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**REVISITING A SEMINAL TEXT OF THE LAW &
LITERATURE MOVEMENT: A GIRARDIAN READING OF
HERMAN MELVILLE'S *BILLY BUDD, SAILOR****

James McBride, J.D., Ph.D.**

Ay, there is a mystery; but, to use a scriptural phrase, it is a “mystery of iniquity,” a matter for psychologic theologians to discuss. But what has a military court to do with it?

-Captain Vere in Herman Melville, *Billy Budd, Sailor*¹

All writers on the science of policy are agreed, and they agree with experience, that all governments must frequently infringe the rules of justice to support themselves; that truth must give way to dissimulation, honesty to convenience, and humanity itself to the reigning of interest. The whole of this mystery of iniquity is called the reason of state.

-Edmund Burke, *A Vindication of Natural Society*²

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1. *HERMAN MELVILLE, BILLY BUDD, SAILOR* 108 (Harrison Hayford and Merton M. Sealts, Jr., eds., The University of Chicago Press 1962) (1924) [hereinafter *BILLY BUDD*].

2. *EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY* 41-42 (Frank Pagano, ed., Liberty Fund 1982) (1756).

INTRODUCTION

At his death in 1891 Herman Melville left behind a number of unpublished texts including a collection of poems, and a manuscript entitled *Billy Budd, Sailor*.³ The corpus of *Billy Budd* was laid to rest in a tin bread box, held for safe-keeping by his wife Lizzie until her death in 1906.⁴ It was not until the 1920s when the manuscript was unearthed by Melville's granddaughters, Eleanor Metcalf and Frances Osbourne, that *Billy Budd* received its long-awaited resurrection as did the body of Melville's work.⁵

Billy Budd is the tale of a "Handsome Sailor,"⁶ impressed into service in 1797 (the year of the Great Mutiny in the British fleet) aboard a British man o' war, named the *Bellipotent*, from a merchant vessel, christened the *Rights of Man*.⁷ Melville's choice of ship's names is significant. Billy Budd moves from the new order that respects civil liberties to the old order, mired in the authoritarian ways of war. He is a charismatic, cheerful, yet naïve, youth whose very presence, for some inexplicable reason, brought peace and harmony to his shipmates aboard the *Rights of Man*.⁸ The old captain of the merchant vessel is sorry to lose his "peacemaker."⁹ As a foretopman who must do a very dangerous job (furling and unfurling the man o' war's sails from the heights of the masts), Billy is well-respected and admired by the crew for his natural vigor and competence. Although quiet, his ease of manner and lack of pretense endears him to his shipmates. However, all is not well aboard the *Bellipotent*.

Billy's physical beauty and popularity spark the envy of the master-at-arms, John Claggart, whose job is to ensure the acquiescence of the crew to the authority of the officers and to uncover and quell any murmurings of discontent.¹⁰ England is at war with France and Claggart plays the pivotal role of ensuring the loyalty of the crew. Under his authority as the master-at-arms, Claggart enjoys access to Captain Vere to report any signs of disloyalty or mutiny. Whereas Melville depicts Claggart, who exhibits "a peculiar ferreting genius"¹¹

3. CARL ROLLYSON & LISA PADDOCK, *HERMAN MELVILLE A TO Z: THE ESSENTIAL REFERENCE TO HIS LIFE AND WORK* 120 (2001).

4. *Id.* at 117, 120.

5. *Id.* at 120.

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

7. *Id.* at 47.

8. *Id.* at 49.

9. *Id.* at 47.

10. *Id.* at 64.

11. *Id.* at 67.

in unsavory spying on the crew, as disingenuous, Billy Budd is honest and forthright—a breath of fresh air from the *Rights of Man*. From what appears to be envy and jealousy, Claggart develops a “monomania”¹² about the Handsome Sailor and decides to lie to Vere, alleging that Billy Budd is involved in a mutinous conspiracy.¹³ Vere calls Billy to his cabin so that the Handsome Sailor can face his accuser.¹⁴ When Claggart makes known the charges, Billy is stunned.¹⁵

The story turns on Billy's tragic flaw. Although seemingly perfect in every other way, Billy suffers from a speech impediment.¹⁶ Faced by what he regards as an ignoble lie, the dumbfounded Billy cannot speak in his own defense, and answers in the only way he knows how. He hits Claggart with a blow of the fist that strikes the master-at-arms dead.¹⁷ Under the Articles of War, killing an officer while at sea during hostilities is punishable by death. Vere exclaims, “struck dead by an angel of God! But the angel must hang.”¹⁸ Vere is well aware of how Billy Budd is regarded by the crew. Indeed he himself exhibits an almost fatherly affection for the boy. Yet despite his feelings and the knowledge that Billy probably intended only to defend his honor, not kill Claggart, Vere convenes a drumhead court-martial and exerts pressure on the jury to convict Billy for Claggart's death.¹⁹ Billy is hung the next morning on the main yardarm before the assembled crew,²⁰ “a martyr to martial discipline.”²¹ Billy's noble bearing, acquiescence to his tragic fate, and dying words “God bless Captain Vere” suggest to many readers that Billy Budd's death was a miscarriage of justice.

Rediscovered during the turbulent 1960s-1970s, *Billy Budd* addressed a question that troubled many Americans: is the law just? Clergy, faculty, and students, as well as citizens from all walks of life, took to the streets during that era to protest what they saw as the injustices of the Vietnam War and racial discrimination. In acts of civil disobedience, protestors challenged what they regarded as unjust laws, whether they were laws imposing segregation or statutes

12. *Id.* at 90.

13. *Id.* at 94.

14. *Id.* at 97.

15. *Id.* at 98-99.

16. *Id.* at 82.

17. *Id.* at 99.

18. *Id.* at 101.

19. *Id.* at 101-114.

20. *Id.* at 123.

21. *Id.* at 121.

authorizing conscription for an unpopular war. Many could hear in the text of *Billy Budd* the echo of contemporary issues. Vere had argued that the letter of law had to be obeyed, even though it led to undesirable circumstances. Vere seemed to endorse the views of an “Establishment” that sought to use the police powers of the state to enforce “law and order.” But to many the sacrifice of a naïve, innocent youth, like many who would lose their innocence and their lives in Vietnam, for the sake of “law and order” came at too high a cost.

For legal scholars, this theme of *Billy Budd* was played out not only in the streets but also in the courtrooms of America. Recognizing the parallel between *Billy Budd* and the issues that faced the nation in the 1960s-1970s, the brilliant legal scholar Robert Cover described *Billy Budd* as a narrative of the “moral-formal dilemma”²² in which the dehiscence or gaping wound between law and morality was uncovered. As one commentator has noted, “Billy Budd represents one dilemma—the moral-formal dilemma—which posits the way courts and judges are limited by the straight-jacket of formal rules even as they recognize, but remain barred from following, the imperative to decide cases justly.”²³

Cover's characterization of *Billy Budd* as a “moral-formal dilemma” seemed to set the agenda for the disputes by legal scholars in the following decades over the relationship of the novella to the meaning and application of law. As a seminal text of the “Law & Literature Movement” in the 1970s-1980s, *Billy Budd* proved to be a battleground between advocates of positive and natural law, conservatives and liberals, and defenders of androcentric culture and feminists. These legal scholars disagreed on whether the law should have been applied to Billy, whether the law was misinterpreted by Vere, or whether the law was distorted to fit the ends of war and patriarchal culture. Despite their many differences, most legal scholars in the fledgling Law and Literature movement, however, attempted to redeem the law itself. If there was any injustice in Billy's execution, the responsibility fell on the shoulders of individuals (or, as feminist scholars suggested, men), not law. Whether or not the law should have been applied, the law itself was not to blame.

22. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 7 (1975).

23. Steven Wilf, *The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic*, 32 *CONN. L. REV.* 1675, 1676 (2000).

Legal scholars argued over whether Vere should have thrown off the “straight-jacket” of rules in the interest of justice by refusing to apply the law to Billy Budd. They took note of Billy’s intent and asked whether Billy was guilty of murder or manslaughter. They assumed that Melville condemned Billy to his death at the hands of Vere because the Handsome Sailor may have been, under the law, in some way guilty, although the punishment excessive.

In contrast to the legal scholars of the Law and Literature movement who debated these ramifications of the novella for the interpretation of law, I approached the text from an altogether different perspective. Before becoming a lawyer, I enjoyed a long academic career as a professor of religious studies. I was immediately struck that legal scholars heretofore had simply overlooked what was obvious about Melville’s novella. Billy Budd was not condemned because he was guilty. He was condemned because he was innocent. This conclusion may seem manifestly unjust, and flies in the face of what most legal professionals hold dear. Nonetheless, it seemed apparent to me that in the novella Billy Budd was not on trial for breaking the law. Rather, Melville had placed the law itself in the dock, and the law was adjudged guilty. According to this reading of *Billy Budd*, law does not serve the ends of justice but rather has an ulterior motive, grounded in its links to the religious origins of human societies, which expresses itself unconsciously in the acts of modern-day communities. Mimetic rivalries and violence that have threatened to tear human societies apart since time immemorial are controlled through the collective murder of a surrogate victim whose death is acted out in rituals of religion and its latter-day heir, law.

This article sets forth the argument that in *Billy Budd* Melville indicted the law itself as the perpetrator of the murder of an innocent victim, albeit a murder necessary to suppress the threat of a spiral of violence involving both individuals aboard the *Bellipotent* and the British fleet-at-large. In doing so, the article enlists the theoretical perspective of the literary critic and theologian Rene Girard who has devoted his life’s work to the exposition of this sacrificial mechanism.

OVERVIEW

Part I illustrates the debate between such legal scholars as Richard Weisberg and Richard Posner (and the reiteration of their positions by Jami Ellison and Edwin Yoder) who disagreed over

whether the law should have been applied by Captain Vere to Billy Budd and whether the end result was an injustice. Part I also highlights the objections of feminist legal scholars, such as Judith Schenck Koffler and Robin West, who found in the Articles of War, as carried out in *Billy Budd*, a reflection of androcentric psychology and patriarchal ideology. Part I concludes that in the minds of these scholars it is human beings who are flawed, not the law.

Part II addresses the intimate relationship between law and violence by examining Jacques Derrida's reading of Walter Benjamin's classic essay *Zur Kritik der Gewalt* ("On the Critique of Violence") written in 1913. Derrida argued that Benjamin's analysis of law-founding violence, which establishes the authority of the state, and law-preserving violence, which is manifest in the state's police powers, exposes a mystical foundation to law, i.e., a primary inscription of violence which the state attempts to efface through fictitious alibis of the law's alleged nonviolent character.

Part III focuses on Melville's experiences with law, religion and violence. Part III.A shows that Melville himself was well-acquainted with this intimate relationship between law and violence, particularly by witnessing the horrors of flogging and slavery during the pre-Civil War period. Part III.B discusses Melville's religious convictions, drawn from his experience at sea, and how his understanding of human depravity and the prelapsarian innocence of the South Sea Islanders influenced his earlier literary works, such as *Moby Dick*, and set the stage for his last great work, *Billy Budd*.

Part IV introduces Rene Girard's theory of the scapegoat. Girard argued that mimesis is the foundation of human behavior. We imitate each other. Desire is not a psychological phenomenon, but rather arises from social relationships in which the individual desires what the one imitated possesses. Imitation breeds rivalry, and rivalry violence. Violence triggers revenge; revenge causes reciprocal violence. The spiral of violence threatens the very existence of the social order. In this context, human beings have stumbled upon a practice that successfully vents the violence that would otherwise rend apart community. This instrument of peace is the collective murder of a surrogate victim. Part IV.A explains the mechanics of sacrificial violence, the way in which transgressions are projected by the community onto the victim, the intimate relationship between violence and the sacred, and the function of religion as a means to repress from consciousness the real meaning behind the execution of the condemned.

Part IV.B explains the modern existence of the sacrificial mechanism in decay under the guise of law. As the latter-day heir of religion, law, according to Girard, is infused with the aura of the sacred. But the origins of the sacred are not benign. The sacred arises out of sacrificial violence. Hence, law itself, grounded in its religious antecedent, is founded on violence. Derrida, like Benjamin, argued that the state is inscribed in the fabric of our social being by violence, but neither Derrida nor Benjamin explained its particulars. Girard's suggestion is that the state, like its predecessor, religion, is founded on the sacrificial mechanism which the state, like religion, enlists for the alleged well-being of the society as a whole. From the Girardian perspective, the collective murder is not committed for the sake of the scapegoat's personal transgressions. The victim of capital punishment is killed as a surrogate for all those whose transgressions have caused the suffering of countless members of the community. Through the victim's death, reciprocal violence is interdicted and hostilities are vented from the body politic.

Part V applies Girard's model of interpretation to Melville's novella, *Billy Budd*. Part V.A describes Billy Budd himself and the ways in which Melville signals to the reader the Handsome Sailor's status as a surrogate victim. Richard Weisberg has disagreed with a reading of Billy Budd as a Christ figure. Part V.A. examines Weisberg's arguments and offers reasons to reject his conclusion. Part V.B. examines the mimetic rivalries that structure the plot of the novella. John Claggart, the *Bellipotent's* master-at-arms, both desires and envies Billy Budd. He would like to enjoy the same easy confidence, the same respect of the crew, and the same innocence as the Handsome Sailor. But Melville suggests that it is not in Claggart's nature. Claggart's mimetic desire turns to hatred, and victimizes Billy Budd for what he was, not for what he did. Captain Vere is the mimetic rival of the British naval hero Admiral Nelson who exhibits a charismatic leadership and courage absent from Vere himself. Melville suggests that the personality of Nelson, as a "pre-Vere sailor," resonates in the persona of Billy Budd. Hence, Vere's personal agenda, i.e., his jealousy of Nelson, becomes the driving force behind the execution of Billy Budd. Finally, Billy's shipmates are the mimetic rivals of the *Bellipotent's* officers. They envy the officers' stature, authority and wealth. The officers fear the potential for revolution which threatens to bring down both the British monarchy and the Royal Navy. The execution of Billy Budd, upon

whom is writ large the potential for insurrection, cuts short the murmurings of revolt.

