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New Light on the Trial of *Billy Budd*

Richard H. McAdams* and Jacob I. Corré**

[Draft chapter for forthcoming publication by Oxford University Press on the subject of war in law and literature, to be edited by Alison LaCroix, Jonathan Masur, Martha Nussbaum, & Laura Weinrib]

Few American literary works have been the subject of as much academic commentary as has *Billy Budd*, Herman Melville's unfinished final novel.¹ Possibly no American novel has garnered more attention from those interested in the roles that law plays in understanding literature. To summarize what some regard as a novel immune to summary: *Billy Budd* is a guileless and winsome impressed crewman on board an English man o' war in 1797. England is at war, and recent mutinies fill the navy with anxiety. Budd is prone to bouts of severe stuttering. John Claggart, the ship's master-at-arms, brings a malicious charge of mutiny against Budd to Captain Edward Vere. Overwhelmed by his inability to respond verbally, Budd strikes Claggart and kills him. Vere seems fond of Budd, believes him innocent of the mutiny charge, and knows he struck Claggart without malice. Nevertheless, Vere appoints a summary "drumhead" court to try Budd. After testifying, Vere persuades a reluctant panel of judges to convict Budd and sentence him to hang. The execution occurs at dawn the next morning, as Budd proclaims, "God bless Captain Vere!"²

The story raises fundamental questions about the conflict between justice and military necessity. Budd is a good man who reacted violently but without bad intent to extreme provocation. Few would think he should die for what he did. The setting on an English warship in 1797 enhances the difficulty of evaluating Budd's case. England was at war in 1797.³ Security concerns stood at an exceptionally high pitch. Two significant mutinies occurred in the ports of England, the first, in April, at the port of Spithead, and the second, more serious one, in May, at the port of the Nore.⁴ The events in the novel occur in the summer of 1797. At several points, the narrator of *Billy Budd* discusses the mutinies at the Nore and Spithead and their profound effect on the Navy.

Where did the law stand on Budd's case? The novel itself offers two sources of positive law. The first is Vere's description of the contemporary law governing the discipline aboard English ships, especially the 1749 Articles of War.⁵ Some who condemn Vere have questioned the reliability of his statements of the law. The second source is the anonymous narrator of the story, who describes the naval customs for a

drumhead proceeding, and refers specifically to the celebrated 1842 case of the United States brig *USS Somers*. The captain of the *Somers* had summarily tried and executed three mutineers. A court of inquiry exonerated, and a court-martial subsequently tried and acquitted the captain and some of the brig's officers.⁶ The case was the subject of public controversy for many years to come.

The earliest law and literature scholarship about *Billy Budd* drew a parallel to the events on the *Somers* and the ensuing legal proceedings.⁷ This perhaps was the result of the relation of the *Somers* case to Melville's own life. Melville's first cousin, Guert Gansevoort, was a first lieutenant on the *Somers*. Gansevoort helped suppress the mutiny, and participated in the decision summarily to hang the mutineers.⁸ The first extensive analysis of the questions raised by the 1749 Articles of War appeared in 1962, and found no legal fault in Vere's actions.⁹

That scholarship changed dramatically twenty years later. Professor Richard Weisberg began publishing important work advancing new interpretations of the legal dimensions of *Billy Budd*, as well as of Vere's character.¹⁰ Weisberg argues that there was neither a legal basis for the process of a summary trial for Budd, nor substantive grounds for executing him. Weisberg combines his legal analysis with a novel interpretation of the general background of the story and Vere's actions. He concludes that Vere deceived the members of the drumhead court into convicting Budd and sentencing him to die. Vere did this, according to Weisberg, because secretly he resented Budd, whom he saw as realizing an ideal naval character that Vere knew he could never obtain.¹¹ Among other supporters of Weisberg's view that Vere abused the law,¹² Robin West describes the conclusion by saying that Vere is a "murderer."¹³

Others disagree with Weisberg.¹⁴ In particular, Judge Richard Posner objected to Weisberg's analysis of both the applicable law and of Vere's character.¹⁵ In Posner's view, Budd was guilty of a capital offense, any irregularities in the trial notwithstanding. Posner also thinks that Weisberg's assigning a malicious character and despicable motives to Vere is an implausible interpretation of the narrative.

We believe there is more to say about these disputes. We examine three types of evidence: First, as Melville situates *Billy Budd* in the immediate aftermath of the mutinies of Spithead and the Nore, collectively known as The Great Mutiny, and the novel repeatedly refers back to those events, we begin with a historical review of "The Great Mutiny." That background provides greater reason to credit the arguments of Vere, contrary to his critics. Second, while accepting for purposes of argument Weisberg's claim that Vere's statement of the law might be self-serving and suspect, we examine the relatively neglected statement of the relevant law and customs provided by

the novel's anonymous narrator. Third, as the novel specifically references the American *Somers* case, we examine that affair with an eye towards divining the relevant naval laws and customs.¹⁶

We conclude that the regime of naval discipline, as it existed both in England at the time of Budd's trial, and in the United States around the time of Melville's composition, mandated neither Budd's punishment nor his vindication. Budd's case occupies the ground where judgment and discretion combine to determine the outcome. The circumstances on the *Bellipotent*, together with the background military and political circumstances of the time, show even more vividly the intractable difficulty of deciding Budd's case. *Billy Budd* is not a tragic story about the need to cling to strict law even where intuitions of justice plead for a different outcome. It is not an outrageous example of the willful manipulation of law by an unaccountable authority maliciously bent on implementing a grave injustice. It is a story about confronting a case almost too hard to imagine. Vere may well have been mistaken, but he is not a murderer.

***Billy Budd* and the Great Mutiny**

Weisberg's interpretation of *Billy Budd* emphasizes the personal and psychological to the detriment of the historical and political. He has little to say about the context that should play a central role in interpreting Vere's decisions: the mutinies of 1797. Melville set his novel in the *summer* of 1797, right after the series of mutinies at Spithead and the Nore. Mutinies are normally named after the ships on which they occur, but these mutinies were named after the ports where they took place because they occurred in a coordinated fashion on many ships.

