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VOICELESS *BILLY BUDD*: MELVILLE'S TRIBUTE TO THE SIXTH AMENDMENT

THE HONORABLE JUAN RAMIREZ, JR.* and AMY D. RONNER**

INTRODUCTION

In *Billy Budd, Sailor*, Herman Melville's voice christens the climactic chapter depicting the trial that culminates in Billy Budd's death sentence:

Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blendingly enter into the other? So with sanity and insanity.¹

Here, the author ponders the adjudicator, Captain Edwin Fairfax Vere, who presides over the case of a morally innocent sailor accused of murdering the evil petty officer, John Claggart.² Just before the trial, the author foists a frightening proposition upon his readers: namely, that Captain Vere, the one empowered to decide life or death, could indeed be "the sudden victim of any degree of aberration."³ What is most curious, however, is that despite the fact that the omniscient narrator doubts his own character's sanity, commentators have

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1. HERMAN MELVILLE, *Billy Budd, Sailor*, in *BILLY BUDD AND OTHER STORIES* 287, 353 (Frederick Busch ed., Penguin Books 1986) (1962).

2. *See generally id.*

3. *Id.* at 353.

deified Captain Vere or at least defended his approach to legal deliberation.⁴

It is likely that Melville did not foresee that his ambiguous novella would launch a debate not just in the literary community, but also amongst lawyers. There is, in fact, such a legal obsession with Melville's creation that in 1980, Princeton University devoted a substantial portion of an interdisciplinary conference to parsing its enigmas.⁵ But even earlier, several scholars championed Captain Vere as one duty-bound to adhere to a rule of law that contravened his heartfelt sense of justice.⁶ For example, Charles Reich said:

Melville allows Vere no choice within the terms of the law itself; if the law is obeyed, Billy must hang. . . .
 . . . We may perhaps criticize the law, but not the officer whose "vowed responsibility" is to "adhere to it and administer it."

4. See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 4-6 (1975) (comparing Vere to Melville's father-in-law, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, who were both "righteous men"); TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES 71-72 (Fred R. Shapiro & Jane Garry eds. 1998) (suggesting that Vere is modeled after Melville's father-in-law, whose "duties required him to return fugitive slaves in violation of his personal conscience, just as Vere's position requires him to apply the Articles of War to Billy even though he knows Billy to be morally innocent"); CARL S. SMITH ET AL., *LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS* 73, 78 (1983) (defending Vere as a "pragmatist" and equating him with God in "a modern reenactment of the Fall of Man"); William Braswell, *Melville's Billy Budd as "An Inside Narrative,"* 29 AM. LITERATURE No. 1, 133, 143 (1957) (stating that "The internal evidence as a whole shows . . . that Melville looked upon Vere as a sympathetic character."); John B. Noone, Jr., *Billy Budd: Two Concepts of Nature,* 29 AM. LITERATURE No. 3, 249, 255 (1957) (stating that "[V]ere is the embodiment of one eighteenth-century interpretation of that 'good' word, reason."); Richard A. Posner, *A Comment on Weisberg's Interpretation,* in 1 CARDOZO STUD. L. & LITERATURE 71, 73 (1989) (comparing Vere with Oliver Wendell Holmes and stating that "[w]e are meant to understand that Vere is isolated by his intelligence and has no one with whom he can take counsel or share responsibility"); Brook Thomas, *Billy Budd and the Untold Story of the Law,* in 1 CARDOZO STUD. L. & LITERATURE 49, 59 (1989) (arguing that Vere, operating in "the same honored Anglo-American legal tradition as Coke . . . feels that individual rights can be protected from arbitrary violations by the state only through maintaining rule by law"); R. E. Watters, *Melville's "Sociality,"* 17 AM. LITERATURE No. 1, 33, 49 (1945) (stating that Vere represents reason and "unites that truth with a warm human love which purges it of all its cerebral harshness and redeems its earthly injustice"); Edwin M. Yoder, Jr., *Naval Warfare: Fated Boy: Billy Budd and the Laws of War,* 31 J. MAR. L. & COM. 615, 621 (2000) (concluding "[b]ut of one thing we may be reasonably confident: Melville, in the end, was on Captain Vere's side").

5. See Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist,* 57 N.Y.U. L. REV. 1, 4 (1982) (discussing the Conference on "A Moral Critique of Law: The Example of Melville," held at Woodrow Wilson School of Public and International Affairs, Princeton University, June 20-21, 1980); see also 1 CARDOZO STUD. L. & LITERATURE No. 1 (1989) (volume devoted to articles on *Billy Budd*).

6. See *infra* notes 7-8.

. . . As Melville presents the case, there is no escape for Vere. It is in this light that we must appreciate Vere's reactions.⁷

In a similar vein, Robert Cover praised Vere for his "righteousness,"⁸ and Judge Posner, who saw the Captain as "a tragic figure, doing his duty in impossible circumstances,"⁹ even went so far as branding Vere's critics "liberals" with an inherent distaste for the military and capital punishment.¹⁰ Essentially, one thing that proponents of Captain Vere share is the belief that the novella advocates a preference for positive law over natural law.¹¹

The opponents of Captain Vere are not all that different from his admirers: they likewise believe that Melville's primary motif is the tension between the rule of law and what is often a natural sense of right and wrong, but are less smitten with an adjudicatory approach that squelches the heart and the individual sense of true justice.¹² For

7. Charles Reich, *The Tragedy of Justice in Billy Budd*, 56 *YALE REV.* 368, 378-79 (1967).

8. COVER, *supra* note 4, at 4 ("Righteous men, indeed, suffer the agonies of their righteousness. Captain Vere betrayed just such agony in leaving his meeting with Billy Budd.").

9. Richard A. Posner, *From Billy Budd to Buchenwald*, 96 *YALE L.J.* 1173, 1185 (1987).

10. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 159 (1988) ("Most liberals in the contemporary sense of the word (and most literary critics are liberals in this sense) are uncomfortable with authority, including military authority, and hate capital punishment."); *see also* Posner, *supra* note 9, at 1184 ("Professor Weisberg . . . inverts Melville's fictive world by making Vere a villain.").

11. *See, e.g.,* COVER, *supra* note 4, at 2-3 (describing Vere's words as "a positivist's condensation of a legal system's formal character" such that "explicit recognition of the role character of the judges," compared to "law . . . distinguished from both the transcendent and the personal sources of obligation," and "law . . . embodied in a readily identifiable source," with an understanding that "the will behind the law is vague, uncertain, but *clearly not* that of the judges," and with a "corollary [that] . . . the judge is not responsible for the content of the law but for its straightforward application"); *see also* ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 288-90 (1984) (comparing Vere's style with the approach of the legal positivists); SMITH, *supra* note 4, at 74 (Vere's "argument to the court proceeds, not by contrasting martial law to criminal law, but by contrasting Divine Law with man-made statutes."); Noone, *supra* note 4, at 256 ("[T]he issue throughout the trial appears to be a conflict between 'natural justice' and the exigencies of the military code . . ."); Posner, *supra* note 4, at 76 ("Vere refuses to allow the positive law governing naval discipline to be trumped by appeal to the 'higher law' . . ."). *But see* Thomas, *supra* note 4, at 58 ("Too often critics of *Billy Budd* match the twin conflicts symmetrically, aligning individual freedom with natural law and social order with manmade law [which] is to fall prey to the common error of conflating the doctrines of natural rights and natural law.").

12. *See, e.g.,* SUSAN WEINER, *LAW IN ART: MELVILLE'S MAJOR FICTION AND NINETEENTH-CENTURY AMERICAN LAW* 139 (1992) ("[T]he legal case of Billy Budd includes an attack on the system of legal reasoning by which society was increasingly and yet almost unconsciously dominated," and "Melville is able to explore features of the legal system that lead to injustice rather than justice."); Ray B. Browne, *Billy Budd: Gospel of Democracy*, in 17 *NINETEENTH-CENTURY FICTION* No. 4, 321, 321-22 (1963) (arguing that Vere is not the voice of the author but rather Melville's "antagonist," and pointing out that Vere is the opposite of the people's rights and that he represents Edmund Burke); Jami K. Elison, *The Prosecution of Billy Budd (Ultra Vires of Positive Law)*, 35 *WILLIAMETTE L. REV.* 57, 67 (1999) ("Melville wants his readers to question at what point does law overextend its prescriptions

example, Leonard Casper called Vere's verdict an "unnatural" perversion and complained that "[b]y shifting responsibility for his decision to the King, Vere denies that he is a free agent with an individual sense of discrimination and judgment."¹³ Merlin Bowen even went so far as to liken Vere to Claggart, who is the embodiment of evil:

In the book's central opposition of civilization and nature, head and heart, there can be no real question where Captain the Honorable Edward Fairfax Vere stands: quite clearly, and despite his own instinctive feelings in the matter, he stands with Claggart and against Billy. By both temperament and training, he is much closer to the petty officer he despises than to the young foretopman he admires.¹⁴