Part VI draws the implications of a Girardian reading of *Billy Budd* for the interpretation of law. Law is a vehicle for what Melville called (using a Biblical phrase) the “mystery of iniquity,” whereby injustice in the form of the sacrificial mechanism occurs for the sake of the community-at-large. Melville’s *Billy Budd* therefore suggests that law itself is based upon blood-letting, and that the official justifications for executions are a form of legal self-delusion.

Part VII offers a conclusion that parts ways with Girard. As a theologian, Girard believes that the crucifixion of Jesus as the central narrative of Christianity exposes the workings of the sacrificial mechanism in human societies. This revelation, if it is not obscured by religion, has the potential to unmask what human beings are actually doing in executing the condemned. The passion narrative of Christ symbolizes the first and last death of the surrogate victim and challenges societies to abandon the use of the sacrificial mechanism. Girard’s theological hope, however, is one that I fear will fall upon deaf ears.

I. CONFLICTING INTERPRETATIONS OF *BILLY BUDD* BY LEGAL SCHOLARS

At the 1987 Law and Humanities Institute Symposium which launched the premier issue of the *Cardozo Studies in Law and Literature*,²⁴ Richard Weisberg provoked controversy, with his innovative, yet, in his own words, “legalistic” interpretation of the text.²⁵ He asserted that the manuscript was an exercise in what he termed “considerate communication”²⁶—a disingenuousness in which Captain Vere hides his envy of Billy Budd behind his authority as an officer being compelled by the law to condemn the Handsome Sailor for mutiny. According to Weisberg, Vere’s motivation for the condemnation of Billy Budd arose out of his intense jealousy of Admiral Horatio Nelson²⁷ and a covert strategy of (self-) deception,

24. Richard H. Weisberg, *Accepting the Inside Narrator's Challenge: Billy Budd and the 'Legalistic' Reader*, 1 *CARDOZO STUDIES IN L. & LITERATURE*, 27-48 (1989) [hereinafter *Legalistic Reader*].

25. *Id.*

26. *Id.* at 34.

27. Admiral Horatio Nelson commanded the British fleet at Trafalgar where in 1805 he decisively defeated the French and Spanish navies. As a national hero, Nelson was (and still

whereby the Handsome Sailor serves unconsciously as a surrogate for Vere's rival. For Weisberg, Billy embodies the "pre-Vere" sailor—a seaman typified by Nelson who evinces a "natural authority," a camaraderie with his crew and a charismatic heroism in the face of danger.²⁸ Vere, whom Weisberg calls a "bookish" man, does not exhibit the same sort of natural vigor and leadership as Nelson and only enjoys the begrudging respect of the crew by virtue of his rank. Richard Posner quickly dismissed Weisberg's views as a "Straussian"²⁹ or esoteric interpretation which hypothesized a hidden dimension to the text allegedly introduced by Melville—a reading deemed "implausible" by Posner.³⁰ For Weisberg, the problem lies in Vere's misapplication of the law, particularly his refusal to abide by the requirements of the Articles of War.³¹ "I believe, at any rate, that [Melville] had not problems with Law, only with those whose private, distorted vision gained authority over it from time to time."³² Posner, on the other hand, did not censure "Vere's mode of proceeding" which he found "harsh, perhaps horrible, but not illegal."³³ Although Weisberg and Posner were at odds over the interpretation of the text, they did have one thing in common. The law itself was not to blame. The law was and is innocent.³⁴

is) revered as the consummate naval officer. See DAVID HOWARTH & STEPHEN HOWARTH, *LORD NELSON: THE IMMORTAL MEMORY* (1989).

28. *Legalistic Reader*, *supra* note 24, at 28-29.

29. Richard Posner, *Comment on Richard Weisberg's Interpretation of Billy Budd*, 1 *CARDOZO STUDIES IN L. & LITERATURE* 72 (1989) [hereinafter Posner, *Comment on Weisberg*]. The term "Straussian" references the view of the conservative twentieth century philosopher Leo Strauss (d. 1973) who taught that classical philosophical texts were written on two different levels, an exoteric and esoteric level. The exoteric level was written for a commonplace understanding of the text. The esoteric level contained the true meaning of the text and was only accessible to an intellectual elite. According to Strauss, the esoteric level was sometimes forgotten, only to be rediscovered through a careful reading of the text by an enlightened scholar. See, e.g., LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* (1952). Weisberg's theory of "considerate communication" which suggests that Vere's motives cannot be taken at face-value implies that Melville created an esoteric (as well as exoteric) level to *Billy Budd* that only a careful reader would uncover.

30. Posner, *Comment on Weisberg*, *supra* note 29, at 72.

31. *Legalistic Reader*, *supra* note 24, at 28. The "Articles of War" constituted the disciplinary code imposed on officers and crews during times of conflict. Among the behaviors condemned, spying, aid and comfort to the enemy, disobeying a superior's order, cowardice, negligence, disaffection, desertion, and mutiny which were all punishable by death. See 22 George II, C.33 (1749).

32. *Legalistic Reader*, *supra* note 24, at 44.

33. Richard A. Posner, *From Billy Budd to Buchenwald*, 96 *YALE L.J.* 1173, 1183 (1987).

34. "The execution of Billy Budd is presented as a justifiable act within the implied if distinctly earthbound moral universe of the novella." Posner, *Comment on Weisberg*, *supra*

Weisberg and Posner's positions in the debate have been echoed more recently in law review articles on *Billy Budd*. In one 1999 law review article entitled *The Prosecution of Billy Budd (Ultra Vires of Positive Law)*, Jami Ellison, pursuing Melville's textual suggestion of Vere's madness, asked whether Vere's "unhinged" application of the law was a reflection of Vere himself being "unhinged."³⁵ Like Weisberg, Ellison suggested that Vere's "tragic flaw" leads to the unjust execution of Billy Budd.³⁶ Ellison argued that because he was "not a man of full consciousness," Vere did not understand that there are boundaries to law and that in some instances (which Ellison called the *ultra vires* of positive law) the application of the law would not be appropriate.³⁷ These instances call for a sense of "prosecutorial and judicial discretion" which Vere lacked.³⁸ Edwin Yoder, in a pair of law review articles in 2000 and 2001, advanced a utilitarian defense of the law, holding that the "rationale of military justice"³⁹ demands "lucid recognition that larger 'justice' for the many may require a more severe, indeed pitiless, brand of literal justice to the solitary defendant."⁴⁰ Yoder implicitly rejected the position advanced by Ellison because the circumstances under which Vere made his decision to prosecute Billy Budd for violating the Articles of War occurred at a time of conflict when the very existence of the Empire was at stake. Hence, reflecting a Posnerian position, Yoder concluded that Vere made his "tragic choice" to apply and enforce the law, even though Billy Budd's seeming innocence begs mercy.⁴¹ In these latter-day incarnations of the Weisberg-Posner debate, Ellison and Yoder may disagree on whether to apply the law, but they too have one thing in common: the law itself remains unscathed.

A more radical critique of the law might be expected from feminist critics. Judith Schenck Koffler's interpretation of Melville's text focused on its subversion of gender characteristics, evident in the

note 29, at 78; "Recall that Melville does not here attack the Law." *Legalistic Reader*, *supra* note 24, at 43.

35. Jami K. Ellison, *The Prosecution of Billy Budd (Ultra Vires of Positive Law)*, 35 WILLAMETTE L. REV. 57, 68-70, 79 (1999) (citing BILLY BUDD, *supra* note 1, at 102); Cf., *Legalistic Reader*, *supra* note 24, at 29 (describing the hanging of Billy Budd as "lawless, indeed insane.").

36. Ellison, *supra* note 35, at 73.

37. *Id.* at 69.

38. *Id.* at 81.

39. Edwin M. Yoder, Jr., *Fated Boy: Billy Budd and the Laws of War*, 31 J. MAR. L. & COM. 615, 619 (2000).

40. Edwin M. Yoder, *Melville's Billy Budd and the Trials of Captain Vere*, 45 ST. LOUIS U. L.J. 1109, 1116 (2001)

41. *Id.* at 1121.

feminization of the Handsome Sailor, and the redemption of homoeroticism from a heterosexist culture.⁴² But Koffler did not take the law to task; instead, she read the text as an exposition of “patriarchal compulsion,”⁴³ which presses into its service both men and the law. To Koffler the law itself was not at fault. It is the pathologization of the feminine that bears responsibility for the unjust execution of the androgynous Budd.⁴⁴ In her response to Koffler’s interpretation, Robin West argued that “it does indeed matter whether Vere’s verdict was right or wrong. . . . it matters whether or not Vere’s verdict is correct, whether it is mandated by law, whether it was ‘necessary.’”⁴⁵ West fantasized a rewritten text that hypothesized what would happen if Captain Vere were a woman.⁴⁶ She suggested that a female judge would regard Billy Budd differently because s/he (a female Vere) would understand who the Handsome Sailor really was—a victim.⁴⁷ As a victim, Billy Budd is rendered female, whose silence seals his/her fate.⁴⁸ West concluded that only if women break that silence will the “morally innocent” be “legally innocent” as well.⁴⁹ A feminist revolution in Western consciousness would redeem the victims of misogyny and free law from its indenture to a male-dominated social order.⁵⁰ Until that happens, Melville’s novella, “a sacred text of patriarchy, not law,”⁵¹ would continue to reflect androcentric *distortions* of law.

One might think that the controversies over Melville’s “unfinished” manuscript have exhausted themselves and should be committed to the academic graveyard. Indeed, even Weisberg concluded some ten years ago, “[t]he debate about Herman Melville’s *Billy Budd Sailor* has just about outlived its welcome.”⁵² So at the risk of Billy Budd being an unwelcome guest, I propose to invite the parousia of the Handsome Sailor once more and revive consideration

42. Judith Schenck Koffler, *The Feminine Presence in Billy Budd*, 1 CARDOZO STUDIES IN L. & LITERATURE 1, 2 (1989).

43. *Id.* at 10.

44. *Id.* at 12-13.

45. Robin West, *The Feminine Silence: A Response to Professor Koffler*, 1 CARDOZO STUDIES IN L. & LITERATURE 15, 18 (1989).

46. *Id.* at 16.

47. *Id.* at 17-18.

48. *Id.* at 19.

49. *Id.* at 17.

50. *Id.* at 19-20.

51. *Id.* at 16.

52. Richard H. Weisberg, *Three Lessons from Law and Literature*, 27 LOY. L.A. L. REV. 285, 287 (1993).

of Melville's novella as a prism through which we might glimpse darkly the meaning of law and justice.

II. VIOLENCE AND THE LAW

There is nothing new about the suggestion that the law is inscribed with violence. Almost twenty years ago, Robert Cover argued, "death and pain are at the center of legal interpretation."⁵³ "[I]n order to do violence safely and effectively, responsibility for the violence must be shared: law must operate as a system of cues and signals to many actors who would otherwise be unwilling, incapable or irresponsible in their violent acts."⁵⁴ Violence is an appendage of the law, but in Billy Budd's case many legal scholars, like Weisberg and West, argued that the law was applied unjustly. But is the real question whether the law was applied unjustly . . . or whether the law itself is unjust?

Some thirteen years ago in his brilliant *tour de force* entitled *Force of Law: The "Mystical Foundation of Authority,"*⁵⁵ Jacques Derrida maintained that justice is an impossibility.⁵⁶ The possibility of justice is precluded by the "mystical foundation of authority." Derrida argued that the authority of the state is grounded in violence and that the state through its ideology, e.g., divine right of kings, constitutionalism, attempts to obscure its violent origins through "legitimate fictions."⁵⁷ His lecture—a critical reading of Walter Benjamin's political article *Critique of Violence (Zur Kritik der Gewalt)*⁵⁸—concluded that violence was therefore not an appendage of

53. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986).

54. *Id.*

55. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"* 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990).

56. "Justice in itself, if such a thing exists, [is] outside or beyond law . . . Justice is an experience of the impossible." *Id.* at 945, 947. For Derrida, justice always remains on the horizon as a future, an *avenir* (*à-venir*, "to come"), rather than a present. *Id.* at 969. Derrida relates the coming of justice to the work of deconstruction that exposes the injustice of the law and the injustices of the present. *Id.* at 945.

57. *Id.* at 939.

58. WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277-300 (Peter Demetz ed., Edmund Jephcott trans., Harcourt Brace Jovanovich 1978) [hereinafter *Critique of Violence*]. Benjamin wrote this essay four years before exhibiting what his friend, the Kabbalist scholar Gershom Scholem, called "signs of a turning" (*Anzeichen einer Wendung*) from anarchism to a redemptive politics fusing Jewish mysticism and Marxism. WALTER BENJAMIN, BRIEFE 368 (Gershom Scholem & Theodor W. Adorno eds.) (1966). See James McBride, *Marooned in the Realm of the*

the law but rather its very bone and sinew.⁵⁹ There is, wrote Benjamin, “something rotten in the law.”⁶⁰ The incestual relationship between law and violence may be found in what Benjamin called “law making violence” (*die rechtsetzende Gewalt*) and “law preserving violence” (*die rechtserhaltende Gewalt*).⁶¹ The “mystical foundation of authority” therefore originates in violence, which at the moment of law’s inception is neither legal nor illegal.⁶² The founding violence of the state is complemented by law preserving violence, most notably in its police powers.⁶³ Quoting Benjamin, Derrida noted “the specter of ghostly apparition [i.e., the law’s violence] is all-pervasive.”⁶⁴ The state is conscious of its mystical foundation of authority, and fears its *Doppelgänger*, revolutionary violence, which likewise is a “fundamental, founding violence.”⁶⁵ This revolutionary moment which overturns the founding and law-preserving violence of the state is an *épokhè*, a “suspension” of law or “instance of non-law.... But it is also,” observed Derrida, “the whole history of law.”⁶⁶ Revolution is not therefore lawlessness, but rather an unmasking of the “mystical foundation” of law’s authority. It is the reinscription, albeit in a new guise, of the same founding violence which marked the state that it overthrows. The new order reiterates the old. Although history is strewn with a succession of states, law always remains, sustained by violence and human suffering and blood.⁶⁷ As Benjamin chillingly reminded us, shortly before escaping the Nazis by suicide in 1940, “there is no document of civilization which is not at the same time a document of barbarism.”⁶⁸

Profane: Walter Benjamin's Synthesis of Kabbalah and Communism, 57 J. AM. ACAD. RELIGION 241 (1989).