The mutinies at Spithead began in early 1797 shortly after a group of seamen serving on the larger ships of the Channel Fleet sent diverse parties a series of petitions for increased wages, and improved conditions. The recipients disregarded the letters, which became increasingly strident. Sixteen ships mutinied at Spithead on 16 April 1797. Fifteen ships at Plymouth joined the mutiny ten days later. The mutineers expelled some officers, and refused to sail, but continued performing routine functions while attempting to negotiate their working conditions. Admiral Lord Howe, a former commander of the fleet, intervened in May and reached a peaceful settlement, which included a royal pardon for the mutineers.¹⁷

Peace did not last. Mutinies at Portsmouth, Sheerness and Yarmouth followed Spithead. The worst mutiny broke out at the Nore on 12 May 1797, aboard HMS *Sandwich*. Several other ships quickly joined the mutiny. As had the Spithead mutineers,

the mutineers at the Nore began by demanding modest changes to working conditions. They, however, rejected the Spithead terms offered to them, and came to demand radical political reform, including the dissolution of Parliament and the pursuit of peace with France. The mutineers blockaded the ports of London. Eventually, the mutiny collapsed, due largely to internal dissension. Eleven ships attempted to escape, after a number had abandoned the mutiny in early June. All the mutineers had surrendered by June 15.¹⁸

These combined mutinies were known “without exaggeration,” according to *Billy Budd*’s narrator, as “the Great Mutiny.” (54) They were “great” not just because of their size but also because the navy and the public feared, at one point, that mutineers would sail a fleet of ships to France, changing the balance of power in the war. Later, they feared the mutineers’ blockade of London would continue for a crippling period of time, turning the Navy’s function in support of English commerce on its head. One early chronicler of the mutinies vividly described their effect on the mood of the nation. In the time between Spithead and the Nore, “the country was inundated by seditious pamphlets” composed by “mischievous individual who sought to make the present occasion an instrument to incite the whole kingdom into a flame of rebellion.”¹⁹ While the mutinies were ongoing, “the intense anxiety manifested by the whole nation amounted almost to convulsion.”²⁰

The events in *Billy Budd* take place in the summer of 1797 (54), only a few weeks or months after the mutinies at Spithead and the Nore. The narrator of the novel says “the Great Mutiny” was

a demonstration more menacing to England than the contemporary manifestoes and conquering and proselyting armies of the French Directory. To the British Empire the Nore Mutiny was what a strike in the fire brigade would be to London threatened by general arson. . . . Reasonable discontent growing out of practical grievances in the fleet had been ignited into irrational combustion as by live cinders blow across the Channel from France in flames. (54)²¹

Weisberg references the mutinies only in one aspect: the narrator’s description of how historians in such matters abridge the truth by omitting details from an event that challenges national pride. But he fails to engage the story’s most obvious and direct relevance: The Great Mutiny’s vital context for evaluating Vere’s motives for the summary execution of Budd. The historians’ reticence reflects the profound fear the Great Mutiny engendered in British society.

The narrator reports that the Nore insurrection was put down with difficulty, thanks to the “unswerving loyalty of the marine corps.” (55). As a result of the mutinies, some improvements were made, “[b]ut not every grievance was redressed.” (58). One critical issue was “impressment.” Although England did not use conscription to supply men for other military services, it used “the press” or the “press gang” to compel men into naval service. Once in service, men rarely left their ships, which essentially imprisoned them. *Billy Budd* recites in its first pages an apt allegory: Budd is impressed from a merchant ship named *The Rights of Man*, to which he says: “And good-bye to you too, *old Rights-of-Man*.” (49). All conscription is involuntary servitude, but naval service involved hard and dangerous work for which even small infractions were punishable by flogging. Impressment was therefore controversial, but the navy could not otherwise obtain enough manpower to run its sailing ships, especially during war. “Its abrogation would have crippled the indispensable fleet, one wholly under canvas, no steam power.” (59).

For Budd’s story, the crucial point is that the problem was not fully settled, and certainly not perceived to be fully settled, when the Nore mutinies ended in June. Just as the Nore was the “unforeseen renewal of [the Spithead] insurrection on yet a larger scale,” (55), there was no certainty that July or August would not bring a new and still larger rebellion. Relevant too is the history just after the fictional events in *Billy Budd*. In September of 1797, there was another mutiny on HMS *Hermione*, which is generally understood to be the bloodiest in British naval history. Mutineers murdered the captain, eight other officers, and two midshipmen. They sailed and delivered the ship to Spain. Thus, Melville set *Billy Budd* right between the combined mutinies of Spithead and the Nore and the worst individual mutiny of the *Hermione*. As the narrator says about the timing of Budd’s slaying of Claggart: “That the unhappy event which has been narrated *could not have happened at a worse junction* was but too true. For it was close on the heel of the suppressed insurrections, an aftertime very critical to naval authority, demanding from every English sea commander two qualities not readily interfusable – prudence and rigor.” (102-03, emphasis added).

All of which forms the basic context for evaluating Vere’s fear that the failure to execute Budd would risk mutiny. The captain of any British naval ship in the summer of 1797 had to be alert to the danger of mutiny. The text makes this clear. The narrator explains early on: “Discontent foreran the Two Mutinies, and more or less it lurkingly survived them. Hence it was not unreasonable to apprehend some return of trouble sporadic or general. . . . So it was that for a time, on more than one quarter-deck, anxiety did exist. At sea, precautionary vigilance was strained against relapse.” (59). As an example, during engagements, “the lieutenants assigned to batteries felt it incumbent on them, in some instances, to stand with drawn swords behind the men working the

guns." (58). The point of this, one might infer, is to threaten to use the sword against the men should they pick that chaotic time to turn on the officers.