Professor Richard Weisberg's analysis of *Billy Budd*, which is highly imaginative and unorthodox, also links Vere with Claggart as both "marked by a prudent dissembling of underlying obsessions, and a burning envy directed at a sublime embodiment of the heroic, sailor-like mode."¹⁵ According to Weisberg, Vere's rage, unlike that of Claggart, is directed at an inaccessible target—the "envied, magnificently overt Admiral Nelson"—and thus, secures its "surrogate" in what is available, the heroic Billy, who is "emblematic of Nelson in his overt popularity and ability to use that popularity for good."¹⁶ Weisberg explores how the articulate Vere "impose[s] a subjectively attractive result that the law does not require," illustrating his "concern that the values and normative structures likely to inhere in many judges today may pose barriers to objective judicial behavior."¹⁷

Professor Weisberg, like the little boy courageously insisting that the emperor is naked, bares the trial for what it really is—a fiasco. He, more than any other legal scholar, addresses the multiple procedural errors that conspire with the adjudicator's probable "insanity" and elocutionary prowess to choke due process and moral innocence. But Weisberg, like other critics, is too fixated on Vere himself and on the cast of characters aboard the very ship that becomes the situs of a tragic capital execution.

and blend from the pursuit of justice to the execution of injustice—where insistence becomes obstinance."); Weisburg, *supra* note 5, at 5 (arguing that "Vere successfully posits a dilemma he did not really face" and that the "moral and legal significance of the story turns . . . on the articulate adjudicator's ability to impose a subjectively attractive result that the law does not require.").

13. Weisburg, *supra* note 5, at 15 (quoting Leonard Casper, *The Case Against Captain Vere*, 5 PERSP. 146, 151 (1952)).

14. MERLIN BOWEN, *THE LONG ENCOUNTER* 218 (1960); see also Weisburg, *supra* note 5, at 16 (discussing Bowen's comparison between Vere and Claggart).

15. Weisburg, *supra* note 5, at 59.

16. *Id.*

17. *Id.* at 5.

The present authors do not quarrel with the obvious, that in *Billy Budd* Melville explores the proverbial tug of war within Captain Vere, between his own moral nature and what he perceives to be the dictates of positive law. We also wholeheartedly concur in Weisberg's assessment that the "novella's deepest meanings are sheltered beneath a cloak of narrative equivocation, irony, and selective omission,"¹⁸ but moreover, find it more fruitful to focus exclusively on the "shelter"—especially the "selective omission" of the one essential hero that Melville excludes from his narrative—namely, Billy's attorney. As such, *Billy Budd* is really about this one character missing from the H.M.S. *Bellipotent*.

It is no coincidence that the "Handsome Sailor" has one fatal flaw in the form of a "vocal defect" that prevents him from speaking up for himself.¹⁹ As such, Billy Budd is both literally and figuratively *the* client, one who necessitates empowerment through the voice of legal representation. In truth, the image of Billy Budd dangling by "halter" in the ship's mainyard should invoke the landmark United States Supreme Court case, *Powell v. Alabama*,²⁰ in which Justice Southerland described what a legal system would be like without the sacrosanct right to counsel.²¹

In three parts, this essay supports its thesis that Melville's novella is really a testimonial to the right to counsel and what that right means in its fullest sense. Part I simply sets the stage for this analysis by summarizing the story of *Billy Budd* and describing some of the primary participants in what essentially ends with the annihilation of a morally innocent man. As is often the case with Melville's characters, like the notorious Captain Ahab in *Moby Dick* whose relentless pursuit of the great white whale engenders cataclysm, both Captain Vere and Claggart are imbalanced and even somewhat monomaniacal. Through them and to some extent through the technique of allegory, Melville shares his vision of what are the inevitable imperfections inherent in any institution in which human beings serve as judges of other human beings.

Part II is an ostensible detour into a brief summary of the right to and importance of counsel in our legal system, especially when a human life is at stake. But in this context, the authors go beyond merely summarizing seminal United States Supreme Court decisions confirming the vitality of the Sixth Amendment, but venture into a relatively new field of legal studies called therapeutic jurisprudence, one which has already had an impact on the courts and on the laws here and

18. *Id.* at 67.

19. MELVILLE, *supra* note 1, at 302.

20. *Powell v. Alabama*, 287 U.S. 45 (1932).

21. *Id.* at 61-65.

abroad.²² As developed below, therapeutic jurisprudence scholars and proponents of the psychology of procedural justice have emphasized that an attorney is key, that he or she is the one that can give clients voice and validation and can, in truth, elevate our legal system.²³

Part III suggests that Melville, at least implicitly, understood the underpinnings of therapeutic jurisprudence and how critical it is for a client, particularly an accused, to have a voice in the form of legal representation. Essentially, Melville's novella is a potent exposé of "justice" without counsel and a portrayal of an imbalanced system in which those accused and even those facing a death penalty are either stammering or silenced. As such, what we are left with in *Billy Budd* is neither a treatise on the imperative of positive law nor a study of the aberrance of a judge seduced by an irrationally evil false accuser, but really the image of a mute accused, who is alone, incapable of articulating his own defense, and powerless to even raise the kind of procedural infirmities that rendered his capital trial a sham.

This essay concludes by revisiting the ambiguities at work in *Billy Budd* and suggests that Melville has not left us without hope or prophylaxis. By closing with a re-examination of the "rainbow" that prefigures the climactic trial scene, the present authors hone in on what is Melville's core message and advocate more broadly how such literature can be a profound contributor to legal education and to our justice system.

I. THE STORY OF *BILLY BUDD*, SAILOR

Billy Budd, Sailor is the tragedy of the "Handsome Sailor,"²⁴ who was impressed from a merchant ship, the *Rights of Man*, onto a British man-of-war, H.M.S. *Bellipotent*, during the war between Britain and the French Directory.²⁵ The author gives his readers background information about the British navy and about Billy himself.

It is the summer of 1797, a turbulent time for the British navy: in April of that year, the navy had endured a "commotion at Spithead," followed in May by a second and yet more serious outbreak in the fleet at the Nore, called the "Great Mutiny."²⁶ As such, the atmosphere is one of trepidation: everyone, especially the impressed crewmen, are vigilant of a recurrence.

22. See generally *infra* notes 126-138 and accompanying text.

23. *Id.*

24. MELVILLE, *supra* note 1, at 292.

25. *Id.* at 292-97.

26. *Id.* at 303. Melville explains: "It was indeed a demonstration more menacing to England than the contemporary manifestoes and conquering and proselytying 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." *Id.*

Billy, aged twenty-one, stands in stark contrast to the agitated macrocosm. He is reputed to be a "peacemaker,"²⁷ and also "happily endowed with gaiety of high health, youth and a free heart."²⁸ Most significantly, one of the first things that we learn about Billy is that he, lacking guile, does not "deal in double meanings and insinuations of any sort."²⁹ Melville portrays him as a species of angel and even alludes to Adam's Prelapsarian state with "virtues pristine and unadulterate."³⁰ Billy, however, has a fatal flaw in the form of a speech impediment:

Though in the hour of elemental uproar or peril he was everything that a sailor should be, yet under sudden provocation of strong heart-feeling his voice, otherwise singularly musical, as if expressive of the harmony within, was apt to develop an organic hesitancy, in fact more or less of a stutter or even worse. In this particular Billy was a striking instance that the arch interferer, the envious marplot of Eden, still has more or less to do with every human consignment to this planet of Earth.³¹

Billy is the antithesis of another man, who eventually becomes his false accuser, John Claggart, a petty officer, who serves as "a sort of chief of police charged among other matters with the duty of preserving order on the populous lower gun decks."³² Claggart, in comparison to Billy, is a verbally-gifted prevaricator and quite adept at obfuscating his true motives. The angelic sailor, who resides in the foretop, clashes with this satanic Claggart who presides in the realm below and has a "subterranean fire . . . eating its way deeper and deeper."³³

In this sense, the *Bellipotent* is likened to a Manichaeian universe with a Claggart sphere of darkness and a Billy sphere of light. This conceit is something Melville expands periodically: for example, at one point, he describes Claggart's "complexion, singularly contrasting with the red or deeply bronzed visages of the sailors," which is "in part the result of his official seclusion from sunlight."³⁴ The problem is that there is no palatable reason for Claggart's obsessive resentment of the Handsome Sailor, and Melville equates that mystery with the very incomprehensibility of evil itself, stating that it is a "mania of an evil nature, not engendered by vicious training or corrupting books or

27. *Id.* at 296.

28. *Id.* at 298.

29. *Id.*

30. *Id.* at 301 ("Billy in many respects was little more than a sort of upright barbarian, much such perhaps as Adam presumably might have been ere the urbane Serpent wriggled himself into his company.").

31. *Id.* at 302.

32. *Id.* at 313.

33. *Id.* at 340.

