual insight,' Melville means something akin to the 'intuition' he attributes to Shakespeare in 'Hawthorne and His Mosses': 'But it is those deep far-away things in him [Shakespeare]; those occasional flashings-forth of the intuitive Truth in him; those short, quick probings at the very axis of reality; – these are the things that make Shakespeare Shakespeare' (Melville 1159–60). According to *Billy Budd's* narrator, to know a difficult or disguised human nature requires a form of insight deeper than the lawyer's diligent study of 'Coke and Blackstone' (1382). By intuition, rather than mere professional expertise, one can penetrate Claggart's apparent rationality to find the contradictory irrational impulse in the man, the 'natural depravity' which works with reason to achieve an 'atrocious' that 'would seem to partake of the insane' (1383). Working in an ad hoc and holistic fashion, intuition is open to impressions and feelings as well as to contradictions, perceiving while

not necessarily being able to explain the fact that Claggart can be simultaneously rational and irrational.

Like Melville, several noted American philosophers and jurists in the late nineteenth and early twentieth centuries were interested in the hard-to-define, amorphous power of intuition. William James, for instance, also turns to Shakespeare for an illustration of this kind of insight: 'Why, for instance, does the death of Othello so stir the spectator's blood and leave him with a sense of reconciliation?' James speculates, 'Shakespeare, whose mind supplied these means, could probably not have told why they were so effective' (985–86). For James, the authority of intuition appears to be discerned by the subject as deriving in part from its mysterious nature – it astonishes and seems to come from some 'deeper level' than mere rationality. In intuiting something, our 'thought obeys a *nexus*, but cannot name it' (988). '[A]sk your most educated friend,' says James, 'why Beethoven reminds him of Michael Angelo, or how it comes that a bare figure with unduly flexed joints, by the latter, can so suggest the moral tragedy of life,' and you will receive no adequate answer (988). Citing James, Judge Joseph C. Hutcheson Jr. and Justice Benjamin Cardozo candidly admit that in certain difficult cases judicial reasoning has to proceed 'by feeling' rather than 'by calculation.' The judge accepts the novel legal question in its confusing entirety, trying 'to feel, or hunch out a new category into which to place relations under his investigation,' a concept capable of fully addressing the particular circumstances of the case while serving the normative goal of establishing and/or modifying rules in light of an always developing sense of justice (see discussion of Hutcheson and Cardozo in Crane 754–55). Even Justice Holmes's deference to his professional role, his willingness to be 'the supple tool of power,' did not blind him to the 'avowed or unconscious' intuitions, moral feelings, biases, and customs that inevitably lie behind and animate the process of judgment (Rogat 249–50 [quoting Holmes]; Holmes, *Common Law* 1). As Holmes famously observed, 'The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding' ('Path' 167).

Vere himself is not averse to the intuitive form of judgment Holmes describes as the unseen foundation of legal decisions. The narrator tells us that 'something exceptional in the moral quality of Captain Vere made him, in earnest encounter with a fellow-man, a veritable touch-stone of that man's essential nature' (Melville 1401–02). However, when confronted with Claggart and his accusation, Vere's intuition fails: as to 'what was really

going on in [Claggart], [Vere's] feeling partook less of intuitional conviction than of strong suspicion clogged by strange dubieties' (1402). It is important that Vere's response to Claggart and later his conduct of the official inquiry into Billy's act come after the tale tells us that doubts and fears have occluded Vere's better intuitive sense. As Cameron and others have rightly observed, the temporal proximity of the events on board the *Bellipotent* to the Nore mutiny is critical to making Vere's behaviour 'intelligible' (Cameron 186). The potential threat of mutiny makes Vere less 'starry' and more fearful, less intuitive and more rigidly rationalistic, more likely to seek the comforting security of bright-line rules and either/or choices because nuanced judgment and ad hoc flexibility require a degree of confidence and security – something Vere implicitly acknowledges is missing as he urges the drumhead court that the threat of mutiny militates against any fine moral reasoning (Melville 1414). With Lionel Trilling and John Keats in mind, we might say that the fear of mutiny turns Vere toward the passive certainties of ideological thinking and away from the imagination's ability to 'remain in uncertainties, mysteries, and doubts' and the creative perspective capable of discerning new truths 'in the opposition of ideals, and in the felt awareness of the impact of new circumstances upon old forms of feeling and estimation' (Trilling, *Liberal Imagination* 298–99; see also Trilling, 'Poet as Hero' 245, 249–50).