59. “Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground.” Derrida, *supra* note 55, at 943.

60. *Critique of Violence*, *supra* note 58, at 286.

61. Derrida, *supra* note 55, at 981.

62. *Id.* at 943.

63. *Id.* at 1011.

64. *Id.* (citing *Critique of Violence*, *supra* note 58, at 287).

65. *Id.* at 989.

66. *Id.* at 991.

67. *Id.*

68. WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 253, 258 (Hannah Arendt ed., Harry Zohn trans.) (1968) [hereinafter *Philosophy of History*].

III. MELVILLE'S EXPERIENCES WITH LAW, RELIGION, AND VIOLENCE

A. *Melville and Violence*

Melville was no stranger to the role that law played in legitimating the most heinous forms of violence. He bore witness to such violence while serving in the Merchant Marine and the United States Navy, both of which engaged in flogging sailors who had transgressed martial rules of discipline.⁶⁹ His novel *White Jacket; or The World in a Man-of-War*, based on his experiences aboard the U.S.S. *United States* in 1843-44,⁷⁰ inveighed against the practice.

[A]t the first blow, the boy, shouting "My God! Oh! my God!" writhed and leaped so as to displace the gratings, and scatter the nine tails of the scourge all over his person. At the next blow he howled, leaped, and raged in unendurable torture. "What are you stopping for, boatswain's-mate?" cried the Captain. "Lay on!" and the whole dozen was applied.⁷¹

Although it may be apocryphal, it is said that a copy of the book, published in March 1850, was placed on the desk of each Congressman during the House debate over the proposal to abolish the practice.⁷²

69. ROLLYSON, *supra* note 3, at 66.

70. Commenting on the "authenticity" of *WHITE JACKET*, Rear Admiral S.R. Franklin observed that "[Melville] gives no names, but to any one who served in the Frigate *United States* it was easy to recognise the men by their sobriquets." S.R. FRANKLIN, *MEMORIES OF A REAR-ADMIRAL WHO HAS SERVED FOR MORE THAN HALF A CENTURY IN THE NAVY OF THE UNITED STATES* (1898).

71. HERMAN MELVILLE, *WHITE JACKET; OR, THE WORLD IN A MAN-OF-WAR*, 138-139 (Grove Press 1956) (1850) [hereinafter *WHITE JACKET*].

72. ROLLYSON, *supra* note 3, at 66. The petition to abolish flogging in the United States Navy was introduced in the House on December 31, 1849.

Mr. MANN, of Pennsylvania, submitted the following resolution; which, giving rise to debate, lies over under the rule:

Whereas, by an act of Congress, entitled "An act for the government of the navy of the United States," passed 2d March, 1799—sec. 1, art 3--seamen and marines are allowed to be flogged for certain offences, if the captain shall think proper, which by the 4th article of the same act is limited to twelve lashes on the bare back with *cat-o'-nine-tails*:

And whereas, public sentiment, humanity, and every principle of republicanism and justice demand that such a barbarous law should be stricken from our national statute book: Therefore,

Melville's repugnance at the exhibition of such brutality was equally reflected in his opposition to slavery. Although he deeply respected his father-in-law Lemuel Shaw, the Chief Justice of the Supreme Judicial Court of Massachusetts, Shaw's failure in the *Thomas Sims Case*⁷³ to rule the Fugitive Slave Act of 1850 unconstitutional, despite Shaw's own abhorrence of slavery, deeply disappointed Melville.⁷⁴ Shaw noted that "slavery and the slave trade are contrary to justice and natural right,"⁷⁵ but he concluded that "we are not entitled to consider this a new question; we must consider it settled and determined by authorities, which it would be a dereliction of official duty, and a disregard of judicial responsibility to overlook."⁷⁶ Melville's hostility toward slavery led him to support Lincoln during the Presidential campaign of 1860 and the new President's efforts during the Civil War to preserve the Union and effect the reconciliation of North and South.

Melville's opposition to flogging and slavery evidenced his recognition of the intimate relationship between law and violence. He was not oblivious to the relationship between the degradation of human beings and the welfare of the state and the community, whether it be the enforcement of discipline at sea, allegedly necessary for the security of the country, or the scourge of forced labor, allegedly necessary for the nation's economy. Yet, Melville's distaste for the association between violence and law in the 1840s-1860s does not identify violence with the law *per se*. Instead, much as many legal scholars have argued with regard to *Billy Budd*, Melville appears to be condemning the unjust misapplication of the law. "You see a human

Be it resolved, That the Committee on Naval Affairs be instructed to inquire into the expediency of reporting a bill repealing that part of said act of Congress authorizing the flogging of American seamen, and providing, if necessary, some other mode of punishment better adapted to civilization and the age in which we live.

1833-1873 CONG. GLOBE, 31st Cong., 1st Sess. 90 (1849).

73. 61 Mass. (7 Cush.) 285 (1851).

74. An escaped slave, Sims was arrested and imprisoned in a Boston jail by a United States Marshal acting under the authority of a Commissioner of the United States Circuit Court for Massachusetts. Sims's abolitionist supporters filed a petition for habeas corpus on the grounds that the commissioner was not a judge of the United States and therefore did not have the power to detain him. Shaw held that the authority for Sims's detention was grounded in an act of 1793 (*Fugitives from Justice--Fugitives from Labour. An Act Respecting Fugitives from Justice, and Persons Escaping from Service of Their Masters*. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793)), and that the Act had been found constitutional by the Massachusetts Supreme Court in 1823 (*Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11 (1823)) and the United States Supreme Court in 1842 (*Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)).

75. *Thomas Sims's Case*, 61 Mass. (7 Cush.) 285, 313 (1851).

76. *Id.* at 304.

being, stripped like a slave; scourged worse than a hound,” wrote Melville in *White Jacket*. “And for what? For things not essentially criminal, but only made so by arbitrary laws.”⁷⁷ Are we then to accept the interpretations by these legal scholars, who regard the hanging of Billy Budd as simply a perversion of the law?

Flogging was outlawed by statute in 1850⁷⁸ and slavery was abolished by the Thirteenth Amendment in December 1865.⁷⁹ By the time Melville wrote *Billy Budd* in the late 1880s, these alleged misapplications of the law had been corrected. To be sure, Melville could have been dramatizing a conflict in which he had played a role twenty and thirty years earlier, but the meaning of *Billy Budd* runs deeper. It is a meaning drawn from a reading of the text that recognizes the pivotal importance of the Protestant cultural milieu of nineteenth century America and the Christian theological trope of sacrifice. But that reading of *Billy* requires an understanding of Melville’s own religious convictions.

B. Melville’s Religious Convictions

Melville’s religious convictions centered on the Calvinist doctrines of “Original Sin” and predestination, dramatically played out both in his own experiences as a seafarer and in his masterwork, *Moby Dick*. Throughout his career, Melville was inexorably enticed by the sea, for the sea embodied the depths of unconscious human experience, a transcendent mystery whose image eluded human understanding, yet nonetheless beckoned all, some to their doom and some to their salvation. Melville noted that men by the thousand in the burgeoning metropolis of early 19th century New York were drawn to the water, standing and gazing from the docks that lined the island, if for no other reason than to wonder what secrets about themselves it held. “[T]hat same image, we ourselves see in all rivers and oceans. It is the image of the ungraspable phantom of life; and this is the key to it all.”⁸⁰

In *Moby Dick*, Ishmael and his shipmates are, in the words of Melville – “Isolatoees” – wanderers in exile from the Garden.⁸¹ It is a part of human nature, according to Melville, that we are thrown into

77. *WHITE JACKET*, *supra* note 71 at 139.

78. Act of Sept. 28, 1850, ch. 80, 9 Stat. 513 (1850).

79. U.S. CONST. amend. XIII, § 1.

80. HERMAN MELVILLE, *MOBY DICK* 3 (Random House 1950) (1851) [hereinafter *MOBY DICK*].

81. *Id.* at 119.

this existence, doomed never quite to understand the reasons for our being and yet, in the restless state of alienation, fated always to seek its meaning. The story of the white whale is a parable of this quest to confront these depths and to ring from “the opening maw of hell”, i.e., from the whale, some explanation. Of course it is commonplace, to speak of Captain Ahab’s “monomania”⁸²—the vengeful rage for his “unmasting” by whale’s jaws—as a sign of human hubris, the legacy of Original Sin, and the whale as a sign of nature’s brute force and unrelenting capacity for evil. Yet, Ahab too is an “Adam, staggering beneath the piled centuries since Paradise,”⁸³ born into the world, estranged, and ultimately seeking some respite and peace.

Melville indicates that the whiteness of Moby Dick forewarns mortality (“the pallor of the dead”⁸⁴), and yet the whale is paradoxically both a sign of death and life. The sperm whale not only exhibits a “[t]hirst for human blood;”⁸⁵ he also engenders paradisiacal reverie.⁸⁶ The sperm from the reservoir in the great whale’s head is squeezed by Ishmael and his mates as a means to process the whale oil into a useful product. In so doing, the sailors are bathed in a regenerative harmony—an anagnoretic remembrance of the promise of life—a community of brothers.⁸⁷

This is the paradox of the sea monster (*L. monstrum*, divine), a creation of the divine, which symbolizes the mystery of existence. Melville suggests that the whale is incomprehensible. “[S]peak, mighty head, and tell us the secret thing that is in thee,” cries Ahab, addressing this “Sphynx,”⁸⁸ but the whale’s face is an unreasoning mask. It is the challenge laid down by the narrator to the reader. “[H]ow may unlettered Ishmael hope to read the awful Chaldee of the Sperm Whale’s brow? I but put that brow before you. Read it if you can.”⁸⁹

The events that follow—the destruction of the vessel and its whaling boats and with them all hands, save for Ishmael—are, in the words of Melville, “all predestinated.”⁹⁰ Ishmael bears witness to the apocalyptic fury of the whale and is pulled down into the maelstrom of

82. *Id.* at 176-86.

83. *Id.* at 533.

84. *Id.* at 191.

85. *Id.* at 179.

86. *Id.* at 413-17.

87. *Id.*

88. *Id.* at 310.

89. *Id.* at 346.

90. *Id.* at 168.

the sea only to rise again, carried by a coffin, in a vivid image of the resurrection of the dead.

From the spiritual themes and imagery of *Moby Dick*, one might imagine that Melville was particularly devout, but he was not. Although raised in the Dutch Reformed tradition, Melville exhibited an aversion to many of the manifestations of 19th century American Protestantism. His South Sea novels are replete with his distaste for Protestant missionaries. His admiration of Polynesian peoples of the Marquesas and the Sandwich islands is evident in his novels *Typee*⁹¹ and *Omoo*.⁹² It is also readily apparent that he regarded missionaries as corrupters of a prelapsarian culture. No "race," according to Melville, was "less disposed, by nature to the monitions of Christianity."⁹³ Speaking through the words of a Russian sea captain's memoirs of the South Seas, Melville asserted that the missions movement has "given birth to ignorance, hypocrisy, and a hatred of all other modes of faith, which was once foreign to the open and benevolent character of the Tahitian."⁹⁴ Melville vocalized his criticism of American missionaries during his sojourn in Hawaii during the summer of 1843 and his support for a British takeover of the islands to break missionary influence that he was compelled to flee, enlisting in the U.S. Navy in August, 1843 aboard the U.S.S. frigate, *United States*.⁹⁵

Although nominally Protestant, Melville was not an active member of any congregation, even though he joined the All Souls' Church in New York City in 1883.⁹⁶ He did not particularly defend the rituals of Christianity, at least no more than the religious practices of other traditions. Melville scandalized his readers in *Moby Dick* by suggesting that Ishmael had no qualms about turning into an "idolater" because Presbyterian forms of worship were no more superior in the eyes of God than those of any other faith, including those of "pagan" peoples.⁹⁷

91. HERMAN MELVILLE, *TYPEE: A PEEP AT POLYNESIAN LIFE 178-82* (The Library of America 1982) (1846).

92. HERMAN MELVILLE, *OMOO: A NARRATIVE OF ADVENTURES IN THE SOUTH SEAS 177-89* (Harrison Hayford & Walter Blair, eds., Hendricks House 1969) (1847).

93. *Id.* at 170.

94. *Id.* at 182.

95. ROLLYSON, *supra* note 3, at 119.

96. *Id.* at XXIII.

97. *MOBY DICK*, *supra* note 80, at 48-52. Queequeg takes his idol Yojo to his bosom when, fearing he is about to die, he lies in his own coffin—the same coffin on which Ishmael is resurrected at the novel's end. *Id.* at 472-77.

He made a pilgrimage of sorts to the Holy Land in 1856-57 that later provided material for his epic poem *Clarel* written in 1876.⁹⁸ *Clarel* laments the loss of faith in the modern world of 19th century America, but does not provide any beatific vision of personal salvation. As his friend Nathaniel Hawthorne recalled, Melville could neither “believe, nor be comfortable in his disbelief”—an agnosticism reflected in Mortmain, a central character in Melville’s *Clarel*, who, in despair, hangs himself.⁹⁹ Christian worship had therefore become empty to Melville who bemoaned his contemporaries’ celebration of Christmas, drained of any religious meaning, in *The Margrave’s Birthnight*,¹⁰⁰ written contemporaneously with *Billy Budd*, in which serfs celebrate their lord’s birthday in his castle, but there is “no host.”