34. *Id.*

licentious living, but born with him and innate, in short ‘a depravity according to nature.’”³⁵

The real drama begins with Claggart hatching a scheme to destroy Billy, which is suggestive of Miltonic temptation and the serpent’s entreaty in the Biblical garden.³⁶ Claggart sends a minion to try to bribe Billy into assisting with a mutiny.³⁷ Although Billy instantly rebuffs the sibilant seduction, his “vocal infirmity” foreshadows what will ultimately catalyze his own demise.³⁸ As Melville presents it, “Billy, springing to his feet, said, ‘If you d-don’t start, I’ll t-t-toss you back over the r-r-rail!’”³⁹ We see here how Billy’s frustration with his own blocked speech can unleash itself in violence.

Tragically, Billy’s speech impediment kicks in again when Claggart accuses Billy of mutiny in the presence of Captain Vere, who until then had played a somewhat peripheral role in the evolving drama aboard the *Bellipotent*.⁴⁰ Captain Vere, a forty-year-old bachelor, is described as a “sailor of distinction,” who was “always acquitting himself as an officer mindful of the welfare of his men, but never tolerating an infraction of discipline.”⁴¹ Claiming the nickname, “Starry Vere” because he would occasionally stare dreamily at the blank sea,⁴² the Captain is a bookish pedant whose colleagues tend to find him “lacking in the companionable quality.”⁴³ It is this man that must entertain Claggart’s charges and ultimately decide the life or death of another human being.

When Claggart first tells Captain Vere about the “dangerous character”⁴⁴ on the ship, Captain Vere has his doubts: “[S]omething even in the official’s self-possessed and somewhat ostentatious manner in making his specifications strangely reminded him of a bandsman, a perjurous witness in a capital case before a courtmartial ashore of which when a lieutenant he (Captain Vere) had been a member.”⁴⁵

35. *Id.* at 326.

36. *See supra* note 31 and accompanying text.

37. MELVILLE, *supra* note 1, at 332.

38. *Id.*

39. *Id.*

40. *Id.* at 348-50.

41. *Id.* at 309.

42. *Id.* at 310. The name comes from Andrew Marvell’s poem, “Appleton House,” the lines of which Melville quotes:

This ‘tis to have been from the first
In a domestic heaven nurse,
Under the discipline severe
Of Fairfax and the starry Vere.

43. *Id.* at 312.

44. *Id.* at 342.

45. *Id.* at 344.

Despite his instinctive mistrust of the accuser, Vere, nevertheless apparently giving the whole thing an iota of credence, summons Billy to his cabin for answers.⁴⁶ Billy, however, who just stands there “like one impaled and gagged” and in a “convulsed tongue-tie,”⁴⁷ ends up striking Claggart dead with a single blow.⁴⁸

At this point, things go from bad to worse: the Captain convenes a drumhead court martial,⁴⁹ the members of which were initially inclined toward leniency until Vere, shedding his initial raiment as witness and donning the robe of both “coadjutor” and prosecutor, successfully secures a conviction and the death penalty.⁵⁰ In Captain Vere’s speech, he eloquently persuades the court that duty to law trumps apparent claims of natural justice.⁵¹

The next morning, Billy is hanged, but not without uttering his final, but “unobstructed” words, “God bless Captain Vere!”⁵² Not much later, Vere, fatally wounded in battle, perishes murmuring the words “Billy Budd, Billy Budd.”⁵³

II. THE SIXTH AMENDMENT RIGHT TO A VOICE

The Sixth Amendment, stating that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,”⁵⁴ provides the right to a voice. Despite its indispensability to the American criminal justice system, our British ancestors did not always view the right to counsel as essential.⁵⁵ Before the

46. *Id.* at 347-48.

47. *Id.* at 349.

48. *Id.* at 350.

49. *Id.* at 352. *Cf.* POSNER, *supra* note 9, at 156. A drumhead court martial is a military court convened to hear urgent charges of offenses committed in action. Professor Weisberg “argues that under English law Vere should have waited until the ship rejoined the fleet before proceeding against Billy” and then conducted a regular court martial because a drumhead court martial was only proper if one was accused of mutiny. *Id.* Judge Posner, on the other hand, reasons that “striking a superior officer in wartime was considered mutinous per se.” *Id.*

50. See MELVILLE, *supra* note 1, at 361-65. “Hitherto I have been but the witness, little more; and I should hardly think now to take another tone, that of your coadjutor for the time . . .” *Id.* at 361.

51. See *id.*

52. *Id.* at 375.

53. *Id.* at 382.

54. U.S. CONST. amend. VI.

55. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 355 (“[I]t is a settled rule . . . that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated.”). See generally WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-9 (1955) (explaining the justifications for the rejection of the right to counsel for felons); FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 9-10 (1951) (explaining why denying counsel to felon was

American Revolution, England did not permit defendants accused of felonies or capital offenses to appear through counsel.⁵⁶ Although some American colonies initially adhered to this rule, most had jettisoned it by the middle of the Eighteenth Century.⁵⁷ Some colonial statutes and constitutional provisions recognized that lawyers were necessary to protect against the conviction of the innocent.⁵⁸ In fact, in some colonies before the Revolution, indigent defendants charged with capital crimes were entitled to assigned attorneys.⁵⁹

As scholars and legal historians have suggested, one of the main purposes of the Sixth Amendment in the United States Constitution was to preclude laws, like those in England, which had criminal defendants representing themselves.⁶⁰ Although the Sixth Amendment was not initially construed as guaranteeing the appointment of counsel to indigents, it generally protected the right of those who could afford counsel to have legal representation of their own choosing.⁶¹ It was not, however, until the early Twentieth Century that in *Powell v. Alabama*,⁶² a capital case, the United States Supreme Court began to give our Sixth Amendment right to counsel its due dignity and the stature it enjoys today.

approved in early England); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-41 (1993) (discussing early right to counsel law); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 10 (1988) (explaining why "[t]he right to counsel does not have the illustrious Anglo-American heritage one might expect").

56. Green, *supra* note 55; see also *Crooker v. California*, 357 U.S. 433, 439 (1958) (the right to counsel is "not firmly fixed on our common law heritage.").

57. See Green, *supra* note 55, at 438; Tomkovicz, *supra* note 55, at 10; see also *United States v. Ash*, 413 U.S. 300, 306-07 (1973) (colonial statutes rejected the British rule because it was "absurd and illogical.").

58. See Green, *supra* note 55, at 438. *But see* Tomkovicz, *supra* note 55, at 10 (Although "[b]y statute and by constitutional provision, American colonists abandoned the hostile, restrictive approach to counsel of their British forbears[,] . . . [s]till, the colonial attitude toward lawyers was far from positive.").

59. See Green, *supra* note 55, at 438; see also *Powell v. Alabama*, 287 U.S. 45, 61-65 (1932) (discussing those state constitutions entitling the accused to counsel).

60. See generally Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 786-89 (1989); Green, *supra* note 55, at 438; Tomkovicz, *supra* note 55, at 11 ("The right to counsel incorporated into our fundamental charter pales in comparison to its modern counterpart. Time, experience, and our criminal justice system's evolution have greatly enhanced the sixth amendment grant's legal stature, significance, and scope.").

61. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (discussing how defendants should be "afforded a fair opportunity to secure counsel of his own choice"). BEANEY, *supra* note 55, at 21; Green, *supra* note 55, at 439; Alexander Holzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 7 (1944); Winick, *supra* note 60, at 786-99 (finding root of Sixth Amendment right to counsel of one's choice).

62. 287 U.S. 45.

In *Powell*, nine uneducated black youths, collectively called the "Scottsboro boys," were accused of raping two white women aboard a freight train.⁶³ These boys, strangers in the community, were swiftly tried, convicted and sentenced to death.⁶⁴ Although the defendants were formally represented, their lawyers had been appointed only on the morning of trial.⁶⁵ The Supreme Court, overturning their convictions, found that the tardy appointments were constitutionally infirm, depriving the defendants of legal advice "during perhaps the most critical period of the proceedings against [them] . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important."⁶⁶

Powell was the first modern right-to-counsel decision, one in which Justice Sutherland explained that the failure to afford the Scottsboro boys a "fair opportunity to secure counsel of [their] own choice"⁶⁷ violated due process:

All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.⁶⁸

The *Powell* opinion, focusing on capital cases, recognized that the appointment of counsel was a "logical corollary"⁶⁹ of the defendant's right to a fair hearing and stressed that even an "intelligent and educated"⁷⁰ layperson would need "the guiding hand of counsel at every step."⁷¹

Powell, along with *Johnson v. Zerbst*,⁷² decided six years later, appeared to promise that Sixth Amendment protection would infiltrate state prosecutions. In *Johnson*, the Court held that the Sixth Amend-

63. *Id.* See generally CLARENCE NORRIS & SYBIL D. WASHINGTON, *THE LAST OF THE SCOTTSBORO BOYS* 20 (1979).

64. *Powell*, 287 U.S. at 50.

65. *Id.* at 56.

66. *Id.* at 57.

67. *Id.* at 53.

68. *Id.* at 71. See generally Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 676 n.20 (1992) (pointing out that there were reasons to believe that the defendants were innocent and that the crime had not occurred at all).

69. *Powell*, 287 U.S. at 72.

70. *Id.* at 69.