We have now come to the critical moment of the tale: do we accept Vere's account of the case, in particular that the only issue before the court is whether Billy struck Claggart (Melville 1415)? As Delbanco puts it, 'Every reader of *Billy Budd* asks, Why? Why must Billy die?' Accepting Vere's account of the case and feeling that Melville 'sides' with his captain, Delbanco finds his answer to the question of why Billy must die 'in the crystal clarity of the Royal Navy's Articles of War' (309). As Vere puts it, merely to strike one's 'superior in grade' is, 'according to the Articles of War, a capital crime' (Melville 1415). However, considering the volume and intensity of the critical disagreement over Vere's judgment, one could reasonably conclude that Melville intended to make his readers struggle for themselves with the question before the drumhead court. Melville does not assume that his readers are well versed in military law or criminal law of any sort but rather assumes that they will independently ponder and attempt to think their way around the facts of the case and the law as summarized by Vere.

The questions inspired by the narrative, while not necessarily condemning Vere, prevent the reader from simply acquiescing in his handling of Billy's case. Indeed, much of the power of Melville's tale derives from the fact that it is an 'inside narrative' of Vere's reasoning, vicariously engaging us in that process and simultaneously spurring us to challenge it. While sympathizing with Vere and the difficulty of his situation, yet impelled by the question 'Why must Billy die?' the engaged reader makes further

inquiry. Perhaps the first thing that comes to mind is that if one accepts Vere's account of the case there is no need for deliberation at all. Once one had determined the objectionable act, nothing would remain for reflection – the law, by Vere's account, would be practically self-executing. Why convene a court and institute a trial proceeding if the law is as simple and unyieldingly strict as to be automatic in such a case? Indeed, does such a reflexive and automatic imposition of a rule actually conform to what we think of as legal judgment? Isn't our sense of the aptness of any legal rule's categories continually tested and revised in relation to the particular facts of any given case? In his dissent in *Adams v. Tanner*, Justice Brandeis cites the maxim *ex facto jus oritur* (the law arises from the fact) to indicate the interdependence between norms and facts – the judgment of a rule's validity 'must be based upon a consideration of relevant facts, actual or possible' (600). While 'there is a vagueness' in framing judgment as a dialectic between the general rule and the particulars of the case 'that may,' Justice Cardozo observes, 'dissatisfy' those seeking 'inflexible categories, clean-cut and definite compartments,' yet we cannot avoid the fact that even if the 'absolute and unconditioned' exist, we can know that reality only 'through its manifestations in the conditioned and the relative' (Cardozo 46–47). The automatic application of a bright-line rule would seem particularly inappropriate to a case considered by the members of the drumhead court and Vere himself to be difficult and even harrowing – Vere calls it 'exceptional' (Melville 1414).

Also, if the law is perfectly clear that the mere act of striking an officer is of itself a capital offence, as Vere says late in the proceeding, why does he earlier seek to 'confine [the court's] attention to the blow's consequence' (1415, 1412)? Why repeat the fact that Billy's blow killed Claggart if that fact is immaterial and yet bar evidence as to Billy's lack of homicidal or mutinous motivation as immaterial (1411–16)? Is Vere really saying that the law would mechanically require, without any further reflection or inquiry, the execution of a sailor who struck a superior while having a seizure or spasm of some sort (a condition not dissimilar to Billy's)? In addition, the drumhead court's queries regarding Billy's and Claggart's respective motivations suggest further lines of investigation, such as whether Claggart can be said to have been acting as a superior officer when he knowingly made a false charge of mutiny against Billy, an act that Vere warns Claggart is itself a capital offence (1401). How can Claggart's illegal calumny against Billy be an act in the execution of his office as a 'superior in grade'? If Billy had violently rejected an illegal order from Claggart that he steal from the ship's stores, would he still be liable for a capital crime under this statute? Also, while the average reader may not be familiar with military law, something about Vere's participation as chief witness, prosecutor, and judge will likely raise a question in the layperson's mind as to whether this procedure is fair or proper in a capital case.