Melville’s discomfort with his Protestant contemporaries seems to have been, at least in part, a reaction to what he probably considered was the trivialization of religion in the wake of America’s so-called Second Great Awakening (1800-1830), which de-emphasized the Calvinist doctrine of predestination and held forth the promise of salvation in a “personal” relationship with Jesus.¹⁰¹ The legacy of the revivals which swept the United States from its frontiers to its port cities during the early 19th century suggested that anyone could achieve redemption solely by a change of heart and good works and that a new, morally superior, individual would replace the old, who was mired in the uncertainty of predestination. Nonetheless, this new Christianity of the nineteenth century missions movement did not abandon Puritanism. The “new Christian” of the revivals exuded what Melville considered a kind of moral smugness, typified in the attitudes of missionaries, who conflated this attitude with racial condescension towards native peoples abroad.¹⁰²

Melville, in short, would not brook any relationship with *this* sort of Christianity.¹⁰³ Nonetheless, Melville did not abandon Protestant beliefs altogether. He did hold to one article of faith—the notion of Original Sin. As he himself confessed in *Hawthorne and His*

98. ROLLYSON, *supra* note 3, at 29.

99. HERMAN MELVILLE, *Clarel*, reprinted in *SELECTED POEMS OF HERMAN MELVILLE: A READER’S EDITION* 265-268 (Robert Penn Warren ed., 1970).

100. HERMAN MELVILLE, *The Margrave’s Birthnight*, reprinted in *THE POEMS OF HERMAN MELVILLE* 315-316 (Douglas Robillard, ed., 2000).

101. WILLIAM G. MCLOUGHLIN, *REVIVALS, AWAKENINGS, AND REFORM: AN ESSAY ON RELIGION AND SOCIAL CHANGE IN AMERICA, 1607-1977 passim* (1978).

102. OMOO, *supra* note 92, at 177-89.

103. “[I]t was in this spirit that Melville himself was once to allude to ‘that most true Christian doctrine of the utter nothingness of good works.’” NEWTON ARVIN, *HERMAN MELVILLE* 33 (1950).

Manses, he could not escape a “Calvinistic sense of Innate Depravity and Original Sin, from whose visitations, in some shape or other, no deeply thinking mind is always & wholly free.”¹⁰⁴

The Christian doctrine of “Original Sin” fits what some literary historians have called his brooding, if not altogether bipolar, personality.¹⁰⁵ Melville’s texts are shot through with this notion of the fallenness of the human being. Melville laments the loss of a prelapsarian paradise—most evident in his glimpses of Polynesian societies before their corruption by the missionaries that shine through the palimpsest of his novels—and relentlessly attacks human hubris, so evident in his portrait of Ahab in *Moby Dick*.¹⁰⁶ Ishmael, resurrected from the depths, bears witness to the consequences of such folly.

The hand of Melville’s religious convictions can be read between the lines of his last great work. Billy Budd is faced by human depravity in the form of John Claggart who assumes a “mantle of respectability.”¹⁰⁷ Like the South Sea islanders, innocent in their prelapsarian paradise, Billy too is a “young Adam before the Fall.”¹⁰⁸ Yet knowing what has become of his beloved South Sea Islanders exposed to the rapaciousness of Americans and Europeans, Billy Budd is portrayed by Melville as one who is fated to be sacrificed. Melville’s narrative therefore lends itself to a reading that seeks to explore and understand the dynamics of this sacrificial mechanism and the reasons that lie behind it.

104. 1 HERSHEL PARKER, *HERMAN MELVILLE: A BIOGRAPHY* 755 (1996).

105. See JOHN UPDIKE, *MORE MATTER: ESSAYS AND CRITICISM* 146-147 (1999); see also KAY REDFIELD JAMISON, *TOUCHED WITH FIRE: MANIC-DEPRESSIVE ILLNESS AND THE ARTISTIC TEMPERAMENT* 119 (1996); *HANDBOOK OF POSITIVE PSYCHOLOGY* 183 n.5 (C.R. Snyder & Shane J. Lopez, eds., 2002).

106. “[Melville’s] grotesque is not simply a mannerism, but a way of grasping the absurd realities of an age when prelapsarian innocence must give way to a sense of deceit, guilt, and corruption.” RICHARD RULAND AND MALCOM BRADBURY, *FROM PURITANISM TO POSTMODERNISM: A HISTORY OF AMERICAN LITERATURE* 163 (1991).

107. BILLY BUDD, *supra* note 1, at 75.

108. *Id.* at 94.

IV. RENE GIRARD

A. *The Girardian Theory of the Scapegoat*

In a succession of books over the past thirty years, Rene Girard has outlined and elaborated a theory that identifies the order of human societies, modern, ancient, and “primitive,” with a sacrificial mechanism—a collective murder of a victim whose death expels the violence that would otherwise sunder the social order and reconciles individuals to each other—and generates cultural institutions that guarantee stability, including religion and the state.

Girard’s fundamental premise is that human beings act mimetically.¹⁰⁹ Their wants and desires are based on imitation.¹¹⁰ There is no need for recourse to Freudian theories of self-preservative instinct or libido.¹¹¹ Instead, according to Girard, “*the subject desires the object because the rival desires it.*”¹¹² Social discord therefore originates in mimetic rivalries, competitions in which the object of desire is frequently eclipsed by the rivalry itself. Rivalry breeds violence, and in human social orders based upon collectivities rather than individuality, “[t]he slightest outbreak of violence can bring about a catastrophic escalation.”¹¹³ Violence is a contagion that spirals to ever greater dimensions, spurred on by reciprocal violent acts between groups of individuals.¹¹⁴ Unchecked, mimetic rivalry threatens the very existence of any human society. In its place, “primitive” and ancient societies devised a mechanism that would allow for the expiation of destructive violence and the establishment of order: sacrifice. “The function of sacrifice,” argues Girard, “is to quell violence within the community and to prevent conflicts from erupting.”¹¹⁵

Paradoxically, argues Girard, only violence can end violence.¹¹⁶ In lieu of the violence spiraling out of mimetic rivalry, a sacrificial victim is chosen not only as the surrogate upon which all the transgressions by rivals are superimposed, but also as a symbol of

109. RENE GIRARD, *VIOLENCE AND THE SACRED* 146 (Patrick Gregory trans., The Johns Hopkins University Press 1977) (1972) [hereinafter *VIOLENCE*].

110. *Id.*

111. *Id.* at 183.

112. *Id.* at 145 (emphasis in the original).

113. *Id.* at 30.

114. *Id.* at 26.

115. *Id.* at 14.

116. *Id.* at 26.

transgression itself.¹¹⁷ Girard contends, for example, that this *pharmakos* (Φαρμαχος) or scapegoat in ancient Hellenic societies became the repository for the affect generated by mimetic rivalries.¹¹⁸ He notes that the Greek term *pharmikon* (Φαρμακον) means both poison and its antidote.¹¹⁹ The sacrificial victim therefore is deemed both the source of the strife that besets the social order and its cure.¹²⁰ The death of the scapegoat functions as a type of inoculation that “quell[s] violence within the community and prevent[s] conflicts from erupting.”¹²¹ Likewise, ancient Hebraic society used the scapegoat, chosen from a pair of goats by lot and bearing the sins of the community at large. By driving the scapegoat over a cliff or into the desert, violence, which would otherwise threaten to tear apart the community, was expelled.¹²²

The viability of this sacrificial mechanism depends on a number of factors. First, although it may be alleged that the victim is guilty of some transgression, the allegation functions merely as an alibi to justify the victim’s selection.¹²³ What is required to ensure the success of the sacrificial mechanism is “the murder of somebody, no matter whom—a figure, chosen as it were, at random.”¹²⁴ Second, according to Girard, the victim is chosen not for the alleged transgression but rather for the signs that the victim bears.¹²⁵ The chosen one may be “the lame, the blind, the crippled,”¹²⁶ i.e., bearing any sign that differentiates the victim from other members of his or her own community. Likewise, the sacrificial victims of heroic myth

117. *Id.* at 79.

118. *Id.* at 95.

119. *Id.*

120. *Id.*

121. *Id.* at 14.

122.

And he shall take the two goats, and present them before the Lord at the door of the tabernacle of the scapegoat. And Aaron shall bring the goat upon which the Lord’s lot fell, and offer him for a sin offering. But the goat, on which the lot fell to be the scapegoat, shall be presented alive before the Lord, to make an atonement with him, and to let him go for a scapegoat into the wilderness.

Leviticus 16:7-10.

123. VIOLENCE, *supra* note 109, at 81-82.

124. VIOLENCE, *supra* note 109, at 218. “The crucial fact is that the choice of the victim is arbitrary.” *Id.* at 257. Girard is exaggerating here since the victim must signify to the community in very particular ways.

125. *See, e.g., id.* at 68-88, (Girard’s discussion of Sophocles’s Oedipus (“swollen foot”) as a surrogate victim).

126. RENE GIRARD, THE SCAPEGOAT 31-32 (Yvonne Freccero trans., The Johns Hopkins University Press 1986) (1982) [hereinafter THE SCAPEGOAT].

include “those who are exceptionally beautiful and free of all blemish.”¹²⁷

The community’s perception of the victim reflects a crucial aspect of the sacrificial mechanism necessary for the effective inoculation of the community against future violence.¹²⁸ The members of the community who engage in the sacrifice must view the surrogate victim as both similar to and different from themselves.¹²⁹ If the sacrificial victim is too different from themselves, it would not be possible to project the affect arising from relations with mimetic rivals onto the sacrificial victim.¹³⁰ If the sacrificial victim is too similar to themselves, the scapegoat appears to be just another mimetic rival whose death would trigger a new round of violence initiated by those who identified the victim as one of their own.¹³¹ To work effectively, the substitution of victim for mimetic rival must not be conscious.¹³² The signs of “otherness”—strange appearance, strange behavior, strange origins—introduce the gaps between victim and community, conscious and unconscious mind, needed to vent violence safely in an act of *catharsis*.¹³³

Whereas mimetic rivalry exacerbates difference within the community, the sacrificial act unites the community in opposition to the surrogate victim. The members of the community move from the phase of mimetic rivalry to the phase of sacrificial mechanism “because the victim genuinely *passes* as guilty.”¹³⁴ To choose a victim who is actually guilty risks revenge and a spiral of violence. The transition from mimetic rivalry to sacrifice is therefore marked by a misapprehension. As typified in its most extreme form, e.g., a lynch mob, the victim must be seen as guilty because he or she is chosen, else the victim would not be there.¹³⁵ “So flagrant a disregard of the

127. *Id.*

128. VIOLENCE, *supra* note 109, at 269-73.

129. *Id.* at 271.

130. *Id.* at 39.

131. *Id.*

132. THE SCAPEGOAT, *supra* note 126, at 110.

133. VIOLENCE, *supra* note 109, at 287. Girard again uses a Greek medical term *catharsis* (an evacuation of humors judged to be toxic to humans) as a metaphor to explain the way in which the violence is evacuated from the body politic through the sacrificial mechanism.

134. RENE GIRARD, THINGS HIDDEN SINCE THE FOUNDATION OF THE WORLD 169 (Stephen Bann & Michael Metteer trans., Stanford University Press 1987) (1978) (emphasis added) [hereinafter FOUNDATION OF THE WORLD]. “The true ‘scapegoats’ are those whom men have never recognized as such, in whose guilt they have an unshaken belief.” *Id.* at 46.

135. *Id.*

principle of guilt,” argues Girard, “strikes us as absurd.”¹³⁶ Girard suggests that the sacrificial mechanism has its own logic that sweeps the rationality of guilt and innocence before it. This “final paroxysm of mimeticism”¹³⁷—the community members’ imitation of each other in the vilification of the scapegoat—overcomes the legacy of a “previous weaker mimeticism”¹³⁸—the community members’ imitation and envy of each other—which fragmented the community in violent rivalries. As a “monstrous double”¹³⁹ of mimetic rivals, the surrogate victim incorporates all differences within the community, and aligning the entire community against him- or herself, extinguishes all difference in the decisive [*L. decidere*, “to cut”] act of bloodletting¹⁴⁰ that reconciles members of the community to each other.¹⁴¹ As Girard observed, the execution “of a single individual is substituted for the universal onslaught of reciprocal violence.”¹⁴²

This collective murder of the victim yields a semiotics of sacrifice. The surrogate victim represents the signifier; the signified is found in the meaning conferred by the community on the victim; and the union of the two in the sign of victimage produces reconciliation.¹⁴³ Paradoxically, the vilification of the surrogate victim in the period preceding death metamorphoses in its wake into reverence. Hence, the scapegoat, once the emblem of vilification, yields to an image of social peace and harmony. Violence begets the

136. VIOLENCE, *supra* note 109, at 26.

137. THE SCAPEGOAT, *supra* note 126, at 165.

138. *Id.*

139. VIOLENCE, *supra* note 109, at 271.

140. THE SCAPEGOAT, *supra* note 126, at 114.

141. VIOLENCE, *supra* note 109, at 83.

142. *Id.* at 77.

143. FOUNDATION OF THE WORLD, *supra* note 134, at 103. Girard is analyzing the social significance of the component parts to the linguistic sign of human sacrifice from the perspective of semiotics. This “science of signs” was developed by Ferdinand de Saussure in his classic work, *Course in General Linguistics*.

A language is a system of signs expressing ideas, and hence comparable to writing, the deaf-and-dumb alphabet, symbolic rites, forms of politeness, military signals, and so on. It is simply the most important of such systems.

It is therefore possible to conceive of a science *which studies the roles of signs as a part of social life*. It would form part of social psychology, and hence of general psychology. We shall call it *semiology* (from the Greek *semeion*, ‘sign’).

FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 15 (Charles Bally et al. eds., Roy Harris trans., Open Court 1986) (1972). In Saussure’s system, the signifier is the perceptible image, e.g., a written or oral expression, a photograph, the signified is the underlying concept, and the sign is the link between signifier and signified; *See, e.g.*, GERALD PRINCE, *A DICTIONARY OF NARRATOLOGY* 87 (1987).

“gratuitous gift”¹⁴⁴ of nonviolence. The hatreds grounded in mimetic rivalries have exhausted themselves, expunged by the sacrificial act of the scapegoat’s death.