Weisberg and his supporters claim that the narrative portrays no threat of mutiny on the *Bellipotent*. West calls it a "likely nonexistent threat."²² The historic context suggests otherwise. Perhaps Weisberg and West misread the narrator, when he states early in the story that, on that ship, "very little in the manner of the men and nothing obvious in the demeanor of the officers would have suggested to an ordinary observer that the Great Mutiny was a recent event." (59-60). But note how carefully and redundantly the statement is qualified: "very little" implies that something in the manner of the men *did* suggest the recency of the Great Mutiny; "nothing obvious" allows that something subtle in the officers' demeanor *did* refer to it. And these observations are, in any event, limited by the narrator to what an "ordinary observer" would discern. Someone with greater experience, say "a sailor of distinction even in a time prolific of renowned seamen," like Vere, might well detect more. (60).

Moreover, the threat on the *Bellipotent* is not confined to the background circumstances affecting the whole fleet. When Claggart first begins to accuse Billy Budd to Vere, Claggart says that "at least one sailor aboard was a dangerous character in a ship mustering some who not only had taken a guilty part in the late serious troubles, but also who, like the man in question, had entered His Majesty's service under another form than enlistment." (92) In other words, serving on the *Bellipotent* were (1) participants in the recent mutinies and (2) impressed men. Presumably, in some cases, both.

Claggart is about to lie about Budd, but this statement cannot be a lie because Vere would know if it were, and it would be self-defeating to begin his accusations with an obvious canard. Perhaps it seems impossible that there would be participants in the prior mutinies aboard the *Bellipotent*, but many were in fact not executed and the narrator had previously noted that mutineers later served with Nelson in his great victories. (56). The British navy was so desperate for men during the Napoleonic Wars that, the narrator reveals, some press gangs endeavored to meet their quotas by "drafts culled direct from the jails," (66), another reason for officers to worry about the maintenance of discipline and order.

Claggart goes on to say that he felt a particular need to make his report "in view of extraordinary outbreaks so recent as those which, sorrowfully said, it needed not to name." When he comes close to naming a ship whose captain was taken hostage for a time, Vere cuts him off, for he deemed it imprudent "for a petty officer unnecessarily to allude to them." (93). Why would Vere expect officers to avoid mentioning the specifics

of the “late serious troubles” were there not a concern that even their mention, if overheard, might signal to the crew that the officers were afraid?

Vere’s argument for the summary trial and execution of Budd cannot be evaluated without attending to this context. First, the narrator explains Vere’s reasoning: “Feeling that unless quick action was taken on it, the deed of the foretopman, so soon as it should be known on the gun decks, would tend to awaken any slumbering embers of the Nore among the crew, a sense of the urgency of the case overruled in Vere every other consideration.” (104). Second, Vere argues to the officers of the drumhead court:

[C]onsider the consequences of such clemency. The people” (meaning the ship’s company) “have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them – which our official position forbids – they, long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman’s deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. *Why?* They will ruminare. You know what sailors are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm – the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them – afraid of practicing a lawful rigor singularly demanded at this junction less it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive. (112-13).

Whether ultimately correct or not, this argument makes even more sense when one considers that Claggart was the ship’s master-at-arms, which was “a sort of chief of police charged with . . . the duty of preserving order on the populous lower gun decks.” (64). His killing posed a particular threat to that order.

Vere’s consequentialist argument turns out to be a critical part of his case. The narrator explains that officers of the drumhead court placed the greatest importance on “the practical consequences to discipline, considering the unconfirmed tone of the fleet at the time, should a man-of-war’s man’s violent killing at sea of a superior in grade be allowed to pass for aught else than a

capital crime demanding prompt infliction of the penalty.” (113). Here, the narrator refers to the summary execution of mutineers on the *Somers*, a matter discussed below, and says “the urgency felt, well-warranted or otherwise, was much the same.” (114).

Consider one final point. Weisberg argues that there was no real fear of mutiny because the crew loved Budd and hated Claggart, and would have applauded the captain if he showed Budd leniency. Yet that argument appeals more to a modern liberal sensibility than to the norms of eighteenth century British naval officers. There is nothing peculiar in Vere, in his day, expecting that the maintenance of order among impressed men depended more on fear than on love. Vere’s path pursued the former. His reasoning reflects the common sense about the Great Mutiny, which was that the government’s leniency in negotiating an end to the Spithead mutiny setting a course toward the Nore.

We do not believe that Weisberg gives a fair accounting of the argument just described because he neglects the historic context of the Great Mutiny, as well as the presence of impressed men and mutineers on the *Bellipotent*. Others have made a persuasive case, we think, against Weisberg’s claim that Vere killed Budd out of envy at his being a “Handsome Sailor” like Nelson and unlike Vere.²³ We will not revisit that debate. But the greater strength of the claim for military necessity, casts additional doubt on Weisberg’s more personal and psychological interpretation.

To be clear, we do not defend the case for military necessity because we think it is necessarily correct. We believe the text provides reason to support the contrary view as well. The other officers of the *Bellipotent* think it would be safe and sufficient to detain Billy Budd and refer the matter to the admiral for a court-martial after the ship returns to the fleet. There is reason to doubt the sanity of Vere’s decision, as well as its prudence. We are told that other officers, at some future point, criticized Vere’s decision to keep the entire matter from the rest of the ship until the drumhead court had issued its sentence. (103). Presumably, one alternative would have been to announce that Budd was being held for a capital crime, with the possibility of deciding later to proceed summarily only if discipline appeared to be under threat. As we explain in further detail below, we believe the novel raises this debate – parallel to a real one about the *Somers* – without resolving it.

The Law Outside the Narrative

If we are to evaluate Vere using law, the most suitable source of law is the novel itself. We do not object to using sources outside the novel to assess prevailing legal

standards, as Weisberg does. But one must be wary of external authority. We agree with Weisberg that Melville was legally sophisticated and probably knew the background law, but we doubt Melville would have assumed his audience to share his sophistication. So, the most relevant source of the legal knowledge necessary to interpret *Billy Budd* is the law related within the confines of the narrative.