Other than Billy, Vere is the sole witness to the event in question. Wouldn't the fact that he, of necessity, must be the chief witness in any trial of the matter require that the matter be deferred to later trial by the admiralty, the preference of his junior officers, thereby avoiding the apparent impropriety of his serving in different roles?⁵ The novel does not unambiguously answer these questions, but it does insistently provoke the reader to such interrogation, and that process is precisely the type of deliberation that Vere, not Melville, wants to avoid or truncate.

Vere rejects the balancing of opposed values and the observation of both differentiation and indistinguishability manifest in the two intuitive alternatives offered by members of the drumhead court. For instance, holding Billy until he can later be tried by the admiralty adheres to the law yet respects the moral qualms about the case felt by the drumhead court. Vere's reflexive argument against that option, that it would increase the likelihood of mutiny, is not convincingly explained. Why would according Billy Budd, who, unlike Claggart, is a well-liked member of the ship's crew, fair play and due process increase the chances of mutiny? Is instilling in the crew a fear of imminent execution the only way to achieve loyalty? The example the novel offers of Admiral Nelson suggests just the opposite (1368). Or, in the alternative, convicting Billy but mitigating the penalty in light of Claggart's malign and Billy's innocent motives, while conceptually messy (Billy, in effect, would be treated as both guilty and not guilty in such a ruling) and lacking the smooth, well-oiled quality of the mechanical imposition of a bright-line rule, feels like a more just result than executing an innocent man.

Even if we allow hypothetically that the condemnation and execution of a sailor in Billy's circumstances may, as a matter of historical fact, have been mandated by a tyrannical and patently unjust law (obviously unjust because, under predominant ideas of criminal responsibility both now and when the novel was composed, it requires the death penalty without any inquiry into the mental state of the defendant, punishing an unintentional or reflexive act with the same degree of severity as an act of premeditated and malign intent), we are nonetheless pushed by the novel to question Vere's conduct of Billy's trial. Melville's tale grips us in proportion to the degree to which we become caught up in both closely observing and judging Vere's judgment of Billy. While we recognize the difficult spot the case puts Vere in, we are impelled by the narrative to stand apart from him, his conclusion, and his justifications. The tension of the story, its drama, derives in large part from the reader's discovery that Vere's reasoning

5 Richard H. Weisberg condemns Vere's multiple breaches of the legal procedure under the relevant British naval laws (*Failure* 131–76). Richard Posner defends Vere's actions as consistent with precedent and appropriate in the exigent circumstances of threatened mutiny (155–65).

process is overdetermined by the circumstances. That is to say that while Vere is capable of a better, more flexible, and intuitive form of judgment, something about the array of factors in this case will drive him inevitably to a decision that will haunt him, the decision to take an innocent man's life. As a meditation on judgment, *Billy Budd* illustrates the necessity of both serving established rules and norms and also attending comprehensively to the particular facts of a given case in light of our broader conceptions of justice.

Vere's positing of an essential and unavoidable conflict between morality and law is self-justifying and hyperbolic. It is, like Huck's would-be prayer for divine guidance, a way of avoiding judgment, which is, of necessity in difficult cases, an uncertain, ad hoc process combining the rational weighing of facts, the careful reading of relevant rules and consideration of the policy behind those rules, and a intuitive sense of the just outcome in a more complex and far less absolute fashion than that suggested by Vere's formulation, 'Struck dead by an angel of God! Yet the angel must hang!' (1406) The best form of judgment, whether occurring in a literary representation or a judge's chambers, requires something more. Indeed, as Kenneth Burke suggests in *Counter-Statement*, literary art 'which converts each simplicity into a complexity, which ruins the possibility of ready hierarchies, [and] which concerns itself with the problematical, the experimental' can improve our conceptions of judgment by impeding our desire for easy certainties, 'particularly when [they] involve reversions to an ideology which has the deceptive allurements of tradition' (105). Thus, a reader whose rush to judgment is slowed down by a particularly compelling literary account of a complex moral/legal problem and enjoined to undertake a more deliberative process of judgment would seem to have been tangibly improved by the reading experience: 'Could action be destroyed by such an art, this art would be disastrous. But art can best serve to make action more labored' (Burke 106).