The power of the victim’s transfiguration from an object of vilification to an icon of reverence gives birth to the sacred.¹⁴⁵ Violence and the sacred have an intimate relationship, or in some sense are identified as one.¹⁴⁶ For Girard, “[t]he sacred is the sum of human assumptions resulting from collective transferences focused on a reconciliatory victim at the conclusion of a mimetic crisis.”¹⁴⁷ Henceforth, the charisma of the victim infuses the victim’s name, possessions, words—indeed the touch of the victim and all those individuals or things that he or she touched—with the power of the holy. As the sign of the transcendence of individuation and the unanimity of the community, the holy is grounded in the violent death of the victim that reconciles the community’s members, one with another.¹⁴⁸

The power of the collective murder is so impressed upon the minds of the community that the act is subject to repetition. The sign of victimage that reconciles the community is transferable, and moves historically from victim to victim. The community launches itself into a quest for other victims who mime and transcend the first; yet, at the same time, the original victim is metamorphosed by the community into a persona that hides the makings of the scapegoat mechanism by progressively masking, disguising, and failing to recognize it.¹⁴⁹ This process, argues Girard, is called religion. “Religion, in its broadest sense, then, must be another term for that obscurity that surrounds man’s efforts to defend himself by curative and preventive means against his own violence.”¹⁵⁰

144. VIOLENCE, *supra* note 109, at 258-59.

145. Functionalists have long associated religion with society itself. “If religion has given birth to all that is essential in society, it is because the idea of society is the soul of religion.” EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 419 (J.W. Swain trans., 1968). However, Girard claims that he has taken this contention one step further by identifying the origins of this otherwise mysterious relationship. See *FOUNDATION OF THE WORLD*, *supra* note 134, at 82.

146. “I have used the phrase ‘violence and the sacred’; I might as well have said ‘violence or the sacred.’ For the operations of violence and the sacred are ultimately the same process.” VIOLENCE, *supra* note 109, at 258.

147. *FOUNDATION OF THE WORLD*, *supra* note 134, at 42.

148. VIOLENCE, *supra* note 109, at 259 (“[M]en are only capable of reconciling their differences at the expense of a third party. The best men can hope for in their quest for nonviolence is the unanimity-minus-one of the surrogate victim.”).

149. *Id.* at 249.

150. *Id.* at 23.

To use a Feuerbachian trope,¹⁵¹ the “essence of religion” is “protective misapprehension.”¹⁵² The divinization of the victim helps both to suppress consciousness of the collective murder and the guilt associated with it. By rending the surrogate victim (a symbol of the reconciliation of the community) into a deity, the community effaces the memory of its own participation in the sacrifice of the scapegoat. It is a short step from suppression of guilt to divine will and predestination. The scapegoat can now be remembered as one “chosen,” not by fellow humans, but by Providence, to reconcile the community through his or her own death.

Girard notes that, particularly in “primitive” and ancient societies, religion is the vehicle for the repetition of the collective murder through the development of sacrificial rites. Religion is therefore marked by a “double substitution.”¹⁵³ The historical victim substitutes for the original mimetic rival. In ritual, the ritual victim substitutes for the historical victim.¹⁵⁴ Because the sacred, generated by the collective murder, has been separated over and above the community and the ritual victim is a creature of the sacred, ritual victims are chosen from among those who in some measure are regarded as not belonging to the community. They may be animals or human beings. If human beings, then they may be chosen due to their status as outsiders to the community or they may be made to appear so. Even the act of choosing one from within the community as a ritual victim transforms that individual from profane insider into sacred outsider. The marginality of the ritual victim never exists in a perfect equilibrium of inside and outside.¹⁵⁵ Nonetheless, the ritual victim must straddle this inside/outside boundary to vent the violence that would otherwise threaten the existence of the community.

The process by which the collective murder is portrayed in myth is exemplified, according to Girard, in the phenomenon of “doubles.”¹⁵⁶ Mimetic rivalry produces sets of doubles, in which any given individual will see in the rival his or her opposite who desires

151. LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Prometheus Books 1989) (1841).

152. *VIOLENCE*, *supra* note 109, at 271.

153. *Id.* at 102.

154. *Id.* To illustrate Girard’s point, one need only think of the historical figure Jesus who substitutes for the mimetic rivals of the figures which populate the Gospel narratives, and the transformation of the historical Jesus into the Biblical Christ of the Christian community which reiterated his sacrifice in the mass as a ritualized reenactment of the Christ’s death and resurrection.

155. *Id.* at 272.

156. *Id.* at 79.

the object that he or she desires. Hence, identity breeds difference, which becomes intolerable. The object that apparently was the source of rivalry is eclipsed by the rivalry itself. Resolution of the conflict can only arrive through the elimination of the double, seen as "other."¹⁵⁷ Girard argues that Western myth is replete with examples of such doubling, frequently depicted as internecine struggle between brothers or even twins, e.g., Cain and Abel, Romulus and Remus.¹⁵⁸ Cain's jealousy of his brother Abel's offering results in Abel's murder.¹⁵⁹ Romulus slays his brother Remus over a dispute regarding the boundaries of what is to become Rome.¹⁶⁰ In each case, the sibling rivalry ending in murder rests as the foundation of the community that follows, i.e., the Cainite clan and the city of Rome. Here, both Abel and Remus symbolize the victim of collective murder that is inscribed in the founding of communal authority.¹⁶¹

It is apparent that Western culture—from Hellenic Dionysiac cults and Hebraic traditions of the scapegoat to the central ritual of Christianity—provides a rich source of material for Girard's theory. Western secular societies tend to think that they have transcended the distasteful passions of human sacrifice. Mass religion suppresses thoughts of collective murder and the theological interpretations of the sacred tend to be a sanitized version of reconciliation. If the centrality of sacrifice has receded in modern consciousness, what does the scapegoat mechanism have to do with the law?

B. Law as a Sacrificial Mechanism in Modern Society

If we are to believe Girard, religion, which conceals the origins of the sacred even from itself, is not simply one cultural manifestation among many nor is it an appendage to cultural institutions.¹⁶² Religion is the fountainhead for cultural manifestations, like law, which ensure the stability of the social order.¹⁶³ Although the power of religious institutions in Western culture has receded since Enlightenment, the sacrificial mechanism still appears in world history, most notably in totalitarian movements that scapegoat groups of human beings, e.g., "the Jews, the aristocrats, the bourgeois, the faithful of such and such a

157. FOUNDATION OF THE WORLD, *supra* note 134, at 32.

158. *Id.* at 38-39.

159. *Id.* at 144-149.

160. *Id.* at 146-149.

161. *Id.*

162. VIOLENCE, *supra* note 109, at 92.

163. *Id.* at 23.

religion, and miscreants of all kinds.”¹⁶⁴ Of course, Western secular societies pride themselves on unmasking the scapegoat mechanism of such movements, and believe that these aberrations of human behavior will progressively disappear under the scrutiny of enlightened reflection.¹⁶⁵

Girard, however, suggests that we have forgotten that law itself is a child of the sacrificial mechanism.¹⁶⁶ Law, as a vehicle for the collective punishment of transgressors, is imbued with a religious aura.¹⁶⁷ We mark this fact well in the popular sanctification of the nation-state, for example, the controversies over flag burning¹⁶⁸ and the Pledge of Allegiance.¹⁶⁹ Girard observes that “[e]ven when this theology disappears, as has happened in our culture, the transcendental quality of the system remains intact. . . .”¹⁷⁰ The *imprimatur* of the divine still remains in halls of the United States Supreme Court with the display of the motto “In God We Trust.” The residue of religious belief may appear to be merely historical artifacts, quaint and curious reminders of our past, but Girard asserts that the “concept of legal punishment [cannot] be divorced from its original impulse.”¹⁷¹ Law, like religion, may attempt to efface its origins, but the sense of *mysterium tremendum* surrounding the law suggests that this repression is not free from irruption.¹⁷²

It is understood that human sacrifice *qua* sacrifice finds no home in the nomenclature of American law. However, the law frequently evidences a sacrificial mechanism in decay.¹⁷³ While what we might regard as the more egregious injustices of sacrifice, such as,

164. FOUNDATION OF THE WORLD, *supra* note 134, at 129.

165. *Id.* at 126-127.

166. VIOLENCE, *supra* note 109, at 22-23.

167. *Id.* at 23.

168. See, e.g., James McBride, “*Is Nothing Sacred?*”: *Flag Desecration, the Constitution and the Establishment of Religion*, 65 ST. JOHN’S L. REV. 297-324 (1991). Flag-burning, for example, is commonly called flag desecration, i.e., the de-sacralization or profanation of an object deemed by many to be sacred. The sacred character of the flag, as a symbol of the nation, illustrates Emile Durkheim’s notion of the totemic representation of society as religion itself. *Id.*

169. See *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002), *amended and superceded by* 328 F.3d 466 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 384 (2003), and *cert. denied*, 124 S. Ct. 386 (2003).

170. VIOLENCE, *supra* note 109, at 23-24.

171. *Id.* at 299.

172. See generally RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (John W. Harvey trans., Oxford University Press 1923) (1917).

173. VIOLENCE, *supra* note 109, at 23.

the arbitrary selection of the victim, have all but disappeared,¹⁷⁴ vestiges of the sacrificial mechanism remain. The punishment or execution of the condemned is justified by theories of legal retribution and deterrence, including, sentencing not just for the crime of which the individual is accused, but also for the sake of society itself.

As Walter Benjamin suggested, there is “something rotten” in the law.¹⁷⁵ Girard contends that this “something” “is invariably a corpse.”¹⁷⁶ Girard’s reading of the law is consonant with Derrida’s interpretation of Benjamin. In his reading of Benjamin’s essay *On the Critique of Violence*, Derrida argued that law is synonymous with violence. “If the legal system fully manifests itself in the possibility of the death penalty, to abolish the penalty is not to touch upon one *dispositif* among others, it is to disavow the very principle of law.”¹⁷⁷ The law is thereby marked by death, its symbol being the corpse. Likewise, from the standpoint of the scapegoat theory, Girard implies that the state bears the “mark of Cain”¹⁷⁸ by which it is guilty of the collective murder without which the community could not exist, let alone function. The critique of the state therefore begins with the critique of religion that hides and obscures both its origins and the wellspring of its power.¹⁷⁹

174. Unfortunately, it is still possible (despite the best efforts of organizations like Cardozo’s Innocence Project) and constitutional in the United States to execute the innocent. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993); See also James McBride, *Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty*, in CAPITAL PUNISHMENT 182-202 (Glen H. Stassen ed., 1998) [hereinafter *Capital Punishment*].

175. *Critique of Violence*, *supra* note 58, at 286.

176. FOUNDATION OF THE WORLD, *supra* note 134, at 165. Girard argues that the sacrificial mechanism and the body of the victim are the foundation of both religion and the social order. *Id.* at 163-67.

177. Derrida, *supra* note 55, at 1005.

178. *Genesis* 4:15.

179. In this respect, Girard’s theory uncannily sounds like the Marxist interpretation of civil society. “Thus, the criticism of Heaven is transformed into the criticism of earth, the *criticism of religion* into the *criticism of law*, and the *criticism of theology* into the *criticism of politics*.” Karl Marx, *Contribution to the Critique of Hegel’s Philosophy of Right*, in THE MARX-ENGELS READER 12 (Robert C. Tucker ed., 1972). Both believe that religion promotes a “false consciousness.” However, where Marx believes theology to be the handmaiden of such a “false consciousness,” Girard holds that theology unmasks the illusionary world of religion.

V. APPLICATION OF GIRARDIAN THEORY TO *BILLY BUDD*A. *Reading Billy Budd Through a Girardian Lens: Billy Budd as a Surrogate Victim*

In the postlapsarian world of the fleet, the law, as a sign of human fallenness, is the legacy of Original Sin. The law holds human passions in check. It is for Melville a necessity, for without it human depravity would envelop even “civilized” Western cultures. There is, however, something distasteful about the law, as it is an indelible reminder of the loss of paradise. This disturbing nature of the law itself is the substance of *Billy Budd*. For Melville, the events aboard the *Bellipotent*, suffused by Calvinist predestination, expose the hidden dimension of the law and set the wheels of the sacrificial mechanism in motion.

Billy Budd’s palpable naivete renders him an outsider to the worldly-wise community of seafarers.¹⁸⁰ Dansker, a fellow mate whose wiles have served him into old age, wonders, “what might eventually befall a nature like that.”¹⁸¹ Melville reiterates that Billy Budd is a “Fated boy,”¹⁸² held in a “vice of fate.”¹⁸³ In the Melvillian phrase from *Moby Dick*, he is “predestinated” to be a victim. Early in the novella, illustrating Billy’s reaction to his impressment, Melville compares him to an animal—like one to be led to the slaughter—who may divine his destiny but acquiesces to it. “[H]e was, without knowing it, practically a fatalist.”¹⁸⁴

Billy Budd is to be a victim of circumstances that run beyond his control for it is his charisma and physical beauty that trigger the mimetic rivalry which spells his doom. Melville waxes eloquent about his sculpted body, comparing him to a Hercules carved in stone from classical Greece¹⁸⁵ and “an Apollo with a portmanteau.”¹⁸⁶ He appears to be a demigod whose mother must have been “favored by Love and the Graces.”¹⁸⁷ Dubbed “Beauty” by his mates aboard the *Bellipotent*,¹⁸⁸ he is compared by Melville to a “Handsome Sailor,”

180. BILLY BUDD, *supra* note 1, at 52.

181. *Id.* at 70.

182. *Id.* at 99.

183. *Id.* at 119.

184. *Id.* at 49.

185. *Id.* at 51.

186. *Id.* at 48.

187. *Id.* at 51.