71. *Id.*

72. 304 U.S. 458 (1938).

ment mandated that federal courts provide indigent defendants with appointed counsel in all serious criminal cases.⁷³ Justice Black extolled the right to counsel as “one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty[.]” and said that the Sixth Amendment is “a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”⁷⁴ The *Johnson* Court, resting on the *Powell* progenitor, felt that the Sixth Amendment espoused “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal.”⁷⁵

After *Powell* and *Johnson*, the decision in *Betts v. Brady*,⁷⁶ in which the Court refused to apply the Sixth Amendment right to counsel to the states via the Fourteenth Amendment’s Due Process Clause,⁷⁷ seemed surprising and even nonsequitural. In *Betts*, the forty-three-year-old defendant, who was indicted for robbery and lacked funds for counsel, asked the judge to appoint counsel.⁷⁸ When the judge declined, the accused, a man of ordinary intelligence, represented himself in a non-jury trial.⁷⁹ Although prosecution witnesses identified *Betts* as the robber, he claimed that he was somewhere else when the crime occurred.⁸⁰ He lost and received an eight-year sentence.⁸¹ The *Betts* majority concluded that due process did not necessarily require appointment of counsel in all felony cases, but only when specific circumstances showed that counsel’s absence would result in a fundamentally unfair trial.⁸²

The *Betts* “prejudice” or “special circumstances” rule was problematic: as the dissenters (Justices Black, Douglas and Murphy) suggest, most records in which lay people defend themselves make the prosecution of such a case look like a foregone conclusion in which the evidence of guilt is overwhelming.⁸³ As such, it is hard to extract

73. *See id.*

74. *Id.* at 462.

75. *Id.* at 463-63.

76. 316 U.S. 455 (1942).

77. *See id.*

78. *Id.* at 456-57.

79. *Id.* at 457.

80. *Id.*

81. *Id.*

82. *Id.* at 473 (“[T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”).

83. *Id.* at 476 (“Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant’s case was adequately presented.”).

from the record what defenses or mitigating factors trained advocates would have raised or what strategies they might have pursued. Despite the drawbacks of the disappointing decision, it took more than twenty years for the Court to overrule *Betts* in *Gideon v. Wainwright*.⁸⁴

In *Gideon*, a state court charged Clarence Earl Gideon with the felony of breaking and entering a poolroom with intent to commit a misdemeanor.⁸⁵ When he appeared in court as indigent and without a lawyer, he unsuccessfully sought the appointment of counsel.⁸⁶ After conducting his own defense, the jury returned a verdict of guilty, and Gideon was sentenced to five years in prison.⁸⁷

On certiorari, the United States Supreme Court appointed counsel for Gideon,⁸⁸ buried *Betts*,⁸⁹ and held that, because the Fourteenth Amendment fully incorporated the Sixth Amendment right, states were required to make appointed counsel available to indigent defendants in all felony cases.⁹⁰ Justice Black, vindicating what was the gist of his dissent in *Betts* stressed:

Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁹¹

There is a postscript to *Gideon*, and perhaps one of the things that has made it one of the most celebrated Supreme Court decisions: the retrial, in which Gideon was represented by appointed counsel, resulted in an acquittal.⁹² Essentially Gideon's lawyer, W. Fred Turner, persuaded the jury that there was reasonable doubt as to guilt because

84. 372 U.S. 335 (1962).

85. *Id.* at 336.

86. *Id.* at 337.

87. *Id.*

88. *Id.* at 338.

89. *Id.* at 339.

90. *Id.* at 339-45.

91. *Id.* at 344.

92. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 237, 249 (1964).

Gideon's chief accuser, Henry Cook, might in fact have been the real perpetrator of the crime.⁹³

After *Gideon*, the United States Supreme Court considered whether the constitutional right to appointed counsel applied to misdemeanor prosecutions. In *Scott v. Illinois*,⁹⁴ the Court drew the Sixth Amendment line and said that the right to an attorney requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his own defense."⁹⁵ In this regard, the Court explained that actual imprisonment differs from fines or the mere threat of imprisonment and found that distending the right to counsel to encompass all misdemeanors would impose inordinate and unpredictable costs on the state.⁹⁶ For the court, such practical considerations, however, must yield when an accused faces actual loss of liberty and, of course, the most serious punishment—death.

At present, the assistance of counsel must be available at all of the critical stages in the criminal prosecution, which are the junctures at which substantial rights of the accused may be impaired by counsel's absence.⁹⁷ Among those deemed to such critical stages are police or prosecutor attempts to elicit inculpatory statements from the accused, a first appearance or arraignment which can later be used against the accused, and, of course, the actual trial and sentencing.⁹⁸

It is significant that before the landmark decision, *Miranda v. Arizona*,⁹⁹ in which the Supreme Court held that the Fifth Amendment privilege against self-incrimination applies to custodial interrogation,¹⁰⁰ the Court recognized that the Sixth Amendment right to the assistance of counsel could curb government attempts to admit suspects' incriminating statements.¹⁰¹ In the pre-*Miranda* case, *Massiah v. United States*, the Court held that the accused's Sixth Amendment right to counsel barred the admission into evidence of statements he

93. *See id.* at 249.

94. 440 U.S. 367 (1979).

95. *Id.* at 374.

96. *Id.* at 373.

97. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

98. *See id.* at 134-37 (holding that sentencing is a critical stage of criminal prosecution, thus, requiring appointment of counsel); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (excluding defendant's confession after repeated requests by the defendant to consult with retained counsel were refused, and after his attorney had actually been turned away at the police station); *White v. Maryland*, 373 U.S. 59, 60 (1963) (holding that an initial appearance is a critical stage at which counsel should have been made available); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (holding an arraignment is a critical stage of the proceedings requiring aid of counsel).

99. 384 U.S. 436 (1966).

100. *Id.*

101. *See Massiah v. United States*, 377 U.S. 201 (1964).

made to a government agent.¹⁰² In *Brewer v. Williams*,¹⁰³ decided eleven years after *Miranda*, the Court adhered to the “clear” Sixth Amendment rule of *Massiah* “that once adversary proceedings have been commenced against an individual, he has a right to legal representation when the government interrogates him.”¹⁰⁴

Brewer v. Williams is a classic criminal procedure text book case. It involved the brutal murder of a little girl, Pamela Powers, who vanished while attending an event with her family at the YMCA in Des Moines, Iowa.¹⁰⁵ Williams, who had recently escaped from a mental hospital and was residing at the YMCA, was seen leaving the lobby with some clothing and a large bundle wrapped in a blanket.¹⁰⁶

After a warrant was issued for Williams’s arrest on the charge of abduction, Williams placed a long-distance call to a Des Moines attorney, Henry McKnight, who advised Williams to turn himself in to the Davenport police.¹⁰⁷ When Williams surrendered, he was booked and given *Miranda* warnings.¹⁰⁸ McKnight again conferred with his client, explaining to him that Des Moines police officers would be picking him up and instructing him not to talk to them about Pamela Powers.¹⁰⁹ The Des Moines police further promised that the officers would not question Williams during the drive back to Des Moines.¹¹⁰

After arraignment, the judge again advised Williams of his *Miranda* rights and another lawyer, Kelly, told him not to say anything until he could consult with his attorney back in Des Moines.¹¹¹ When the detective and his colleague came to pick up Williams, they met with Kelly and repeated the *Miranda* warnings.¹¹² Kelly also reiterated to the detective that Williams was not to be questioned about Pamela Powers until he had consulted with McKnight in Des Moines.¹¹³ When Kelly sensed “some reservations” on the part of the detective, he “firmly stated that the agreement with McKnight was to be carried out that there was to be no interrogation.”¹¹⁴ In fact, Kelly even unsuccessfully tried to get permission to accompany Williams in the police car with the officers.¹¹⁵

102. *Id.* at 206.

103. 430 U.S. 387 (1977).

104. *Id.* at 401.

105. *Id.* at 390.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 391.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 391-92.

114. *Id.* at 392.

115. *Id.*

En route to Des Moines, the detective, who knew that Williams was deeply religious and had mental problems, delivered what has been denominated the “Christian burial speech” in which he commented on the bad weather, referred to the likelihood of not finding the child’s body, and proclaimed that the child’s parents deserved a decent “Christian burial” for their little girl.¹¹⁶ In response, Williams blurted out incriminating statements and disclosed the body’s location.¹¹⁷

In holding that the admission of William’s statements at his trial deprived him of his constitutional right to the assistance of counsel, the Supreme Court, reiterating Justice Sutherland’s “memorable words” in *Powell v. Alabama*, stressed that the right, “guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversary system of criminal justice” and “vital” at the pretrial stage.¹¹⁸

One thing that pervades the *Williams* decision is the Justices’ acute awareness of the fact that “[t]he emotional aspects of the case make it difficult to decide dispassionately.”¹¹⁹ The Court nevertheless pledged its loyalty to the Sixth Amendment and to the sacred role of lawyers, especially when needed most—when “[t]he pressures on state executive and judicial officers charged with the administration of the criminal law are great.”¹²⁰ Justice Stevens elaborated:

Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage [—] as in countless others in which the law profoundly affects the life of the individual [—] the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individuals [sic] effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.¹²¹

116. *Id.* at 392-93 (“And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.”).