In any event, nothing in Weisberg's legal sources answers the relevant questions. The printed sources on which he relies yield only a limited and abstract understanding of how the system of naval discipline in England actually worked at the end of the eighteenth century. This is because all of those sources are formal, "legislative" in nature. As any legal realist would say, it is important to identify and understand how these rules worked in practice.

The specific foundation of the law of naval discipline in 1797 was a statute that Parliament passed in 1749, commonly called the Naval Act.²⁴ Part II of the Naval Act lists the Articles of War, 36 consecutively enumerated paragraphs identifying substantive offenses against naval discipline. Each Article of War provides a punishment, ranging from dismissal, to the imposition of a sentence, sometimes expressly including death, deemed fit by a court-martial, to mandatory sentences of death. The 22nd Article of War is most pertinent to the case of *Billy Budd*. It subjects to a mandatory death sentence any person who strikes or draws a weapon on a superior officer "being in the execution of his office, on any Pretence whatsoever."²⁵ The Naval Act also sets out the procedural rules governing a court-martial. Nineteen of the 25 parts of the Naval Act fall into this category. These provisions provide great detail about the rules governing the initiation and composition of a court-martial, the form of indictment and other documentation, and trial.²⁶

But the Naval Act does *not* set forth the circumstances that mandate the convening of a court-martial. The written rules define what procedures a court-martial requires, but do not state when a court-martial is required. It is obvious that a court-martial is not always required for naval discipline, given that those procedures involve substantial delay and the involvement of an admiral and other ship captains. The eighteenth-century navy could not run if any iota of misbehavior by a member of a ship required the convening and completion of a court-martial before the captain could administer any form of discipline. Running any military organization requires the power to administer summary discipline. England's navy of 1797, especially with its large contingent of impressed crewmen, was no exception.²⁷

Weisberg does not contest this point. He concedes that discipline occurred outside the parameters of formal courts-martial. His only response is to cite printed

material suggesting a strict limit on the captain's summary power. The author of a comprehensive treatise on contemporary martial law wrote that "[a] captain or commander of any of his majesty's ships or vessels, has the power of inflicting punishment on a seaman in a summary manner for any faults or offense committed, contrary to the rules of obedience established in the navy."²⁸ But while the passage extolled the administrative and deterrent advantages of granting the captain some summary power to punish crew members, it ended with a qualification on which Weisberg relies: "By the 4th article of the Old Printed Instructions, a captain was not authorized to punish a seaman beyond 12 lashes on his bare back, with a cat-of-nine-tails; but, if the fault should deserve a greater punishment, he was directed to apply for a court-martial."²⁹

This is very weak evidence. The "Old Printed Instructions" were set forth in *Principles of good Government to be observed on board His Majesty's Ships of War*, a collection of documents that had existed since at least 1734, and which referred to instructions established "by his majesty in council."³⁰ The Old Printed Instructions were thus issued by the king sitting in his Privy Council after the establishment of Parliamentary Supremacy, and yet had no Parliamentary mandate. We are as yet unaware of any authority that would have bound the Admiralty in general, or any ship's captain in particular, to their terms. Moreover, in other work, we report on an extensive review of British captain's logs maintained in the United Kingdom National Archives. Rather than initiating court-martial proceedings, captains routinely ordered the summary administration of more than twelve lashes to punish a whole host of offenses. When Vere convened a drumhead court on the *Bellipotent*, the Old Printed Instructions had little or no operational effect on the practice of naval discipline.³¹

If one is to seek a prevailing standard outside the text of *Billy Budd*, we think the more accurate statement of the extraordinary martial power of British naval captains comes from the mid-nineteenth-century author, William Johnson Neale, who stated:

The captain of a man-of-war is, for the time being, as despotic a sovereign as can easily be imagined: he certainly has not ventured often to take the lives of his fellow subjects without any trial, though instances even of this have not been wanting; but for every inferior punishment, with the exception of flogging round the fleet, he is at once both judge and jury -- witness and prosecutor, if he pleases.³²

As an example that "instances even of this have not been wanting," Neale related the case of an unnamed captain who heard of a crew member complaining twice about the

quality of the ship's wine. After a cursory investigation, the captain determined on his own that the complaint was an attempt to foster discord and the complainant was therefore a mutineer, whereupon the captain drew his sword and killed him. The captain was never court-martialed and ultimately received a peerage.³³ In sum, the law outside the narrative does not support the claim that Vere acted contrary to legal practice in 1797.

The Narrator's View of the Law

So we return to the law and custom related within the narrative. Vere's own statements of the law vindicate his decision, but we agree with Weisberg that we must consider the possibility of his being biased. Intentionally or unintentionally, Vere might be misleading the drumhead tribunal. Weisberg, however, overlooks the source of law and custom within the narrative that provides our entire knowledge of the story: the narrator, never identified, but one whose "inside narrative" suggests he was on board the *Bellipotent* as the events unfolded. The narrator says just enough to make Weisberg's legal analysis untenable.