188. *Id.* at 72.

whom the narrator saw long ago on the Liverpool dock, whose body bore witness to his prowess as a “mighty boxer or wrestler.”¹⁸⁹ The Handsome Sailor’s physical presence is compared to that of an Assyrian bull, fashioned by priests, to whom passersby gave spontaneous homage. In short, he is a god made flesh, not unlike Alexander the Great whose mythic “curbing”¹⁹⁰ of his “divine” steed Bucephalus presaged his dominion over the world and consequent apotheosis. Billy Budd is anointed by Melville to be such a “Handsome Sailor,”¹⁹¹ as equally fated as his namesake whose stature as “a native African of the unadulterated blood of Ham” suggests that Billy too will be victimized by unwarranted prejudice.¹⁹² Melville crafts a persona of the latter-day “Handsome Sailor” that is transparent, as if the physical beauty could not hide any possible imperfections of character. “[M]oral nature was seldom out of keeping with the physical make.”¹⁹³ Virtue exudes from his very being and the placidity in its wake ensures the peace of the community of seafarers that surrounds him.¹⁹⁴

The victim, here as in his personal experiences and fictive narratives, is an “upright barbarian.”¹⁹⁵ Richard Weisberg has argued that the very use of the term “barbarian” indicates that Billy Budd cannot be read as a Christ figure whose death reconciles humanity. Likewise, he concluded that the Handsome Sailor’s welcoming, yet uncomprehending reaction, to the visit of the chaplain hours before his execution suggests that a kerygmatic reading of Billy Budd is remiss.¹⁹⁶ This conclusion, however, is misplaced. Weisberg, for example, neglected to point out that Melville described Billy Budd as an “upright barbarian, much such perhaps as Adam presumably might have been ere the urbane Serpent wriggled himself into his company.”¹⁹⁷ And although Billy Budd’s reaction to the chaplain is compared to the response of Polynesian natives to Christian

189. *Id.* at 44.

190. *Id.*

191. *Id.* at 53.

192. The so-called “Hamitic hypothesis” was used by slaveholders to legitimate the bondage of Africans (and for that matter was employed by the Dutch Reformed Church in South Africa to justify the South African government’s policy of apartheid). FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 65 (Juliet Sheen & Kevin Boyle eds., 1997). In Genesis 9:20-29, Ham’s descendents are cursed because Ham saw his father’s (Noah) nakedness and therefore are destined to be the “servants” of Shem and his descendents.

193. BILLY BUDD, *supra* note 1, at 44.

194. *Id.* at 47.

195. *Id.* at 52.

196. *Legalistic Reader*, *supra* note 24, at 41.

197. BILLY BUDD, *supra* note 1, at 52.

missionaries,¹⁹⁸ Melville's characterization of Billy Budd as a "barbarian," akin to the Polynesian peoples who preceded contact with the missionaries, suggests that he repudiated a Protestant Christianity that foreclosed the anagnorsis of a prelapsarian humanity. Billy Budd therefore appears as a "Second Adam," an unmistakable theological reference to Jesus.¹⁹⁹

Melville's descriptions of Billy Budd are replete with allusions to the Christ figure. Not only is he innocent, acquiescent, loving and a "peacemaker,"²⁰⁰ the circumstances of his birth are shrouded in mystery, just like the alleged illegitimacy of Jesus.²⁰¹ He is a foundling with no knowledge of his place of birth or father,²⁰² much like Kasper Hauser, who was discovered as a grown youth in Nuremberg, Bavaria, his origins effaced, and who was to die inexplicably at the hands of an assassin in 1833.²⁰³ Hauser was rumored to be a noble, denied his birthright for unknown reasons. Likewise, the birth narrative in Matthew seeks to legitimate the claim of Jesus as messiah by placing him in the line of descent from the royal house of David.²⁰⁴ Melville similarly legitimates the anointing of Billy Budd with the charismatic power to reconcile differences by highlighting an analogous lineage. "[N]oble descent was as evident in him as in a blood horse."²⁰⁵ Like Kasper Hauser and, probably, Jesus,²⁰⁶ he was illiterate.²⁰⁷ As a sign of the fallen world, literacy

198. *Id.* at 121.

199. Jesus is described as "the last Adam" by Paul in 1 Corinthians 15:45 and the "second man" (i.e., Adam) in 1 Corinthians 15:47. The theology of the last or Second Adam was given prominence by the Church Father Irenaeus in his polemic *Against Heresies*. See Irenaeus, *Against Heresies*, in 1 ANTE-NICENE FATHERS 309, 544 (Alexander Roberts & James Donaldson eds., 1994). The doctrine is further referenced in JOHN CALVIN, 1 INSTITUTES OF THE CHRISTIAN RELIGION 406 (Henry Beveridge, trans., Wm. B. Eerdmans Publishing Co. 1964) (1559) "I should like to know why Christ is termed by Paul the second Adam, (1 Cor. 15: 47) unless it be that a human condition was decreed him, for the purpose of raising up the ruined posterity of Adam."

200. Captain Graveling, master of the *Rights of Man* from which Billy Budd is impressed, calls him "my peacemaker." BILLY BUDD, *supra* note 1, at 47.

201. The birth narratives, absent from the earliest gospel Mark, were added to the later synoptic gospels Matthew and Luke. Jesus' illegitimacy, being conceived out of wedlock, underscores his role as an outsider who is similar to, but different from, his community. See, e.g., JANE SCHABERG, THE ILLEGITIMACY OF JESUS: A FEMINIST THEOLOGICAL INTERPRETATION OF THE INFANCY NARRATIVES (Sheffield Academic Press 1995).

202. BILLY BUDD, *supra* note 1, at 51-52.

203. See MARTIN KITCHEN, KASPER HAUSER: EUROPE'S CHILD (2001).

204. *Matthew* 1:1-25.

205. BILLY BUDD, *supra* note 1, at 52.

206. Although the Johannine gospel suggest that Jesus could read (See *John* 7:15), many scholars associated with the controversial "Jesus Seminar" argue that, as a peasant, Jesus most likely could not read, although standing in the oral tradition, he could rely on collective

would have brought Billy under Claggart's intellectual aegis, characterized by subterfuge and deception.

Judith Koffler has suggested that the identification of Billy Budd with the Christ figure is eclipsed by the homoeroticism of the novella.²⁰⁸ Billy Budd is depicted as being both androgynous and childlike,²⁰⁹ and therefore vulnerable to "the love of men for men."²¹⁰ It is, of course, likely that homosexual activity took place aboard 19th century merchant ships, whaling vessels, and war frigates over the course of their long voyages. Much has been made of the passage in which Billy Budd spills his soup upon the deck as Claggart is passing by, prompting the latter to contemplate "ejaculat[ing] something hasty at the sailor."²¹¹ Melville's own alleged bisexuality, evidenced by homoerotic passages in his South Sea novels like *Typee* and his masterwork *Moby Dick*, add weight to this interpretation.²¹² However, homoeroticism does not preclude a reading of Billy Budd as a Christ figure. On the contrary, the feminine aspects of Billy Budd character add to the case for associating the Handsome Sailor with Jesus. Feminist theologians have long pointed out the identification of the feminine aspect of the divine, i.e., wisdom (Sophia), with the Christ figure of the New Testament.²¹³ Carolyn Walker Bynum's work²¹⁴ has emphasized the feminine persona of Jesus, ranging from his depiction with lactating breasts, literalizing the allegory of "spiritual milk,"²¹⁵ in medieval paintings to the piercing of his side,²¹⁶ thus generating the "birth" of the faithful, accompanied by the discharge of blood and

memory to teach. See THE FIVE GOSPELS: WHAT DID JESUS REALLY SAY? 27 (Robert W. Funk et al. trans., Scribner 1993).

207. BILLY BUDD, *supra* note 1, at 52.

208. See Koffler, *supra* note 42.

209. "He was young; and despite his all but fully developed frame, in aspect looked even younger than he really was, owing to a lingering adolescent expression in the as yet smooth face, all but feminine in purity of natural complexion . . ." *Id.* at 50.

210. Koffler, *supra* note 42, at 2.

211. BILLY BUDD, *supra* note 1, at 72.

212. See TYPEE, *supra* note 91, at 127-36; MOBY DICK, *supra* note 80, at 10-25, 413-17.

213. See, e.g., SUSAN COLE ET AL., WISDOM'S FEAST: SOPHIA IN STUDY AND CELEBRATION (Sheed & Ward 1997).

214. CAROLYN WALKER BYNUM, HOLY FEAST AND HOLY FAST 270-272 (1987).

215. 1 *Peter* 2: 2-3. "Like newborn babies, crave pure spiritual milk, so that by it you may grow up in your salvation, now that you have tasted that the Lord is good."

216.

Then came the soldiers, and brake the legs of the first, and of the other which was crucified with him: but when they came to Jesus, and saw that he was dead already, they brake not his legs: but one of the soldiers with a spear pierced his side, and forthwith came there out blood and water.

John 19:32-34.

water. These ideas and images are not the creation of feminist theologians, but are rather an integral part of the Christian cultural history of Western consciousness.

Melville's text makes plain this identification with the Christ figure in the death of Billy Budd. At the moment when he is unjustly accused by Claggart of mutiny, his face reflects the anguish of a "crucifixion."²¹⁷ The early Christian community metaphorically described Jesus' crucifixion by the image of being "hanged from a tree."²¹⁸ Billy Budd too is hanged from a "tree," the mainarm of the ship, and, in a mystical vision of transfiguration ascends into the heavens, "shot through with a soft glory as of the fleece of the Lamb of God."²¹⁹ In the wake of his death, the sailors of the *Bellipotent* prize every fragment of the spar as if it was a "piece of the Cross"²²⁰ itself, a talisman of the miraculous.

It has been, of course, commonplace in Melville scholarship to cite allusions to the Christian passion, which made Richard Weisberg's objections all the more surprising and controversial. In addition to denying that Billy Budd is a surrogate Jesus, Weisberg claimed that Melville intended John Claggart to be the Christ figure. Weisberg cited three reasons for his assertion. John Claggart's initials are "J.C." Claggart's age at his death was 35 – the same age as Jesus at his crucifixion. Melville uses the appellation "man of sorrows" to describe Claggart – a title often ascribed by Christian writers to Jesus himself.²²¹ Weisberg's conclusions implied that *Billy Budd* is Melville's "considerate communication" about the conflict between pagan and Christian cultures, symbolized by the "upright barbarian" Billy and the Christ figure Claggart. This conflict was allegedly underscored in the text by Melville's reference in the closing chapters to the naval chronicle *News from the Mediterranean*,²²² a thinly-veiled reference to the kerygma of Jesus' apostles as recorded in the books of the New Testament, in which Christ/Claggart triumphs over paganism by means of a distorted account of the events aboard the *Bellipotent*. For Weisberg, Billy Budd is a victim of Christian persecution. Perhaps more to the point, Weisberg concluded that Melville's novella

217. BILLY BUDD, *supra* note 1, at 99.

218. *Acts* 5:30 and 10:39; *Galatians* 3:13.

219. BILLY BUDD, *supra* note 1, at 124.

220. *Id.* at 131.

221. RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 115 (1992).

222. BILLY BUDD, *supra* note 1, at 130.

is a narrative in which the law itself “had become the main victim of Christianity.”²²³

Weisberg’s reading of *Billy Budd* turned the text upside down – at least in terms of the way it was previously read. Certainly, his interpretation resonates to a certain extent with Melville’s hostility toward Christian missionaries, but the Claggart/Christ association seems to have gone too far. As Gail Coffler so recently pointed out, Claggart’s initials are not only identical to those of Jesus Christ, but also to those of John Calvin.²²⁴ Claggart’s office as the master-at-arms, assigned the task of spying on the crew for any possible transgression, is far more akin to the Calvinist Puritanism than it is to the kerygmatic forgiveness of Jesus. Moreover, Claggart is identified by Vere with the Biblical character Ananias.²²⁵ The Ananias story most applicable to the *Billy Budd* text is the Ananias of Acts 23, the Pharisee whose condemnation of Paul brings the apostle’s admonition that God would strike him dead.²²⁶ Ananias here is as diametrically opposed to the representative of the Christ figure as is Claggart himself.

Weisberg also contended that Claggart’s age was the same as Jesus’, implying that it was more than mere coincidence. Although scholars in the twentieth century believe that Jesus died most likely between the ages of 34 and 37 (being born somewhere between 7 B.C.E. and 4 B.C.E. and dying in 30 C.E.), Melville, as a nominally Protestant Christian, would probably have assumed the accuracy of the Christian calendar, or that Jesus was born in 1 A.D. and died in 30 A.D. Therefore, there would be no hidden relationship between a 30 year old Jesus and a 35 year old Claggart.

Finally, Weisberg argued that the application of “the man of sorrows”²²⁷ metaphor to Claggart sealed the association.²²⁸ However,

223. *Id.* at 116.

224. Gail Coffler, *Religion, myth, and meaning in the art of Billy Budd*, Sailor, in *NEW ESSAYS ON BILLY BUDD*, 59 (Donald Yannella ed., 2002).

225. As Coffler rightly notes, there are three Ananiases. *Id.* at 68-69. The Pharisee who charges Paul with sedition and whom Paul prophesies will be struck down by God (*Acts* 23:2-3); “a devout man according to the law” who urges a newly converted Paul to preach the gospel to nonbelievers (*Acts* 22: 12-15); and the member of the early Christian community who does not surrender all of his property for the common good and is consequently struck down by God at the behest of Peter (*Acts* 5:1-6).

226. *Acts* 23:1-35.

227. *Isaiah* 53:3. “He was despised and forsaken of men, a man of sorrows and acquainted with grief.”

228.