117. *Id.* at 393.

118. *Id.* at 398 (citing *Powell*, 287 U.S. at 57).

119. *Id.* at 415 (Stevens, J., concurring) (“Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent’s escape from a state mental institution. The emotional aspects of the case make it difficult to decide dispassionately . . .”).

120. *Id.* at 406 (“The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim [is] a small child.”).

121. *Id.* at 415 (Stevens, J., concurring).

The Supreme Court decided *Williams* a little more than a decade after *Miranda v. Arizona*,¹²² in which it held that the Fifth Amendment privilege against self-incrimination applies to custodial interrogation.¹²³ In *Williams* and its progeny, the Court indicated that the Sixth Amendment protection afforded by *Massiah* could be more potent than the Fifth Amendment *Miranda* rights.¹²⁴ That is, a defendant, who could not successfully challenge his confession on the basis of *Miranda* and on the Fourteenth Amendment right to due process might nevertheless prevail on the potentially more viable right-to-counsel argument.¹²⁵

The right to counsel is also the core of therapeutic jurisprudence, which is a relatively new field of legal study that already has had an impact on the courts and our laws.¹²⁶ The basic premise of therapeutic jurisprudence is that the law “function[s] as a kind of therapist or therapeutic agent” and that “legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or anti-therapeutic consequences.”¹²⁷ What this movement commends is simply the creation of legal procedures that have a therapeutic impact on the participants and our culture at large.

122. 384 U.S. 436 (1966).

123. *Id.*

124. See *Maine v. Moulton*, 474 U.S. 159 (1985) (holding that *Massiah* is satisfied if the state knowingly exploits an opportunity that the accused has initiated and arranged in order to elicit disclosure from the accused); *United States v. Henry*, 447 U.S. 264 (1980) (holding that using an undercover informant to elicit defendant's disclosures violates the Sixth Amendment); Tomkovicz, *supra* note 55, at 15-22 (discussing the “Post-Massiah Developments”). According to Tomkovicz, the *Massiah* right has “remarkable stamina and growth,” and “resides at the [S]ixth [A]mendment's outer border.” *Id.* at 7-9.

125. See *Maine*, 474 U.S. 159; *Henry*, 447 U.S. 264; Tomkovicz, *supra* note 55, at 15-22.

126. See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) (collecting an anthology of therapeutic jurisprudence work in a variety of legal areas and commentary on the approach); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991) (applying therapeutic jurisprudence to various issues in mental health law); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winnick ed., 1997) (showing how therapeutic jurisprudence can help us understand and restructure mental health law); *Special Issue on Therapeutic Jurisprudence*, 37 COURT REV. 1, 1-68 (2000) (collection of articles on how therapeutic jurisprudence can affect the courts and judicial decisions); Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (applying therapeutic jurisprudence to criminal justice); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Anti-therapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000) (applying therapeutic jurisprudence to appellate practice); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002) (applying therapeutic jurisprudence to juvenile justice).

127. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

With respect to therapeutic jurisprudence, various scholars have pointed out that when individuals participate in a judicial process, what influences them the most is not the result, but their own assessment of the fairness of the process itself.¹²⁸ For example, Tom Tyler, a social psychologist and proponent of procedural justice, has explained:

Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives.¹²⁹

Professor Keri Gould, who has dealt with kindred concepts in the context of individuals charged with serious crimes, has concluded that those who "experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and are less likely to accept judicial decisions."¹³⁰ Essentially, such feelings can enfeeble an individual's potential for rehabilitation and can engender what psychologists refer to as "learned helplessness," which breeds apathy, retards progress, and prompts individuals to simply give up.¹³¹

128. See generally E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 94-95, 118 (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) [hereinafter TYLER, *OBEY THE LAW*]; E. Allen Lind et al., *Voice Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). For application of such principles in civil commitment hearings, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992) [hereinafter Tyler, *The Psychological Consequences*]; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (discussing role of counsel in civil commitment hearings).

129. Tyler, *The Psychological Consequences*, *supra* note 128, at 437 (footnotes omitted); see also Amy D. Ronner, *Punishment Meted Out for Acquittals: An Anti-therapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472-77 (1999) (discussing how unfair procedures engender disrespect for the law, disregard for human life, rage and a sense of helplessness).

130. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?* 10 N.Y.L. SCH. J. HUM. RTS. 835, 865 (1993); see also Ronner, *supra* note 129.

131. MARTIN E. P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* xvii (1992) (discussing learned helplessness). In his study, Seligman, a psychologist, defines the interlocking ingredients of such learned helplessness: "[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome." *Id.*

An anti-therapeutic process can also erode society, manifesting itself in a waning faith in and even scorn for the laws and justice system.¹³²

When, however, individuals believe that the legal system has treated them fairly, and with respect and dignity, there is an opposite effect.¹³³ Specifically, the participants in the process do not just experience greater satisfaction, but tend to be more inclined to accept responsibility for their own conduct and undertake measures to reform. Such a therapeutic process basically boils down to a litigant or the accused having a sense of “voice,” which is an opportunity to tell their stories to a decision-maker.¹³⁴ Along with voice is “validation,” or the feeling that the adjudicator has really listened to, heard, and taken seriously the participant’s position.¹³⁵ With voice and validation, litigants tend to find the results of a proceeding less coercive and feel as if they voluntarily played a role in the ultimate judicial pronouncement.¹³⁶ As such, the participants themselves, the adjudicators and observers (society at large) tend to be more at peace with the result—even one with which they do not necessarily agree.¹³⁷

In the legal context, especially in a criminal proceeding, the attorney is key: it is he or she who can help individuals articulate their wishes and tell their stories. It is the attorney who can help effectuate such individuals’ participatory interests and give them voice and validation.¹³⁸ It is also the attorney as the voice that can make legal proceedings seem less coercive and increase the likelihood that the results will be perceived as fair.

III. BILLY BUDD’S VOICELESS DEATH

Since we do not know exactly when Melville wrote *Billy Budd, Sailor*, which was not discovered until after his death in 1924, we can only speculate as to the people and circumstances that might have in-

132. See Ronner, *supra* note 129.

133. See generally TYLER, *OBEY THE LAW*, *supra* note 128, at 19, 71-74.

134. Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1158 (1997) (discussing the importance of voice and validation in the mental health context); see also Ronner, *supra* note 126, at 93-96 (discussing “The Three V’s”: Voice Validation, and Voluntary Participation in the context of juvenile justice); Ronner & Winick, *supra* note 126, at 501-03 (discussing the importance of “voice” and “validation” in appellate proceedings).

135. See Ronner & Winick *supra* note 134, at 501.

136. *Id.*

137. *Id.* Recent research by the MacArthur Research Network on Mental Health and the Law on patient perceptions of coercion found that even in situations that are inherently coercive—like civil commitment—individuals do not feel coerced when they perceive state actors as benevolent and when they are given voice and validation. See Winick, *supra* note 128, at 47-50; see also Nancy S. Bennett et al., *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI & L. 295 (1993).

138. See Ronner & Winick *supra* note 134, at 503-04.

spired the enigmatic novella.¹³⁹ While it is ludicrous to suggest that Melville was clairvoyant and could somehow predict Justice Sutherland's eloquent vindication of the right to counsel in *Powell*,¹⁴⁰ it is quite likely that Melville was cognizant of what colonial legislatures and state constitutions had already recognized—namely that legal assistance was indispensable to criminal justice.¹⁴¹

It is, moreover, safe to say that *Billy Budd* resonates with a profound appreciation for the vital role attorneys play, and should play, in our legal system. If, however, we can find anything at all oracular in his novella, it is Melville's belief that human fallibility is destined to spawn imperfect institutions. The judicial system of the *Bellipotent* is just that—flawed and even perilously imbalanced. It is devoid of the one ingredient—namely, the voice of counsel—which has the potential to equilibrate and ameliorate the harm.