The source of all the procedural objections that Weisberg raises to Vere's conduct is Vere's decision to bypass a court-martial in favor of a summary proceeding. The printed materials do not mention summary procedure, which leads Weisberg to claim that Vere invented it. Yet *the narrator suggests otherwise several times*. The narrator, not Vere, tells the reader that "it would not be at variance with usage to turn the matter over to a summary court of [Vere's] own officers Accordingly a drumhead court was summarily convened." (104). After Vere's long argument for conviction and execution, we return to the narrator who states the result:

In brief, Billy Budd was formally convicted and sentenced to be hung at the yardarm in the early morning watch, it being now night. Otherwise, *as is customary in such cases*, the sentence would forthwith have been carried out. *In wartime on the field or in the fleet, a mortal punishment decreed by a drumhead court – on the field sometimes decreed by but a nod from the general – follows without delay on the heel of conviction, without appeal.* (114, emphasis added)

Finally, the narrator explains: "Now each proceeding that follows a mortal sentence pronounced at sea by a drumhead court is characterized by promptitude not perceptibly merging into a hurry, though bordering that." (126)

One might counter these statements by noting that other officers of the *Bellipotent* alluded to a practice of delaying action until the ship rejoined the squadron, thus permitting a formal court-martial. The surgeon thought Vere should place Budd in confinement “in a way dictated by usage” and, after rejoining the squadron, refer the matter to the admiral. The other officers agreed. (101). But note that the surgeon thought that Vere’s actions were “impolitic,” not illegal or unprecedented. No one contradicts either the narrator’s characterization that “it would *not* be at variance with usage to turn the matter over to a summary court of [Vere’s] own officers,” or the custom immediately executing those condemned by a drumhead court.

Perhaps the narrator’s description of naval usage and custom is incorrect. Yet, even if Vere’s legal claims are unreliable, it is hard to imagine that Melville would offer the reader *no* accurate description of the law. How would the ordinary reader apprehend that Vere had acted unlawfully? How can the only reliable source of the law for evaluating the narrative come from the kind of legal research Weisberg does? In any event, Weisberg does not actually set out to prove the narrator wrong. The printed legal materials Weisberg uses do not purport to address naval *custom and practice*. Of course, one might argue that, if this practice existed, it was illegal. But one cannot prove this merely by observing that the rule omits the practice. In the nation that created the common law, if a statute does not purport to abrogate a custom, the customary practice presumably persists alongside the statutory innovation. Weisberg’s criticism of Vere is less compelling if naval captains at the time generally understood themselves to have the authority to bypass court-martial procedures and carry out summary executions, and occasionally did so without censure. The narrator suggests exactly that.

The primary point, however, is that the reader has no reason to second-guess the narrator’s view of the legal practice and the naval custom. Weisberg suggests that the story is one where Vere is a villain, but one can only learn that by leaving the text and conducting external legal research.

The Law Revealed in the Case of the Somers

Another way to evaluate Vere within the novel is to consider the affair of the *USS Somers* as related by the narrator. Although the *Somers* was an American naval ship, and the parallel events occurred almost a half-century after the fictional hanging of Billy Budd, the *Somers* case would have likely been familiar to readers when Melville wrote, more familiar than any source of English naval law. In this section, we refer to some material about the *Somers* that is outside the narrative, albeit only to reinforce the significance of what is in the text.

The novel compels the reader to connect Budd's case and the *Somers*. The narrator explains the emotions of the members of the drumhead court as follows:

Not unlikely they were brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war *Somers* to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out though in a time of peace and within not many days' sail of home. *An act vindicated by a naval court of inquiry subsequently convened ashore.* History, and here cited without comment. True, the circumstances on board the *Somers* were different from those on board the *Bellipotent*. But the urgency felt, well-warranted or otherwise, was much the same. (113-14, emphasis added)

As explained below, a contemporary reader could easily have been familiar with some basic background: the *Somers'* First Lieutenant, Guert Gansevoort, reported to the Captain, Alexander Slidell Mackenzie, a mutiny plot with three ringleaders, but possibly involving others. One of the ringleaders, Philip Spencer, was the son of Secretary of War, John Spencer. Even after Mackenzie arrested the ringleaders and placed them in irons, he judged the situation on the small ship to be dangerous because of undetected co-conspirators among the crew. His officers concurring, Mackenzie ordered the immediate hanging of the ringleaders, and their burial at sea. Upon return to New York, a naval court of inquiry exonerated Mackenzie and the officers involved. Mackenzie nevertheless requested a court-martial, a common way for an officer to clear his name, which also acquitted Mackenzie and the officers.

The *Somers* case became a focal point of public controversy, attracting critics and defenders of Mackenzie.³⁴ Mackenzie was already known to the public, as the author of several books detailing personal and historical naval adventures.³⁵ Unsurprisingly, Secretary Spencer argued vehemently that the execution of his son was unjustified, doubting both the existence of a mutiny plot and the need for summary procedures.³⁶ James Fennimore Cooper (who had once argued in print with Mackenzie about a matter of naval history) came to hold a very critical view of Mackenzie's actions, and ultimately published an annotated version of the naval proceedings in the case.³⁷

Other literary and legal notables sided with Mackenzie: Richard Henry Dana, Jr., a Harvard-trained lawyer who spent time as a merchant seaman and

wrote *Two Years Before the Mast*; Francis Leiber, an academic lawyer who went on to write a comprehensive code of the laws of war; Henry Wadsworth Longfellow, who knew Mackenzie before the event; and Charles Sumner, the lawyer and prominent abolitionist of Massachusetts, who served as Senator from 1861 to 1871.³⁸ Sumner penned a vigorous defense of Mackenzie, and reported elsewhere that Justice Joseph Story also maintained that Mackenzie had acted appropriately.³⁹ In the end, the failings of Richard Spencer caused many to fear for the moral character of the younger generation, which contributed to the creation of the U.S. Naval Academy in Annapolis.⁴⁰

Melville was aware of the controversy, which occurred while he was at sea on a merchant ship. Gansevoort, the lieutenant who first reported the mutiny plot to Mackenzie, was his cousin, whom he had known since childhood. Moreover, the case of the *Somers* was revived in the public imagination around the time that Melville was writing *Billy Budd*, as several national magazines featured retrospective articles on the subject. Many defended Mackenzie, but one was provocatively titled “The Murder of Richard Spencer.”⁴¹

None of this means that Melville sided with his cousin. Indeed, in his 1850 novel, *White Jacket*, Melville criticizes the naval use of the death penalty and a captain’s unconstrained power to punish the crew. After quoting several of the Articles of War that end with the phrase “he shall suffer death,” Melville refers to the *Somers* in the following passages:

What happened to those three sailors on board an American armed vessel a few years ago, quite within your memory, *White Jacket* . . . ‘*Shall suffer death!*’ those were the three words than hung those three sailors. . . . By the mainmast! Then, in a time of profound peace, I am subject to the cut-throat martial law!⁴²

And later:

The well-known case of a United States brig furnishes a memorable example, which at any moment may be repeated. Three men, in a time of peace, were then hung at the yard-arm, merely because, in the captain’s judgment, it became necessary to hang them. To this day the question of their complete guilt is socially discussed.