When Claggart’s unobserved glance happened to light on belted Billy rolling along the upper gun deck in the leisure of the second dog watch,

Billy Budd was not the first text in which Melville had employed this phrase. Over thirty years before, Melville had invoked the metaphor in his “Tryworks” chapter of *Moby Dick*.²²⁹ Located on the deck of the *Pequod*, the tryworks boiled down whale blubber into oil, creating an image of a floating hell on water in the midst of the night. Melville’s reference to the “Man of Sorrows” as the “truest of all men” illustrated the dark side of human existence, and was not employed to invoke the image of the victim unjustly sacrificed by humanity.²³⁰ Likewise, Claggart’s identity as the master-at-arms, responsible for policing the crew, fits the sense in which Melville used the term in *Moby Dick* as a sign of fallenness. Aware of the dark side of humanity, Claggart longs for that which he cannot have. Hence, his forelorn desire is an “evanescence . . . quickly repented of.”²³¹ Like Captain Ahab, who was obsessed by the need to destroy the monster of the high seas, *Moby Dick*, he is possessed by a “monomania” that seeks the demise of the “monstrous double,” i.e., Billy Budd.²³²

B. *The Mimetic Rivalries in Billy Budd*

In light of the high regard with which he is beheld by the rest of the crew aboard the *Bellipotent*, it is unexpected that any crew-member would not fall under the spell of “Baby Budd.”²³³ Dansker’s admonition to the Handsome Sailor that “Jemmy Legs is down on you” seems inexplicable to Billy Budd.²³⁴ Yet it is John Claggart,

exchanging passing broadsides of fun with other young promenaders in the crowd, that glance would follow the cheerful sea Hyperion with a settled meditative and melancholy expression, his eyes strangely suffused with incipient feverish tears. Then would Claggart look like the man of sorrows.

BILLY BUDD, *supra* note 1, at 87-88.

229.

The sun hides not the ocean, which is the dark side of this earth, and which is two thirds of this earth. So, therefore, that mortal man who hath more of joy than sorrow in him, that mortal man cannot be true—not true, or undeveloped. With books the same. The truest of all men was the Man of Sorrows, and the truest of all books is Solomon’s, and Ecclesiastes is the fine hammered steel of woe. ‘All is vanity.’ ALL.

MOBY DICK, *supra* note 80, at 422. I am again indebted to Gail Coffler for this astute observation. See Coffler, *supra* note 224, at 64.

230. MOBY DICK, *supra* note 80, at 422.

231. BILLY BUDD, *supra* note 1, at 88.

232. See *id.* at 90 for Melville’s description of “monomania”; cf. MOBY DICK, *supra* note 80, at 460, 528, 540.

233. BILLY BUDD, *supra* note 1, at 71.

234. *Id.*

otherwise dubbed Jemmy Legs, who alone understands “the moral phenomenon presented in *Billy Budd*.”²³⁵ As the master-at-arms, it is Claggart who bears responsibility on a man o’ war for policing the ship and preventing discord among the crew.²³⁶ He knows the fallen disposition of men, but what he recognizes in *Billy Budd* is a prelapsarian innocence—one out of synch not only with the others over whom he watches, but also at odds with his own nature.²³⁷ He is not unaware of the magnetic power that *Billy*’s innocence conveys. The master-at-arms’ “melancholy expression would have in it a touch of soft yearning, as if Claggart could even have loved *Billy* but for fate and ban,”²³⁸ but he steels himself against the illusory world beyond his own and that of fallen humanity.²³⁹

Claggart is therefore the mimetic rival of *Billy Budd*. His relationship to the Handsome Sailor is marked by envy.²⁴⁰ Although exercising a position of institutional authority, Claggart cannot gain the same respect that the crew offers *Billy* as an exemplar of charismatic authority. He has neither the heart nor the personal beauty – both of which profoundly move *Billy*’s crewmates.²⁴¹ Commentators on *Billy Budd* who have recognized some sort of rivalry between the Handsome Sailor and Claggart, as imagined by the master-at-arms, often stop here. But Melville’s narrative of this mimetic rivalry extends to more than the affections of the crew, for Claggart desires what *Billy Budd* possesses and what Claggart can never have – a prelapsarian innocence. Hence, Claggart’s envy is married to antipathy, “conjoined like Chang and Eng in one birth.”²⁴² *Budd*’s very existence is to Claggart unbearable.²⁴³ Melville suggests that Claggart’s jealousy is a “Natural Depravity”—although more than a “savouring of Calvinism” that imbues all humanity.²⁴⁴ It not a depravity born of the “sordid or sensual,” but rather is civilized, intellectual, without “vices or small sins”²⁴⁵ and enfolded into “the

235. *Id.* at 78.

236. *See id.* at 64.

237. *Id.* at 77.

238. *Id.* at 88.

239. *Id.* at 78.

240. *Id.* at 77.

241. *Id.* at 47.

242. *Id.* at 77. Chang and Eng were the prototypical “Siamese twins” who were born and lived during Melville’s lifetime in what is now Thailand and were joined together at the ribs.

243. *Id.* at 78.

244. *Id.* at 75.

245. *Id.* at 76.

mantle of respectability.”²⁴⁶ What Melville depicts in Claggart is the smug condescension of moral superiority, born of a human hubris that substitutes repression for innocence. In short, Claggart embodies much of what Melville found objectionable about the Christian missionaries whom he encountered in his Polynesian travels and his novels of the South Seas, *Typee* and *Omoo*.²⁴⁷ Claggart exhibits his “cynic disdain, disdain of innocence” as if a human being could be “nothing more than innocent.”²⁴⁸ Yet, because antipathy is married to envy, his disdain for the Handsome Sailor also bears the loathing Claggart feels for all humanity, indeed, his own self-loathing for which Billy Budd will have to pay.

Claggart’s relationship to Billy Budd is not the only paired conflict in the text. Melville interweaves two other levels of mimetic rivalry into the narrative. Weisberg rightly observed that simultaneously with the Claggart/Budd conflict, Captain Vere is acting out his envy of Admiral Horatio Nelson. Weisberg argued that the insertion of Nelson into the narrative in Chapters 3 and 4 before Melville’s introduction of Vere or Claggart frames the following story in terms of Nelson’s life and heroism.²⁴⁹ Dubbed “the greatest sailor since our world began,” Nelson embodies a nature that “vitalizes into acts” the aspirations for glory that other individuals only feel.²⁵⁰ His death at Trafalgar, brought about by mounting the deck in full regalia during the height of battle, demonstrated a courage, which, Melville suggests, lesser men do not possess.²⁵¹ Vere, on the other hand, would not even be recognized as a sailor, if ashore in civilian clothes.²⁵² Although of a practical and competent nature, he had no “brilliant” qualities. Melville’s depiction of Vere’s occasional reveries indicates a longing to be other than he is, a realization brought home by the appellation (given him by cousin and crew) “starry Vere”—the name given a heroic ancestor in a poem by Andrew Marvell.²⁵³ Weisberg concluded that Vere’s jealousy turns to enmity, and that the animosity of the captain, despite his affection for the Handsome Sailor, falls upon Billy Budd. Billy therefore acts as a “surrogate for Nelson” in

246. *Id.* at 75.

247. *See supra* Part III.B.

248. *Id.* at 78.

249. *Legalistic Reader*, *supra* note 24, at 33.

250. BILLY BUDD, *supra* note 1, at 58.

251. *Id.*

252. *Id.* at 60.

253. *Id.* at 61.

Vere's eyes.²⁵⁴ Much like Nelson, Billy Budd is a natural sailor, who not only does his duty but is also one who commands the respect of his peers, and is incapable of dissimulation.²⁵⁵ He is, in short, heroic. Weisberg concluded that Melville "veils the trial of *Vere v. Nelson* under the name of *Rex v. Budd*."²⁵⁶

Richard Posner rejected Weisberg's analysis because Melville provided no "textual clue" of the Vere-Nelson rivalry and pointed out that Trafalgar and other of Nelson's naval victories followed the date in which *Billy Budd* is set.²⁵⁷ Nelson's introduction appears to Posner to be only for the purposes of the novella's "verisimilitude."²⁵⁸ There is no evidence, however, that Melville was beset by qualms about the novella's authenticity that plagued the publishers of his first South Sea novels, *Typee* and *Omoo*, some 40 years before (which, in any case, annoyed Melville).²⁵⁹ Melville does use Nelson as a foil, describing his assignment to the *Theseus*, one of the ships involved in the Nore Mutiny, set some months before the opening of Melville's story, to quell any embers of insurrection. The parallel between the presence of Nelson on the *Theseus* and Vere on the *Bellipotent* is palpable, even to Posner who concluded that had Nelson been faced with a mutiny, he would have most certainly put it down with force if need be.²⁶⁰ But here Posner seems to have missed the point. Granted, Nelson's heroism occurred years later in the battles with the French fleet. Granted that, without those victories, Nelson may not have come to the attention of Vere. However, Posner treats Melville's fiction as if it were an historical account, subject to an historian's verification. Melville is not giving an historical account, but rather is using artistic license to contrast the character of a Nelson with his own creation, to highlight the flaws in Vere's character. Vere's character cannot abide Nelson or one like him, for whereas Nelson, like Billy Budd, is a charismatic figure exercising an inborn authority; Vere's standing is buttressed not by his own qualities but by rank. Weisberg's conclusion therefore provided a vital piece in the analysis of narrative, for it explained why Vere would be complicitous in the sacrificial mechanism.

254. *Legalistic Reader*, *supra* note 24, at 28.

255. BILLY BUDD, *supra* note 1, at 43.

256. *Legalistic Reader*, *supra* note 24, at 39.

257. Posner, *Comment on Weisberg*, *supra* note 29, at 75.

258. *Id.*

259. ROLLYSON, *supra* note 3, at 206.

260. Posner, *Comment on Weisberg*, *supra* note 29, at 75.

The Nelson subtext at the outset of the novella introduces the third level of mimetic rivalry—the one that eclipses mere individual conflict and reveals the spiral of violence that can destroy the social order itself. Although triggered by “some glaring abuses,” the Spithead rebellion of “ringleaders” on the crews of ships anchored at the mouth of the Thames quickly spread. Melville describes the “Great Mutiny” in terms reminiscent of Girard’s use of the medical model to describe violence. It is a “distempering irruption of contagious fever in a frame constitutionally sound”²⁶¹ This third level of mimetic rivalry between sailors and their officers begs the question regarding the source of their discontent. What object do the subjects desire that their rivals possess? Melville makes it clear that the object of their desire is the power and privilege of the aristocrats and upper classes. This “irrational combustion” of “private grievances” into revolution bears with it all the dangers witnessed on the continent under the French Directory—a mimetic rivalry which abandons the object of desire for the endless bloodletting of mimetic violence: the Terror.²⁶²

These three levels of mimetic rivalry bind the novella together. There can be no question that Billy Budd possesses what others desire. He is envied by Claggart for his innocence and by Vere for his charisma. Impressed from the *Rights of Man*, Billy embodies an inborn sense of liberty which his fellow crewmates desire but cannot have, even in its pale imitation as democratic rights. Generated by these three levels of mimetic rivalry, desire is compressed into a dense mass of affect that explodes in an act of violence, the hanging of Billy Budd.

As the epicenter of the rivalries that orbit about him, Billy is the anointed victim. “[T]he victims are chosen,” claimed Girard, “not for the crimes they are accused of but for the victim’s signs that they bear.”²⁶³ Although Girard notes that “world mythology swarms” with victims who are deformed or otherwise physically incumbered, e.g., hunchbacks, the blind and lame, there are also heroic victims who are physically perfect., “exceptionally beautiful and free of all blemish.”²⁶⁴ Physical beauty, like Billy Budd’s, separates him from the crowd and marks him for victimage. Although many critics regard Billy’s stutter

261. BILLY BUDD, *supra* note 1, at 55.

262. *Id.* at 54.

263. THE SCAPEGOAT, *supra* note 126, at 24.

264. *Id.* at 31-32.

as his tragic flaw, that compelled him to throw an unintentionally fatal blow, "his stammer," like that of Moses, "is a sign of the victim."²⁶⁵

The academic debate over *Billy Budd* bogged down over the question of whether Billy Budd was guilty, and if so, of what crime, and whether the drumhead court-martial was held properly. Most conclude that he killed Claggart unintentionally. However, in terms of the model of collective murder, the unintentionality of the victim's alleged crime does not preclude sacrifice. "The simplest solution is to retain the victim's crimes but claim they were not intended. The victim did indeed do what he is accused of, but *he did not do it intentionally*."²⁶⁶ Rather than undermine the case for collective murder, the lack of intentionality reinforces the propitiousness of the sacrificial victim. Melville suggests that due to his "immature nature essentially honest and humane,"²⁶⁷ Billy was completely oblivious to the reasons for his summoning before Claggart and Vere. Describing the victim's role in the sacrificial mechanism, Girard observes, "[b]ecause [the victims] have not been informed of certain circumstances, they bring about unintentionally the state of affairs required to justify the use of collective violence against them."²⁶⁸

The application of Girard's theory to the encounter between the Handsome Sailor and the master-at-arms in Vere's cabin has significant implications. It suggests that the focus of the academic debate on the ramification of the text for an understanding of law is wrong-headed. Claggart's death is tangential, and Billy's culpability, is, in some sense, irrelevant to the meaning of the novella, since both only serve as an alibi to legitimate the central act of sacrifice. To focus intellectual energies on this aspect of the text is surely to miss the substance of the novella, i.e., Billy's death, as one might imagine Melville himself believed.

Writ large in Melville's Billy is the double substitution of the sacrificial victim. On the one hand, as Melville scholars commonly note, is the *historical* surrogate who substitutes for all members of the community beset by mimetic desire. Appalling living conditions

265. *Id.* at 178. "And Moses said unto the Lord, O my Lord, I *am* not eloquent, neither heretofore, nor since thou hast spoken unto thy servant: but I *am* slow of speech, and of a slow tongue." *Exodus* 4:10 Freud suggests that Moses was murdered by the Israelite community, which obscured this collective crime in the Torah. SIGMUND FREUD, *MOSES AND MONOTHEISM* 51-52 (Katherine Jones trans., Vintage Books 1955) (1939). "Freud was not wrong when he took seriously th[e] hint of collective murder." *THE SCAPEGOAT*, *supra* note 126, at 178.

266. *THE SCAPEGOAT*, *supra* note 126, at 82.

267. *BILLY BUDD*, *supra* note 1, at 98.