139. There are abundant theories about what motivated Melville to write *Billy Budd*. See COVER, *supra* note 4, at 4 (suggesting that the model for Captain Vere was Melville's father-in-law, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, who "came down hard for an unflinching application of the harsh and summary law" with respect to the fugitive slaves in antebellum America); POSNER, *supra* note 10, at 161 (noting Melville was inspired by "Holmes's classic of legal positivism," *The Common Law*); SMITH, *supra* note 4, at 76 (Novella's "historical prototype" was the incident in 1842, in which "Captain Alexander Slidell Mackenzie of the U.S. Navy brig *Somers* summarily hung three members of his crew for mutiny without any formal trial before a military court."); Charles Roberts Anderson, *The Genesis of Billy Budd*, 12 AM. LITERATURE 329, 331 (1940) (The memory of Englishman Jack Chase, Melville's shipmate and hero of *White-Jacket*, inspired the story and "prompted Melville to give his story a setting in British naval history."); Braswell, *supra* note 4, at 133 ("*Billy Budd* may justifiably and profitably be considered as an inside narrative about a tragic conflict in Melville's own spiritual life."); Browne, *supra* note 12, at 322 ("*Billy Budd* is a search for the best form of government—autocratic vs. democratic—a question on which Melville worried all of his mature life On this level, . . . Claggart can be equated with the Hobbesian primitive man and Budd with the Rousseauvian 'noble savage,' with Vere as a spokesman or apologist for and manipulator of Hobbesian despotism as compromise."); H. Bruce Franklin, *Billy Budd and Capital Punishment: A Tale of Three Centuries*, 69 AM. LITERATURE 337, 337 (1997) (Melville was inspired by the "national and international attention . . . focused on the climax of a century-long battle over capital punishment unfolding in the very place where Melville was living—New York State."); Noone, *supra* note 4, at 249, 251 ("Billy may be interpreted as embodying the main outlines of the popular conception of Rousseau's 'noble savage,' while Claggart "is the apotheosis of Rousseau's conception of 'civilized' man."); John W. Rathbun, *Billy Budd and the Limits of Perception*, 20 NINETEENTH-CENTURY FICTION 19, 25 (1965) ("Billy becomes the Adam who does not fall, the Isaac who is not saved, the Christ who does not redeem."); Reich, *supra* note 7, at 370-72 (Captain Vere's judgment is based on the decision by the Chief Justice of England, Lord Coleridge who sentenced to death two seaman, "cast away in an open boat 1600 miles from the Cape of Good Hope," who killed another survivor, a boy of seventeen or eighteen, and "fed upon his body and blood" so that they could survive.); Thomas, *supra* note 4, at 59 (Vere is made in "the same honored Anglo-American legal tradition as Coke" because "he feels that individual rights can be protected from arbitrary violations by the state only through maintaining rule by law.").

140. See generally *Powell v. Alabama*, 287 U.S. 45 (1932). See *supra* notes 61-68 and accompanying text.

141. See *supra* notes 55-60 and accompanying text.

Billy Budd is about voiceless death, a theme emerging through the author's development of the cast and surfacing in the novella's three pivotal scenes: the interrogation, the trial, and the execution.

A. The Cast With One Voiceless Man

Before Melville guides us through the cabins of aberrant justice, he introduces us to the *Bellipotent* characters that serve as foils for, and thus underscore the speechlessness of, a Billy Budd destined to die a premature death.¹⁴²

Billy Budd is impressed from a merchant ship, the *Rights of Man*, onto the new ship, cheerfully accepting his fate, and enjoying a reputation as peace-maker and booster of morale.¹⁴³ Billy's effect on others was like a "Catholic priest striking peace in an Irish shindy,"¹⁴⁴ which was explained: "[n]ot that he preached to them or said or did anything in particular; but a virtue went out of him sugaring the sour ones."¹⁴⁵ Essentially, what Billy projects has nothing to do with organized religion or words, but rather with an unspoken purity that seemed to emanate from his very soul.

Billy is also depicted as popular, yet paradoxically alone "in marked contrast to certain other individuals included like himself among the impressed portion of the ship's company."¹⁴⁶ What we learn is that he, unlike his cohorts, is and has been solitary in the most literal sense:

But . . . [the others] were not so young as our foretopman, and no few of them must have known a hearth of some sort, others may have had wives and children left, too probably, in uncertain circumstances, and hardly any but must have had acknowledged kith and kin, while for Billy, as will shortly be seen, his entire family was practically invested in himself.¹⁴⁷

Billy lacks a clan or even a whisper of familial bonds. He also seems somewhat defiant of gender categories, with the author likening him periodically to a girl with a "smooth face all but feminine in purity of natural complexion"¹⁴⁸ and describing his fatal flaw, the "vocal

142. See MELVILLE, *supra* note 1, at 293-94.

143. See Yoder, *supra* note 4, at 615. Budd's transfer from the "merchantman *Rights of Man* (named, we are told, for Thomas Paine's pamphlet defending French revolutionary principles against Edmund Burke) to the 74-gun man-of-war *Bellipotent* ('mighty in battle') . . . marks a symbolic passage from an environment of natural law to the sterner climate of military law[,] . . . [a] passage [that] will lead to his death." *Id.*

144. MELVILLE, *supra* note 1, at 295.

145. *Id.*

146. *Id.* at 298.

147. *Id.*

148. *Id.* at 299.

defect,"¹⁴⁹ with an allusion to "the beautiful woman in one of Hawthorne's minor tales."¹⁵⁰ What we have in Billy is an amalgam of a young, somewhat androgynous, solitary, nearly prelapsarian being, who knows nothing of "double meanings and insinuations" and has an impaired capacity to speak for himself.¹⁵¹ He is suggestive of the paradigmatic client.

The problem though is not Billy's own nature, but the fact that he is surrounded by others with diametrically opposite traits. His enemy, Claggart, is Billy's antithesis, a man adept at wielding words, cloaking meanings, and achieving his ends through deceit.¹⁵² As Professor Weisberg aptly points out, "[t]he real opposition here . . . is between the Handsome Sailor's innate openness and the intelligent mater-at-arm's 'ingratiating' indirectness, or, as we shall call these qualities here, *overt*ness and *covert*ness."¹⁵³ This comes across when Billy accidentally spills the soup in front of Claggart, who stifling the impulse to chastise, instead projects a smile and utters, "Handsomely done, my lad! And handsome is as handsome did it, too!"¹⁵⁴ This scene shows Claggart doing what he does best—convincing an audience of an untruth or specifically proving that he has no grudge against and even possibly favors the Handsome Sailor.

In fact, Claggart, the epitome of Iago's apothegm, "I am not what I am"¹⁵⁵ is effective for the very reason that he can present himself as a man with "even temper and discreet bearing,"¹⁵⁶ and as a "mind peculiarly subject to the law of reason."¹⁵⁷ In this regard, Melville comments on Claggart's duplicitous deformity:

These men are madmen, and of the most dangerous sort, for their lunacy is not continuous, but occasional, evoked by some special object; it is protectively secretive, which is as much as to say it is self-contained, so that when, moreover, most active it is to the average mind not distinguishable from sanity, and for the reason above suggested: that whatever its aims

149. *Id.* at 302.

150. *Id.*; see Judith Schenck Koffler, *The Feminine Presence in Billy Budd*, 1 CARDOZO STUD. L. & LITERATURE 1, 7-8 (1989) (discussing Billy's "unhidden femininity" and how he "makes life on board the *Rights of Man* 'the happy family,' eliciting 'maternal' and feminine qualities from the sailors themselves."); Robin West, *A Feminine Silence: A Response to Professor Koffler*, 1 CARDOZO STUD. L. & LITERATURE 15, 15 (1989) ("The feminine voice, the feminine side of man, maternalism, feminine virtue, and female compassion are all systematically repressed, perverted, silenced, and ultimately annihilated.").

151. MELVILLE, *supra* note 1, at 298.

152. *See id.* at 313.

153. Weisberg, *supra* note 5, at 9 (footnote omitted).

154. MELVILLE, *supra* note 1, at 322.

155. WILLIAM SHAKESPEARE, *OTHELLO, THE MOORE OF VENICE*, act 1, sc. 1 ("But I will wear my heart upon my sleeve For dams to peck at: I am not what I am.").

156. MELVILLE, *supra* note 1, at 325.

157. *Id.*

may be—and the aim is never declared—the method and the outward proceeding are always perfectly rational.¹⁵⁸

Although it has been suggested that “Billy Budd represents prelapsarian Adam, Claggart represents Satan, and Captain Starry Vere represents God,”¹⁵⁹ and that the story is a “modern reenactment of the Fall of Man,” such an exegesis does not congeal well because of Captain Vere’s all too human infirmities.¹⁶⁰ Vere, described as “an exceptional character,” with intellectual leanings, mirrors some of the “madman” traits of Claggart.¹⁶¹ Vere, like Claggart, is also a dangerously proficient speaker and, but to a lesser extent, an accomplished deceiver. That is, as Melville tells us, when Vere disembarks, disguised as a mere civilian, no one would guess his true sailor identity. And significantly, it is Vere’s skill at manipulating language or refraining from “garnish[ing] unprofessional talk with nautical terms” that enables him to construct that opaque veneer.¹⁶² But perhaps what Vere shares most with Claggart is a form of madness, something the surgeon diagnoses as “unhinged”¹⁶³ and the author relegates to possible “aberration.”¹⁶⁴

But there is more to the *Bellipotent* microcosm than the contrasts between Billy Budd and his accuser, Claggart, and ultimate adjudicator, Vere. There are also two somewhat sagacious bystanders that see the issues, but fail to intercede on Billy’s behalf. While Melville does not flesh out these characters too much, we nevertheless get a feel for them. There is the “old Dansker long anglicized in the service, of few words, many wrinkles, and some honorable scars.”¹⁶⁵ Billy, sensing the wisdom of this “*Agamemnon* man,” tries to claim him as a mentor, a role the old Dansker assumes, but somewhat begrudgingly.¹⁶⁶ It is this Delphic figure that issues the warning, “Baby Budd, *Jemmy Legs* ([Claggart] master-at-arms) is down on you,” and who, with “pithy guarded cynicism,” seems to pierce the Claggart facade and see the true unfathomable villainy.¹⁶⁷ Despite the fact that the old Dansker is and could be Billy’s saving grace, he simply does not defend him or even involve himself, because, as the author suggests, “[I]ong experi-

158. *Id.* at 326.