How shall we characterize such a deed? Says Blackstone, ‘If anyone that hath commission of a martial authority doth, in time of peace, hang, or

otherwise execute any man by colour of martial law, this is murder; for it is against Magna Charta.⁴³

It is not clear that the narrator in *White Jacket*, or Melville, thought that Mackenzie and Gansevoort were technically guilty of murder, but the argument against the excessive use of naval authority and discipline does reflect Melville's view.

Therefore, we are justified in thinking that the *Somers* case is useful for interpreting the events in *Billy Budd*. As a legal matter, the first point is simple and powerful, yet neglected by Weisberg: The *Somers* case is a precedent in favor of Vere. As described within the narrative: "An act vindicated by a naval court of inquiry subsequently convened ashore." (114). We can add that the court-martial affirmed the court of inquiry. Both found in favor of the captain's power to bypass formal procedures and to conduct a summary trial and execution. As far as we have been able to determine, no written procedure in the American Articles of War explicitly authorized this summary justice, and yet the ruling recognized that the captain's general powers in an emergency, when the safety of the ship was at stake, were not limited to the explicitly codified powers.

Note also the factual parallels. Both the *Somers* and the *Bellipotent*, the threat offered to justify summary procedures was not fear of the person executed, but a fear of what *the rest of the crew* might do. On the *Somers*, the ringleaders were incapacitated by their irons and presented no risk to justify immediate execution, but officers speculated, that circumstances might precipitate mutiny by other members of the crew, partly out of a desire to free the prisoners. On the *Bellipotent*, Vere did not fear Billy Budd, but he feared mutiny from other members of the crew if he did not execute Budd. So the example of the *Somers* is particularly helpful to Vere.

Significantly too, in the *Somers* case both on-shore inquiries deferred to the captain's judgment with respect to contested factual matters. Critics of Vere claim there was insufficient evidence of possible mutiny on the *Bellipotent*, notwithstanding the Great Mutiny and other circumstances discussed above. Yet, the same complaint existed for the *Somers*. After the fact, there were alternative views of Philip Spencer's conduct, some crediting his claim that his talk of taking over the ship was just a private joke.⁴⁴ And even if Spencer was serious, many claimed that there was no clear evidence of a mutiny danger (charges against the other crew members were ultimately dropped) and no reason to proceed summarily.⁴⁵ Ultimately, however, Mackenzie's judges deferred to his best judgment, which he had exercised during a crisis to maintain control of his ship.

In some ways, Vere is on stronger ground than Mackenzie was. The *Somers* affair occurred in peacetime. *White Jacket* focused on this point – absent war, why was it necessary for the captain to wield such martial authority? But Budd was executed in a hot moment of the Napoleonic wars,⁴⁶ right after the Great Mutiny. The officers of the *Somers* had no American parallel to the Great Mutiny. Moreover, Budd has struck and killed a superior officer, which, however accidental or provoked, was an astonishing criminal act, “the most heinous of military crimes,” punishable by death (103).⁴⁷ The *Somers* mutineers were condemned merely for what they said and supposedly planned.

None of this means, that the *Somers* case resolves all normative issues in Vere’s favor. First, one might think, as many did, apparently including the young Melville, that the *Somers* case was wrongly decided. Second, one might conclude that Mackenzie had more justification than did Vere. Most obviously, none of Vere’s officers agreed with him, many advocating detention and formal court-martial. All of Mackenzie’s officers supported him. Also, given that the fear justifying immediate execution was mutiny, it matters that Vere did not believe Budd himself posed any threat of mutiny. The condemned men on the *Somers*, though incapacitated, were the source of the mutiny concern.

Offsetting this last distinction, it bears mentioning that Budd was not wholly innocent in that regard. Budd knew but did not tell Vere that another impressed man had said that he and others were talking of mutiny. We think this man was an *agent provocateur* sent by Claggart, but Budd did not know that. As the narrator says: “It never entered [Budd’s] mind that, from its extreme questionableness, it was his duty as a loyal bluejacket to report in the proper quarter.” (85) And later: “[I]t was incumbent on him, and failure so to do, if charged against him and proven, would have subjected him to the heaviest of penalties.” (106-07). The 20th Article of War in the Naval Act made it a crime punishable by death to “conceal any traitorous or mutinous Practice or Design.”⁴⁸ Perhaps this is all irrelevant to the proper evaluation of Vere’s actions because Vere did not know what Budd had witnessed (because Claggart died before he could inform Vere). But the narrator’s observation is one more reminder of Melville’s design to make the case a hard one.

All of this is grist for the mill and consistent with our view of *Billy Budd*: It is best understood as neither clearly vindicating nor clearly condemning Vere. Instead, it poses, without purporting to resolve, a vexing and provocative problem. The case against Vere is not that he pretended to fear a mutiny so he could satisfy his murderous envy of Budd. The case against Vere is that he was

wrong, that the speculative danger of mutiny was insufficient to justify summary execution. A formal court-martial might have recommended Budd for mercy, given the extenuating circumstances of his case. The novel shows how much power was vested in the captain. And even a captain acting in good faith, may, by bad judgment, do something lawful but terribly wrong.