268. *THE SCAPEGOAT*, *supra* note 126, at 83.

aboard ship gave rise to the insurrection at Spithead in April 1797.²⁶⁹ Whitehall complied with the demands of the sailors, raising pay, improving the food, and removing abusive officers from the ships.²⁷⁰ The Spithead rebellion was followed the next month by the Nore Mutiny. In addition to objections concerning living conditions, the seamen demanded larger percentages of prize monies and changes to the Articles of War.²⁷¹ Threatening to blockade the Thames, the Admiralty refused to negotiate its authority and put down the rebellion abruptly. Led by a former officer, Richard Parker, the key co-conspirators were hung at the direction of a drumhead court-martial and many other participants were flogged.²⁷² In references to Britain's "Great Mutiny" of 1797 lie traces of Melville's own knowledge of the Somers Mutiny of 1843 aboard a U.S. frigate. The leaders of that rebellion were likewise hanged at the direction of a council of officers, headed by Guert Gansevoort, Melville's cousin and a first lieutenant aboard the ship.²⁷³ Melville most likely conflated these stories of insurrection with the injustices he had witnessed in his own travels aboard both merchant and war ships in the 1840s. Such injustice appears in a fictionalized guise in his novel *White Jacket* (1850) in which a young, handsome sailor, "belonging to the mizzentop" and "a great favorite in his part of the ship" is summarily flogged for striking a blow at a fellow crew member, even though he claimed to have been struck first.²⁷⁴ "No matter," said the Captain, "you struck at last, instead of reporting the case to an officer. I allow no man to fight on board here but myself. I do the fighting."²⁷⁵

These elements, both historical and fictionalized, provide the basis for a surrogate victim who "restores or even establishes the order he has somehow transgressed in anticipation."²⁷⁶ Whether it be the conspirators of the "Great Mutiny" or Somers Mutiny or the "lad" Peter in Melville's *White Jacket*, they are not punished for what they did, but rather for what they represent—the potential for violence which can rip apart society.

269. BRITAIN IN THE HANOVERIAN AGE 1714-1837: AN ENCYCLOPEDIA 485 (Gerald Newman ed., 1997).

270. *Id.*

271. DAVID CORDINGLY, WOMEN SAILORS AND SAILORS' WOMEN: AN UNTOLD MARITIME HISTORY 37-38 (2001).

272. JAMES DUGAN, THE GREAT MUTINY 179, 364-82 (1965).

273. ROLLYSON, *supra* note 3, at 187.

274. WHITE JACKET, *supra* note 71, at 137-138.

275. *Id.*

276. THE SCAPEGOAT, *supra* note 126, at 42.

The original substitution is metamorphosed into a second substitution of the ritual victim for the original surrogate victim. Here Melville goes to extraordinary lengths to identify Billy Budd with the Christ figure so that the reader cannot miss the ritualized nature of his execution. Law and Literature critics have hitherto decontextualized the ritualized aspect of the novella to treat the narrative as if it remains on the first level of surrogate victim in an historicized setting. They tend to overlook the mythic dimension of Billy Budd as a divine hero whose dying words betoken a reconciliation otherwise not possible. For behind the phrase "God bless Captain Vere"²⁷⁷ lies the echo of the Christ figure's parting benediction "Father, forgive them; for they know not what they do."²⁷⁸ As Girard interprets this Jesus saying, human beings do not understand why they are driven to execute the ritual victim. It is not just the persecutors who kill Billy Budd under the color of law. Rather, it is the entire crew who, lining the decks of the *Bellipotent*, are not only called upon to witness his hanging, but acquiesce in the law's fulfillment for their own well-being. The words "God Bless Captain Vere" resonate in their own throats.²⁷⁹

To reach its inevitable conclusion, the law finds Billy Budd guilty because he is innocent. This dilemma would confound legal interpreters who cannot grasp its meaning because they do not recognize the sacrificial mechanism as the life's blood of the law. "This is," writes Girard, "only a paradox for someone with a dualistic vision who is too remote from the experience of a victim to feel the unity and is too determined to differentiate precisely between 'good' and 'evil.'"²⁸⁰ Although his seminal article *Force of Law: The "Mystical Foundation of Authority"* identifies violence as the very inscription of law in the social order, even Derrida, as Girard notes,²⁸¹ does not suspect the dynamic that underlies law's origins.

Those complicitous in the death of Billy Budd experience in him a peace that transcends all understanding. The chaplain finds a consolation that eclipses what his religion has to offer.²⁸² His crewmates realize a heartfelt absolution in the eyes of their Beauty.²⁸³ The death of Billy Budd, as a second Adam, collapses Chronos (*Χρονος*) into Kairos (*Χαίρος*), an inbreaking of what we call eternity

277. BILLY BUDD, *supra* note 1, at 123.

278. *Luke* 23:34.

279. *Id.*

280. THE SCAPEGOAT, *supra* note 126, at 43.

281. FOUNDATION OF THE WORLD, *supra* note 134, at 64.

282. BILLY BUDD, *supra* note 1, at 120.

283. *Id.* at 123.

into time, in what calls to mind both the Garden and the eschaton. Girard himself likes to think that this moment, which terminates violence through violence, is the revelation of the New Testament. Here, Girard differs significantly from other theologians. Whereas Christian theology has been dominated by a reading of the New Testament texts as evidence of Jesus as a sacrificial offering, Girard tenders a “non-sacrificial” interpretation of the kerygma.²⁸⁴ Accordingly Jesus’ death is supposed to be the Alpha and Omega, the beginning and the end, i.e., the unmasking and demise of the sacrificial mechanism that has dominated human societies, “primitive,” ancient and modern. “Everything that is hidden shall be revealed.”²⁸⁵ If only a worldwide “Great Awakening” understood this message, he reasons, humanity would be freed from the bonds that compel the eternal return of the sacrificial victim in countless guises.

Melville’s text, however, does not share that theological hope. The meaning of his death is obscured by the naval periodical *News from the Mediterranean* which portrays Billy Budd as a guilty mutineer and John Claggart as a hero,²⁸⁶ thereby vouchsafing the continued life of the sacrificial mechanism. In the wake of Billy’s hanging is an emerging awareness among the crew of the meaning of his death—or perhaps only the resurrection of reciprocal violence.²⁸⁷ In either case, the moment is foreclosed by a “drum beat to quarters,” wherein “[t]rue martial discipline,” the force of law at sea suppresses any possibility for the eschaton.²⁸⁸

VI. LAW AND THE MYSTERY OF INQUITY

The “mystery of iniquity”²⁸⁹ remains buried in the hearts of human beings.²⁹⁰ While some, like Captain Vere, are oblivious to its machinations, and indeed hold the rule of law as sacred, transcending such passions, the sacred is, if we are to believe Girard, violence. The

284. FOUNDATION OF THE WORLD, *supra* note 134, at 180-223.

285. *Id.* at 167.

286. BILLY BUDD, *supra* note 1, at 130-31.

287. *See id.* at 127.

288. *Id.*

289. *See 2 Thessalonians 2: 7-8:*

For the mystery of iniquity doth already work: only he who now letteth will let, until he be taken out of the way. And then shall that Wicked be revealed, whom the Lord shall consume with the spirit of his mouth, and shall destroy with the brightness of his coming.

290. *See BILLY BUDD, supra* note 1, at 76.

state, as religion's latter-day heir, is similarly encumbered. In the war of all against all in the Hobbesian *Leviathan*,²⁹¹ the spiral of violence is ended through the violence of communal authority for, as Edmund Burke claimed, "[t]he whole of this mystery of iniquity is called the reason of state."²⁹²

Legal scholars tend to think of religion as, at best, ancillary to the law. Religion is a subject of a specialized jurisprudence, usually seen in terms of the degree of separation between religious communities, their beliefs, and their institutions and government. Conservatives and liberals, along a continuum from accommodation to strict separation, vehemently disagree about the influence that religion, as an outside force, should exercise in establishing and adjudicating the law. But virtually all are oblivious to the reality unveiled by Girard's work.

Religion, in its violent manifestation as a sacrificial mechanism, not only antedates law; it lies in the very recesses of law. Legal scholars imbued by an Enlightenment faith in reason might deny this insight, characterizing it as some sort of religious conviction that distorts the law. Hence, a Girardian reading may appear to them to be anachronistic in the wake of the Enlightenment that allegedly freed the state from its dogmatically confessional moorings. But, Girard's basic theory is no theology. It is a social scientific theory describing the basic dynamics of Western societies. To be sure, his conviction that Christianity unmasks this "mystery of iniquity" is a religious belief, but the sacrificial mechanism itself is not.

The implications of this Girardian reading of *Billy Budd* are sobering. The state and its agents, whether prosecutors, judges, juries,

291. "[T]his warre of every man against every man." THOMAS HOBBS, *LEVIATHAN* 188 (C.B. Macpherson ed., Penguin Books 1971) (1651).

292. BURKE, *supra* note 2, at 42. Burke's conclusion may be ironic. According to some Burkean scholars, e.g., F.P. Lock and Peter J. Stanlis, Burke appeared to claim in the preface to the second edition of the *Vindication* that the text was written as a parody of Henry St. John, Viscount Bolingbroke, a liberal imbued with a passion for the Enlightenment faith in reason and nature. Bolingbroke contrasted the alleged goodness of "natural society" with the artifice of civil society and the state. Burke's parody implied that Bolingbroke's attack on hierarchy and government equally necessitated an attack against the artifice of revealed religion which English politicians, no matter how liberal, were hesitant to do. Although meant as a criticism of Bolingbroke, Burke's conclusion fits the theory of the sacrificial mechanism insofar as Girard holds that both religion and the state seek to mask or obfuscate this hidden dimension to the social order. The critique of the state is the critique of religion and vice-versa. Where Burke and Girard part company is that, for Girard, the kerygma of revealed religion, *properly* understood, unveils the sacrificial mechanism. Therefore, in contrast to Burke's position in the *Vindication*, it is possible to embrace both a Bolingbrokean critique of government as a propagator of iniquity and a non-sacrificial theological understanding of Christianity.

and even defense attorneys, indeed, even the public-at-large in whose name the state acts, should recognize that the cases handled by the state have a hidden dimension that eclipses the “facts” at hand. The mechanism may, in fact, be “worn out and its transcendent qualities are replaced by the justification of social utility;”²⁹³ yet, nonetheless, the residues of sacrificial violence remain, most particularly in the death penalty.²⁹⁴ The American public, popular commentators and even we are commonly in denial regarding scapegoating. As Girard facetiously writes, “[e]ach person must ask what his relationship is to the scapegoat. I am not aware of my own, and I am persuaded that the same holds true for my readers. We only have legitimate enmities. And yet the entire universe swarms with scapegoats.”²⁹⁵

If we are to believe Girard, punishment by the state, particularly capital punishment, is never simply for the sake of the individual’s crime. Although unspoken, punishment is always in addition for the crimes that otherwise would have ensued had not the state acted to terminate the spiral of violence. Hence, the convicted always bear the weight of both crimes committed and uncommitted. This hidden dimension to the law is rarely, if ever, recognized. *Billy Budd*’s significance for the Law and Literature movement lies in the text’s apocalyptic revelation of this hidden dimension of law, i.e., Billy’s hanging for crimes he did not commit and, because of his hanging, were never committed. Of course, his sacrifice was for the well-being of the fleet and the society-at-large. But it is a hanging that is incomprehensible to that society and even to the crewmates who loved him. As Girard suggests, human beings, largely do not understand this dynamic, and therefore in their minds his death could not be for their sake. We recognize the dynamic only as the inscrutable, yet sacred, nature of law. If we do not understand the dynamic that lies behind the narrative, Billy Budd appears to have died for what? For the sake of the law, as unjust as that may seem to be.

VII. CONCLUSION

Girard’s chilling conclusion provides the impetus to many to reform the law, particularly by abolishing the death penalty. However, Girard’s theory implies that there is a cost to such reforms. Without a

293. THE SCAPEGOAT, *supra* note 126, at 113.

294. See, e.g., *Capital Punishment*, *supra* note 174.

295. THE SCAPEGOAT, *supra* note 126, at 41.

global awakening that unmasks this hidden dimension to the law, he suggests that the decline of the sacrificial mechanism only causes a reversion to the spiral of violence.

The *sacrificial crisis*, that is, the disappearance of the sacrificial rites, coincides with the disappearance of the difference between impure and purifying violence. When this difference has been effaced, purification is no longer possible, and impure, contagious, reciprocal violence spreads throughout the community.²⁹⁶

Reformers may seek to abolish the death penalty, for example, and may end the state's role as the author of vengeance, but without further changes in the society, or alternative ways to resolve conflict in a society imbued with a passion for guns and bloodshed, abolition may do little to change a culture of violence.

As a theologian, Girard holds to the eschatological promise that the kerygma or Gospel message that exposes the injustice of the sacrificial mechanism will provide a worldwide change in human consciousness.²⁹⁷ I am not nearly as hopeful as Girard. Perhaps, like Melville, I fear that "Original Sin" has too strong a grip on human consciousness to ever let go.

Girard's vision of the eschaton reminds me of another angel—not the face of Billy Budd, but that of Paul Klee's *Angelus Novus*, memorialized in Walter Benjamin's *Theses on the Philosophy of History*. As the future coming towards us, the angel faces the past.

Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel

296. VIOLENCE, *supra* note 109, at 49.

297. FOUNDATION OF THE WORLD, *supra* note 134, at 192-93.

[t]he bond that stood against us with its demands is human culture, which is the terrifying reflection of our own violence. It bears against us a witness that we do not even notice. And the very ignorance in which we are plunged seats the principalities and powers upon their thrones. By dissipating all this ignorance, the Cross triumphs over the powers, brings them into ridicule, and exposes the pitiful secret of the mechanism of sacralization. The Cross derives its dissolving capacity from the fact that it makes plain the workings of what can now only be seen—after the Crucifixion—as evil So it is indeed the Crucifixion that is inscribed in the gospel text and is demystified by Christ, stripped for evermore of its capacity to structure the work of the human mind.

would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.²⁹⁸

The pile of debris, built on the bodies of human suffering, is the legacy of religion and law. The *Angelus Novus*, like Melville's Angel of God, holds forth hope, but as Benjamin concluded "[l]ike every generation that preceded us, we have been endowed with a *weak* messianic power."²⁹⁹

298. *Philosophy of History*, *supra* note 68, at 259-60.

299. *Id.* at 254.