159. SMITH ET AL., *supra* note 4, at 78.

160. *Id.* at 78 (arguing that the treatment of the novella “as if its subject is the trial and death of a particular man in a particular historical setting is to limit severely the real of Melville’s narrative”).

161. MELVILLE, *supra* note 1, at 311.

162. *Id.* at 309.

163. *Id.* at 352.

164. *Id.* at 353.

165. *Id.* at 318-19.

166. *Id.* at 319-20.

167. *Id.* at 320-21.

ence had very likely brought this old man to that bitter prudence which never interferes in aught and never gives advice."¹⁶⁸ As such, the old Dansker hints at the lawyer that fails to materialize.

The only other really viable character that appears before the trial, beside Claggart's emissary, who fleetingly surfaces to try to tempt the Handsome Sailor to mutiny, is the surgeon, summoned to examine Claggart's prostrate body. He, like the old Dansker, is imbued with the kind of insight that could have and might have saved Billy. This "self-poised character of that grave sense and experience that hardly anything could take him aback" was indeed unsettled by "the excited manner he had never before observed in the *Bellipotent's* captain" which left him "[f]ull of disquietude and misgiving."¹⁶⁹ The surgeon is the one that silently considers whether Vere is "suddenly affected in his mind" or even "unhinged."¹⁷⁰ He, however, like the old Dansker feels helpless or at least reluctant to stick his neck out and get involved. The passivity of such peripheral voyeurs only serves to highlight what is so obviously missing—someone not peripheral, not a mere observer, but an active champion with verbal prowess and enough moxie to speak for the accused.

B. The Voiceless Interrogation

It is in this context that Billy Budd confronts stage one in the proceedings, the interrogation, in which he is summoned to answer the charges. Interestingly, this questioning, "closeted" in the cabin behind shut doors,¹⁷¹ should evoke the portion of the landmark *Miranda* decision in which Chief Justice Warren excerpts various recipes for effective interrogation, which have privacy as their essential ingredient:

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his own home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investiga-

168. *Id.* at 336.

169. *Id.* at 351-52.

170. *Id.* at 352.

171. *Id.* at 348; see also Christopher W. Sten, *Vere's Use of the "Forms": Means and Ends in Billy Budd*, 47 AM. LITERATURE 37, 43 (1975) (discussing Vere's "demands for secrecy," which "commenced immediately after Claggart accused Billy" and Vere's "desire for secrecy following Claggart's death" and suggesting that "the possibilities of a mutiny and of a meeting with the enemy were two critical factors in Vere's decision").

tor possesses all the advantages. The atmosphere suggests the invincibility of the forces of law.¹⁷²

Such techniques of isolating and shipping an accused off to an unfamiliar arena, which are inherently coercive, were among the things that motivated the *Miranda* Court to delineate Fifth Amendment safeguards.¹⁷³ They also prompted the Court to emphasize how “[t]he presence of counsel” at such an interrogation serves multiple salutary functions, like mitigating the dangers of “untrustworthiness” in confessions¹⁷⁴ reducing “the likelihood that the police will practice coercion” and helping “to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.”¹⁷⁵

The interrogation of Billy Budd, with its haunting analogue in the pre-*Miranda* “how-to” manuals, opens with Vere’s resolve to “test the accuser” in “a place less exposed to observation than the broad quarter-deck.”¹⁷⁶ Budd is, thus, secretly plucked from his familiar soil and transplanted in the cabin, a situs that has to represent “the invincibility of the forces of the law.”¹⁷⁷ There the young, speech-impaired Billy, ostensibly wilts before his accuser, who, “mesmerically looking him in the eye, briefly recapitulated the accusation.”¹⁷⁸ Captain Vere’s missives, “Speak! Defend yourself,”¹⁷⁹ exacerbate the problem and evoke such “strange dumb gesturing and gurgling”¹⁸⁰ that Billy becomes mute apoplexy personified:

[W]hile the intent head and entire form straining forward in an agony of ineffectual eagerness to obey the injunction to speak and defend himself, gave an expression to the face like that of a condemned vestal priestess in the moment of being buried alive, and in the first struggle against suffocation.¹⁸¹

What makes this scene excruciating for a reader is the fact that the presiding Captain Vere intuits Billy’s “liability to vocal impediment”¹⁸² and recalls one of his childhood schoolmates with “much the same startling impotence.”¹⁸³ Vere, thus cognizant of the impasse, re-

172. 384 U.S. at 449-50.

173. *See id.*

174. *Id.* at 470.

175. *Id.*

176. MELVILLE, *supra* note 1, at 347.

177. *Miranda*, 384 U.S. at 450.

178. MELVILLE, *supra* note 1, at 349.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 349-50.

sponds by trying to coax speech with kindness: that is, he “lay[s] a soothing hand on . . . [Billy’s] shoulder” and employs a “fatherly” tone.¹⁸⁴ Such ostensible gestures of benevolence, however, backfire, “prompt[ing] yet more violent efforts at utterance—efforts soon ending for the time in confirming the paralysis.”¹⁸⁵ Billy simply cannot speak for or defend himself and ends up *literally* incriminating himself by delivering a death-blow to his accuser right in front of Judge-Witness Captain Vere. As such, without a voice or defender, Billy is silently doomed to damn himself, thus, prefiguring the nightmarish doom that Justice Sutherland described in *Powell*:

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide.¹⁸⁶

That is, the proceedings in *Billy Budd* begin with the interrogation of the “dumb” accused, who without counsel, ends up dead.

C. The Voiceless Trial

Stage two of the proceedings is Billy’s trial, which hammering home the point that Justice Sutherland made in *Powell*, shows us how the absence of counsel can amount to “a gross violation of the guarantee of due process of law.”¹⁸⁷ The trial, as Professor Weisberg has suggested, contains “no fewer than *eight* procedural errors,”¹⁸⁸ the first of which is Vere’s convening of a “drumhead court.”¹⁸⁹ According to Weisberg, the 1749 Articles of War bestowed “court-martial commissions exclusively to fleet or squadron commanders,”¹⁹⁰ and thus, Billy’s case should have been “refer[red] to the admiral.”¹⁹¹ As Weisberg explained:

184. *Id.* at 350.

185. *Id.*

186. *Powell v. Alabama*, 287 U.S. 45, 72 (1932). See *supra* note 61-68 and accompanying text.

187. Weisberg, *supra* note 4, at 21.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 22.

Every educated man on the *Bellipotent* (and probably a good number of ordinary sailors) would have known that, under the Articles, capital crimes must be brought to the attention of either the lord high admiral or the commander of the fleet. According to the Articles, the high officers' jurisdictional interest in such matters commenced at the earliest stages of the proceedings and continued to the stage beyond conviction, in which the admiral or fleet commander was to have full review powers.¹⁹²

According to Weisberg, the trial was improper not just because Billy's case triggered "the jurisdictional power of the admiralty, or the commander of the Mediterranean fleet,"¹⁹³ but also because Vere used three (rather than five) judges of inappropriate rank, incorrectly resorted to "summary proceedings,"¹⁹⁴ and illegally conducted the court-martial in "the utmost secrecy."¹⁹⁵

Richard A. Posner, who criticizes Weisberg's interpretation, especially takes issue with the notion "that the court-martial was irregular."¹⁹⁶ For Posner, it seems highly unlikely that Melville, who "had served on an American warship and [whose] father-in-law was a famous judge,"¹⁹⁷ was privy to "the arcana of eighteenth-century naval law that Weisberg has been able to recover only by much patient digging."¹⁹⁸ The problem is that Posner's refutation of Weisberg's view shuns the novella's actual text, or the very fact that characters, like the surgeon, also find the trial procedurally irregular and believe that Vere should "postpone further action in so extraordinary a case to such time as they should rejoin the squadron."¹⁹⁹ As such, Weisberg's misgivings do not derive just from some "patient digging"²⁰⁰ into English naval law, but from his conscientious reading of the novella itself.²⁰¹

Melville makes it known that there is at least some debate aboard the *Bellipotent* with respect to the measures Captain Vere undertakes to effectuate justice.²⁰² In fact, the doubt is pervasive enough to prompt the surgeon to brand the "drumhead court"²⁰³ "impolitic"²⁰⁴ and attribute the Captain's approach to a sudden mental imbalance.²⁰⁵ What makes the procedure troubling, however, is not merely what

192. *Id.*

193. *Id.* at 22-23.

194. *Id.* at 24.

195. *Id.* at 23-25; see also Sten, *supra* note 171.