* * * * *

The setting of the novel right after The Great Mutiny, the narrator's views of naval law and custom, and the *Somers* case all cast considerable doubt on Weisberg's evaluation of Vere. Ultimately, Weisberg's argument depends, as do many legal arguments, on shifting the burden of proof. The Articles of War do not explicitly authorize a captain to bypass formal courts-martial in favor of summary proceedings. But neither do they make formal court-martial the exclusive procedure by which a captain may try and punish a capital crime. If not expressly repudiated by formal law, customary practice presumably survives. Vere's actions were consistent with the customs described without contradiction by a reliable narrator. Perhaps he was unwise or morally wrong to do so – a subject for endless and revealing debate – but under the most faithful reading of the text, Captain Edward Vere did not murder Billy Budd.

NOTES

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¹ See, e.g., Barbara Johnson, "Melville's Fist: The Execution of "Billy Budd", *Studies in Romanticism* 18 (1979): 567-99; David J. Drysdale, "Melville's Motley Crew: History and Constituent Power in 'Billy Budd,'" *Nineteenth Century Literature* 67 (2012): 312-36; Philip Loosemore, "Revolution, Counterrevolution and Natural Law in 'Billy Budd, Sailor,'" *Criticism* 53 (2011): 99-126; Lilian Alweiss, "On Moral Dilemmas: Winch, Kant and Billy Budd," *Philosophy* 78 (2003): 205-18; Jeff Westover, "The Impressments of Billy Budd," *The Massachusetts Review* 39 (1998): 361-84; Sylvan Barnet, "The Execution in 'Billy Budd'", 33 *American Literature* 33 (1962):517-19.

² Herman Melville, *Billy Budd, Sailor (an Inside Narrative)* eds., Harrison Hayford & Merton M. Sealts, Jr. (Chicago: University of Chicago Press, 1962). Citations to the story appear in the body herein, and are to the Hayford and Sealts edition.

³ For general accounts, see J.E. Cookson, *The British Armed Nation, 1793-1815* (Oxford: Oxford University Press, 1997): 38-65; Jeremy Black, *Britain as a Military Power, 1688-1815* (London: UCL Press, 1989): 193-201, 221-25.

⁴ See G.E. Manwaring and Bonamy Dobree, *The Floating Republic: an Account of the Mutinies at Spithead and the Nore in 1797* (London: Geoffrey Bles, 1935); Conrad Gill, *The Naval Mutinies of 1797* (Manchester: Manchester University Press, 1913).

⁵ See *infra*, n. __.

⁶ The Somers mutiny is narrated in detail in Philip McFarland, *Sea Dangers: The Affair of the Somers* (New York: Schocken Books, 1985).

⁷ See, e.g., Charles Robert Anderson, "The Genesis of Billy Budd," *American Literature* 12 (1940): 329-46; see also Michal Paul Rogin, "The 'Somers' Mutiny and Billy Budd: Melville in the Penal Colony," in *Herman Melville: Modern Critical Views*, ed. Harold Bloom (New York: Chelsea House Publishers, 1987). Mackenzie published the records of the proceedings of his court-martial coupled with a review of the record by James Fennimore Cooper. *Infra* at n. __.

⁸ For Melville's connection to Gansevoort, see Hershel Parker, *Herman Melville, A Biography, Volume 2 (1851-1891)* (Baltimore: Johns Hopkins University Press, 2002): 474, 513-16.

⁹ C.B. Ives, "'Billy Budd' and the Articles of War," *American Literature* 34 (1962): 31-39.

¹⁰ Richard H. Weisberg, "How Judges Speak: Some Lessons in Adjudication in 'Billy Budd, Sailor' with an Application to Justice Rehnquist," *New York University Law Review* 57 (1982):1-69; Weisberg lays out his full legal analysis in chapter 8 of *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, 2nd ed. (New Haven: Yale University Press, 1984). We refer to that edition throughout this article as *The Failure of the Word*.

¹¹ Weisberg presents this argument most fully in chapter 9 of *The Failure of the Word*.

¹² E.g., Robin West, "In Praise of Richard Weisberg's Intransigence," *Law & Literature* 29 (2014): 21-40; West, "The Lawless Adjudicator," *Cardozo Law Review* 26 (2005):2225-62; Daniel J. Solove, Melville's 'Billy Budd' and Security in Times of Crisis," *Cardozo Law Review* 26 (2005): 2443-70; Lawrence Friedman, "Law, Force, and Resistance to Disorder in Herman Melville's 'Billy Budd,'" *Thomas Jefferson Law Review* 33 (2001): 61-80; Michael Dolin, "Sanctioned Irregularities: Martial Law in 'Billy Budd, Sailor,'" *Law Text Culture* 1(1994): 129-39.

¹³ 2017 cite

¹⁴ See, e.g., Charles Reich, "The Tragedy of Justice in 'Billy Budd,'" in *Twentieth Century Interpretations of Billy Budd* (Howard P. Vincent (Eastwood Hills, NJ: Prentice-Hall, 1971); Jack W. Ledbetter, "The Trial of Billy Budd, Foretopman," 58 *A.B.A. Journal* 58 (1972): 614-19; Edwin M. Yoder, "Fated Boy: Billy Budd and the Laws of War," 31 *Journal of Maritime Law and Commerce* 31 (2000) 615-22. Robert Cover holds Vere out as the paradigm of a good man confronted with the dilemma of having to choose whether to apply a clear law or disregard that law in face of the contrary dictates of justice. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975): 3-7. Weisberg applauds the richness of Cover's approach, *The Failure of the Word* 142, but comes to very different conclusions.

¹⁵ Richard A. Posner, "From 'Billy Budd' to Buchenwald," 96 *Yale Law Journal*, (1987): 1173-89, 1182-87. (reviewing the first edition of *Failure of the Word*); Posner, *Law and Literature* (4th. Ed. 2009) (pages).

¹⁶ Mackenzie published the proceedings in his own court-martial. Alexander Slidell Mackenzie, *Proceedings of the Naval Court-martial in the Case of Alexander Slidell Mackenzie* (1843). James Fennimore Cooper's "Review of the Proceedings of the Naval Court-martial" appears as an appendix to Mackenzie's volume.