Of course, Melville was well aware that a more intuitive form of judgment can lead one disastrously astray. As Samuel Otter observes, *Pierre* relentlessly demonstrates that 'feelings are a treacherous ground for moral action' (238). However, different Melville tales centre on different weaknesses. Where one might fault Pierre or Ahab for being too credulous of what they take to be intuitive guidance, Vere's mistake is expressly described as a failure of intuition. A refusal of intuition is no wiser, for Melville, than a positive certainty that such beliefs will prove apt. To refuse the force of intuition is to commit the error of Vere, which is a kind of inversion of the error of Ahab. Or, to put this point in *Billy Budd's* terms, judgment requires navigation of the uncertain and hazardous 'space between' options, the place where opposed concepts blend into each other, and intuition (whether dependable or not) is indispensable to this process.

GREGG CRANE

Professor of English, University of Michigan

The Cambridge Introduction to the Nineteenth-Century American Novel (Cambridge University Press 2007)

Race, Citizenship, and Law in American Literature (Cambridge University Press 2002)

'Intuition: The "Unseen Thread" Connecting Emerson and James,' *Modern Intellectual History* 10:1 (2013)

'The Art of Judgment,' *American Literary History* 23:3 (2011)

WORKS CITED

Adams v. Tanner. 244 U.S. 590 (U.S. 1917)

Burke, Kenneth. *Counter-Statement*. Berkeley: University of California Press 1931

Cameron, Sharon. *Impersonality: Seven Essays*. Chicago: University of Chicago Press 2007. <http://dx.doi.org/10.7208/chicago/9780226091334.001.0001>

Cardozo, Benjamin N. *The Growth of the Law*. New Haven: Yale University Press 1924

Claviez, Thomas. 'Rainbows, Fogs, and Other Smokescreens: *Billy Budd* and the Question of Ethics.' *Arizona Quarterly: A Journal of American Literature, Culture, and Theory* 62 (2006), 31–46

Clemens, Samuel Langhorne. *Adventures of Huckleberry Finn*. New York: Norton 1977. [Mark Twain]

Cover, Robert M. *Justice Accused: Antislavery and the Judicial Process*. New Haven: Yale University Press 1975. <http://dx.doi.org/10.2307/1228235>

–. 'Nomos and Narrative.' *Narrative, Violence, and the Law: The Essays of Robert Cover*. Ann Arbor: University of Michigan Press 1992, 95–172

Crane, Gregg. 'The Art of Judgment.' *American Literary History* 23:4 (2011), 751–66. <http://dx.doi.org/10.1093/alh/ajro28>

Dare, Tim. 'Lawyers, Ethics, and *To Kill a Mockingbird*.' *Philosophy and Literature* 25:1 (2001), 127–41. <http://dx.doi.org/10.1353/phl.2001.0003>

Delbanco, Andrew. *Melville: His Word and Work*. New York: Knopf 2005

Delgado, Richard, and Jean Stefancic. 'Norms and Narratives: Can Judges Avoid Serious Moral Error?' *Texas Law Review* 68 (1991), 1929–60

Ferguson, Robert A. *Law and Letters in American Culture*. Cambridge, MA: Harvard University Press 1984

Franklin, H. '*Billy Budd* and Capital Punishment: A Tale of Three Centuries.' *American Literature* 69:2 (1997), 337–59. <http://dx.doi.org/10.2307/2928274>

Gilmore, Michael T. "'Speak, man!': *Billy Budd* in the Crucible of Reconstruction.' *American Literary History* 21:3 (2009), 492–517. <http://dx.doi.org/10.1093/alh/ajp022>