¹⁷ See Manwaring and Dobrée, *The Floating Republic*, *supra* n. __, 7-13, 26-48, 110-18; Gill, *The Naval Mutinies of 1797*, *supra* n. __, 3-28, 72-85.

¹⁸ Manwaring and Dobrée, *The Floating Republic*, *supra* n. __, 134-46, 202-22; Gill, *The Naval Mutinies of 1797*, *supra* n. __ 101-23, 209-42.

¹⁹ *The Mutiny at Spithead and the Nore*, *supra* n. __, 170.

²⁰ *Id.*, 169.

²¹ In the text, parenthetical citations to pages of the novel are to Herman Melville, *Billy Budd, Sailor (an Inside Narrative)*, Harrison Hayford & Merton M. Sealts, Jr. eds., (Chicago: University of Chicago Press 1962). Hayford and Sealts were the first to produce what is now considered the definitive text of *Billy Budd*.

²² West, *supra* note 12.

²³ *cites*

²⁴ 22 Geo.II c.33. The Naval Act consists of 25 parts consecutively enumerated by Roman numeral.

²⁵ The 22nd Article of War in the Naval Act changed the punishment for striking a superior officer. A 1661 statute provided that striking a superior officer was punishable by “death or otherwise as a Court-martial shall finde the matter to deserve.” 13 Chas.2, c. 9, ¶2.

²⁶ *E.g.*, 22 Geo.II c.33, Part VII (commander in chief of fleet or squadron consisting of more than five ships barred from presiding over court-martial); *Id.*, Part XII (specifying maximum and minimum number of members); *Id.*, Part XVI (form of oath for members); *Id.*, Part XVIII (rules governing form of information or indictment); *Id.*, Part XX (rules regarding judge, advocate and witnesses at trial); *Id.*, XXIII (time limitations and formal requirements for initiating court-martial process).

²⁷ The opening paragraph of Part II of the Naval Act provides that the Articles of War “shall be duly observed and put in execution, in manner hereinafter mentioned.” Individual articles refer to the convening of a court-martial, and specifies that the punishment set forth “shall” be imposed upon conviction by the court-martial. This technical analysis cannot be read to require court-martial proceedings in every case of an offense against a particular Article of War. Such a system would be unfeasible.

²⁸ John McArthur, *Principles and Practice of Naval and Military Courts Martial, with an Appendix Illustrative of the Subject*, 4th ed. (1814, 2 volumes.): v. I, 67.

²⁹ *Id.*, v. I, 68.

³⁰ “Principles of good Government to be observed on board His Majesty’s Ships of War,” reprinted in *Regulations and Instructions Relating to His Majesty’s Service at Sea Established By His Majesty in Council*, 13th ed. (1790), 146. *See Ives, supra* n. __, 34 n.13 (citing same provision from 11th edition of 1772). The first edition of this document appeared in 1731, but we have only been able to examine editions as far back as the second edition, which appeared in 1734. Article IV in the 1734 edition is identical to Article IV in the thirteenth edition, cited above, which has a publication date that corresponds most closely to 1797.

³¹ In the course of preparing this article, we reviewed more than 100 years of logs of commanders of English man o’ wars ships spanning the period 1 January 1795 to 31 December 1799. They are housed in the United Kingdom National Archives at shelf-mark ADM51. This examination revealed the administration of several hundred summary punishments exceeding 12 lashes. We also reviewed comprehensively the records of the more than 1,000 surviving court-martial proceedings during the same period, which are housed at shelf-mark ADM1 of the National Archives. The captain’s logs and court-martial practice at the time provide evidence for evaluating other aspects of Budd’s trial as well. Our findings are set forth in [Corré and McAdams working paper].

³² *See* William Johnson Neale, *The Mutiny at Spithead and the Nore with an Enquiry into its origin and Treatment and Suggestions for The Prevention of Future Discontent in the Royal Navy* (1842):152-53.

³³ Sumner, *supra*, describes a suggestive American case, in which the captain of the *Essex*, after confronting and avoiding a possible mutiny, chased a suspected ringleader off the ship into the water at sword point. In Sumner’s version of the story, the expectation was that the sailor would drown, though he was picked up by indigenous people in a nearby canoe. In other versions, the captain planned this outcome, though even here, that means the captain inflicted the punishment of banishment thousands of miles from home after no legal proceeding whatsoever.

³⁴ *See* Harrison Hayford, *The Somers Mutiny Affair* (Englewood Cliffs: Prentice Hall, 1959).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See William P. Leeman, *The Long Road to Annapolis: The Founding of the Naval Academy and the Emerging American Republic* (Chapel Hill: University of North Carolina Press, 2010): 171-89, 202, 210.

⁴¹ Hayford.

⁴² Herman Melville, *White Jacket or The World in a Man-o-War* (1996 [1850]), chapter p.369 (ch. LXX).

⁴³ *Id.* at p.380 (ch. LXXII).

⁴⁴ Hayford

⁴⁵ Hayford

⁴⁶ Note that the paragraph quoted above concerning the *Somers* mentions this distinction – that it occurred in time of peace – and one more fact: that the *Somers* was, at the time, “within not many days sail from home.” We don’t know how many days the *Bellipotent* was from the squadron, only that it was “almost at her further remove from the fleet” when Claggart accused Budd. (90).

⁴⁷ As noted, *supra* __, striking a superior officer while in the execution of his office carried a mandatory death penalty under the 22nd Article of War (whether or not the blow was fatal). Weisberg suggests that Claggart’s misconduct was a defense to the charge that Budd violated the 22nd Article of War when he struck and killed Claggart. *The Failure of the Word*, 154-55. Our review of the court-martial proceedings in the National Archives, *supra* n __, demonstrates the contrary. No court-martial ever accepted such a defense, and a 1795 court-martial specifically ruled that the superior officer’s misconduct was not a defense.

⁴⁸ 22 Geo.II c.33, Part II ¶ 20.