Holmes, Oliver Wendell. *The Common Law*. Boston: Little, Brown 1881

–. '*The Path of the Law*.' *The Essential Holmes*. Ed Richard Posner. Chicago: University of Chicago Press 1992, 160–77

- Hutchinson, Allan. *Dwelling on the Threshold: Critical Essays in Modern Legal Thought*. Toronto: Carswell 1988
- James, William. *The Principles of Psychology*. Cambridge, MA: Harvard University Press 1981
- Johnson, Barbara. 'Melville's Fist: The Execution of Billy Budd.' *Studies in Romanticism* 18:4 (1979), 567–92. <http://dx.doi.org/10.2307/25600211>
- Lee, Harper. *To Kill a Mockingbird*. New York: Harper 1960
- Loosemore, Philip. 'Revolution, Counterrevolution, and Natural Law in Billy Budd, Sailor.' *Criticism* 53:1 (2011), 99–126. <http://dx.doi.org/10.1353/crt.2011.0001>
- McWilliams, John P. 'Innocent Criminal or Criminal Innocence: The Trial in American Fiction.' *Law and American Literature: A Collection of Essays*. Ed Carl S. Smith, John P. McWilliams, and Maxwell Bloomfield. New York: Knopf 1983, 45–124
- Melville, Herman. *Pierre, or, The Ambiguities*, *Israel Potter: His Fifty Years of Exile*, *The Piazza Tales*, *The Confidence Man: His Masquerade*, *Uncollected Prose*, *Billy Budd, Sailor (An Inside Narrative)*. New York: Library of America 1984
- Otter, Samuel. *Melville's Anatomies*. Berkeley: University of California Press 1999
- Posner, Richard. *Law and Literature: A Misunderstood Relation*. Cambridge, MA: Harvard University Press 1988
- Rogat, Yosol. 'The Judge as Spectator.' *University of Chicago Law Review. University of Chicago. Law School* 31:2 (1964), 213–78. <http://dx.doi.org/10.2307/1598530>
- Rogin, Michael Paul. *Subversive Genealogy: The Politics and Art of Herman Melville*. Berkeley: University of California Press 1979
- Schiffman, Joseph. 'Melville's Final Stage, Irony: A Reexamination of Billy Budd Criticism.' *American Literature* 22:2 (May 1950), 128–36. <http://dx.doi.org/10.2307/2921745>
- Spanos, William V. *The Exceptionalist State and the State of Exception: Herman Melville's Billy Budd, Sailor*. Baltimore: Johns Hopkins University Press 2011
- Sundquist, Eric J. 'Suspense and Tautology in "Benito Cereno." *Herman Melville's Billy Budd, "Benito Cereno," "Bartleby the Scrivener," and Other Tales*. Ed Harold Bloom. New York: Chelsea House 1987, 81–106 (Repr. from *Glyph: Johns Hopkins Textual Studies* 8 [1981], 103–26)
- Thomas, Brook. *Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville*. Cambridge: Cambridge University Press 1987. <http://dx.doi.org/10.1017/CBO9780511570513>
- Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age*. New York: Hill and Wang 1982
- Trilling, Lionel. *The Liberal Imagination*. New York: New York Review of Books Classics 2008
- . 'The Poet as Hero: Keats in His Letters.' 1951. *The Moral Obligation to Be Intelligent: Selected Essays*. Ed Leon Wieseltier. New York: Farrar, Straus and Giroux 2000, 224–58
- Twining, William. *Karl Llewellyn and the Realist Movement*. London: Weidenfeld and Nicolson 1973

- Weisberg, Richard H. 'Coming of Age Some More: "Law and Literature" beyond the Cradle.' *Nova Law Review* 13 (1988), 107–24
- . *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*. New Haven: Yale University Press 1984
- Williams v. Walker-Thomas Furniture Company*. 350 F.2d 445 (D.C. Cir. 1965)
- Zink, Karl E. 'Herman Melville and the Forms – Irony and Social Criticism in *Billy Budd*.' *Accent* 12 (1952), 131–39