196. Posner, *supra* note 4, at 72.

197. *Id.*

198. *Id.*

199. MELVILLE, *supra* note 1, at 352.

200. Posner, *supra* note 4, at 72.

201. See *supra* notes 195-196 and accompanying text.

202. See MELVILLE, *supra* note 1, at 352.

203. *Id.*

204. *Id.*

205. *Id.*

Weisberg suggests is its failure to conform to the dictates of the Articles of War,²⁰⁶ but rather the absence of anyone on the *Bellipotent* willing or able to make that argument raises alleged procedural error and advocates an alternate *modus operandi*. Because Billy is lawyerless, the trial does what the *Powell* Court once described as “go forward with the haste of the mob” and this happens in acquiescent silence.²⁰⁷

Perhaps the most egregious procedural glitch, something even Posner conceded was “questionable,”²⁰⁸ is Vere’s assumption of multiple roles in the trial.²⁰⁹ Vere, who is at first sole witness, mutates into the three-headed monster, the prosecutor, jury and judge—all the more egregious because he was the captain of the vessel, with all its incidental powers. While Posner justified this “streamlining of legal procedure [as] . . . necessary to maintain the brisk pace of the narrative”²¹⁰ and as “art trump[ing] due process,”²¹¹ the artistic composition itself bares the author’s unease with Vere’s peculiar violation of adjudicatory separation of powers.²¹² Starry Vere flags his own impropriety and then glibly rationalizes it as military necessity when he blurts out:

Hitherto I have been but the witness, little more; and I should hardly think now to take another tone, that of your coadjutor for the time, did I not perceive in you—at the crisis too—a troubled hesitancy, proceeding, I doubt not, from the clash of military duty with moral scruple—scruple vitalized by compassion. For the compassion, how can I otherwise than share it? But, mindful of paramount obligations, I strive against scruples that may tend to enervate decision.²¹³

What makes Vere’s ubiquity so disturbing is not just what Weisberg isolates as “Anglo-American military law[’s] . . . strict antipathy to multiple role-playing,”²¹⁴ but the fact that Vere’s eloquence enables him to apotheosize a rather demonic derogation of due process.²¹⁵ That is, language enables Vere to cast his trampling of procedure into

206. Weisberg, *supra* note 4, at 20.

207. *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (“[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the claim spirit of regulated justice but to go forward with the haste of the mob.”). See also *supra* notes 61-68 and accompanying text.

208. Posner, *supra* note 4, at 73.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. MELVILLE, *supra* note 1, at 361.

214. Weisberg, *supra* note 5, at 25.

215. *Id.*

something admirable, like deference to “military duty”²¹⁶ and “paramount obligations.”²¹⁷ What is, of course, lacking here is rebuttal or any challenge to what appears to be Vere’s compulsion to dominate the proceedings. There is simply no one there that can or does try to pop Vere’s egocentric bubble, defend Billy Budd, or even chant the magic words “fairness” or “due process.”

What compounds this image of adjudicator Vere swelling and becoming increasingly silver-tongued is the pathetic vision of the accused, who seems to shrink into silent invisibility. The trial commences on an even keel: Billy responds to questions with “syllables not so much impeded in the utterance as might have been anticipated,”²¹⁸ pledges his loyalty to the King, calls Claggart a liar, explains that he struck Claggart because he could not use his tongue, and denies knowledge of any mutinous plot.²¹⁹ When, however, the inquiry becomes more sophisticated, it stymies Billy, who is unable to even begin to explain what it was that made Claggart maliciously lie.²²⁰ What we have learned from the development of this character is that Billy’s very virtue or innocence renders him impervious to what he needs to know to even start to answer that question.²²¹ Billy is estranged from the concept of the kind of innate evil embodied in the Claggarts of the post-lapsarian world.

After being silenced by this perplexing inquiry, Billy essentially vanishes from his own trial. What is ironic here is that Billy, the creature of utmost simplicity, was forced to confront the very question that has stumped not just Melville scholars for nearly a century—namely, what makes Claggart tick—but more broadly, has propelled profound thinkers, like the Baron Gottfried Wilhelm Leibnitz, to futilely ponder theodicy, the branch of theology that defends God’s goodness and justice in the face of the existence of evil.

What we, as readers, do sense from the trial of Billy Budd is that innocence and guilt are becoming amorphous and even interchangeable. All along, we know, as did the Captain, that the veritable criminal is Claggart, who has been “[s]truck dead by an angel of God.”²²² But somehow things get twisted, or turned so topsy-turvy that it is the “angel” that “must hang.”²²³ The warp here is the inevitable result of a system in which an accused is rendered voiceless. Billy lacks an ombudsman that can explain Billy, suggest reasons for Claggart’s lie, and

216. MELVILLE, *supra* note 1, at 361.

217. *Id.*

218. *Id.* at 356-57.

219. *Id.*

220. *Id.*

221. *See id.*

222. *Id.* at 352.

223. *Id.*

attribute such raw malice to envy or even perhaps a repressed sexual attraction for the Handsome Sailor.²²⁴ Whatever the legal strategy might be, the point is that there was no one present at Billy's trial to create reasonable doubt or, like the heroic lawyer that Gideon ultimately won on remand, perhaps suggest that the real culprit is the accuser—not the accused.²²⁵

Nothing in *Billy Budd* makes defense counsel's absence more conspicuous than Captain Vere's closing speech, which consumes the trial and bombards us with juxtaposed opposites that serve to advance one result—death.²²⁶ At the heart of Vere's oration is his acknowledgment of the debate over positive, natural and divine law:

But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. Through the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King's officers lies our duty in a sphere correspondingly natural? So little is that true, that in receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now. For suppose condemnation to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.²²⁷

Vere, like Marcus Antonius in Shakespeare's *Julius Caesar*, is a master of rhetoric: he, in essence, tips his hat to natural law, contending that he believes that the immutable rules of nature are honorable.²²⁸ He also purports to pay homage to divine law or what he calls "innocen[ce] before God."²²⁹ From there, however, he methodically pulverizes the putatively honorable natural and divine laws and sways the adjudicators toward his stated preference—positivism, manmade laws and allegiance to the King.

224. See Koffler, *supra* note 150, at 8 (Claggart's "strangled erotic desires for Billy are deeper than the merely physical, but suffuse him with emotion and his eyes with feverish tears. . . . In short, he is in love.").

225. See *supra* notes 83-92 and accompanying text.

226. Melville, *supra* note 1, at 361-62.

227. *Id.*

228. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2 (W.G. Clark & Aldis W. Wright eds., Nelson Doubleday, Inc. n.d.) (1601) ("Here, under leave of Brutus and the rest—For Brutus is an honorable man; So are they all, all honorable men . . .").

229. MELVILLE, *supra* note 1, at 361.

What is clever here (in fact, ingenious) is Vere's technique of exploiting the experience of his audience, by importing what is familiar, the "commissioned fighters," who obey command even when their own judgments possibly contest the cause.²³⁰ In essence, Vere argues that legal positivism justifies what is the very reality of the adjudicators' own lives, or as notable law and literature scholars have put it, his "disturbingly cogent argument" is "that, if he as captain is to pass judgments in accord with divine law, all impressed sailors aboard the *Bellipotent* should be immediately freed."²³¹

With respect to Vere's approach, Posner, as have others, pointed out that Holmes's *The Common Law*, "[his] great work of legal positivism,"²³² had appeared before and was making "great headway at the time Melville wrote *Billy Budd*,"²³³ which explains Vere's "refus[al] to allow the positive law governing naval discipline to be trumped by appeal to the 'higher law' under which Claggart's death was well deserved."²³⁴ What makes the closing argument so quirky, however, is not just its eerie parroting of Holmes, but the fact that the opposing argument is right there, but muffled, in the text.²³⁵

It is Vere himself who implies that there is a rebuttal waiting to emerge, echoing perhaps Edmund Burke, or advocating a more Jeffersonian linkage between natural rights and reason, or asserting the value of "natural free agents."²³⁶ Melville suggests a crucial voice is missing, one that might retrieve and bolster the forces that Vere muted and banished.²³⁷ Such an advocate might champion natural and divine

230. *Id.* at 362.

231. SMITH ET AL., *supra* note 4, at 73-74. "Although Vere's concepts of natural and human justice may derive from Burke, they bear startling similarity to contentious arguments about the criminal law recently advanced by America's most prominent legal thinkers. Holmes's *The Common Law*, published in 1882, four years before Melville began writing *Billy Budd*, directly attacks the assumption that the law exists primarily to safeguard individual rights." *Id.* Smith, McWilliams & Bloomfield, elaborate on the parallels between Vere's "cogent argument" and Holmes:

When Holmes wishes to prove that society's survival must and will take precedence over "the dogma of equality," he cites the same example: "No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death."

Id. at 74 (quoting OLIVER WENDELL HOMES, JR., *THE COMMON LAW* 41 (Harvard University Press, 1963)) and stating "Oliver Wendell Holmes, Sr., had been Melville's physician during the 1850s."

232. Posner, *supra* note 4, at 76.

233. *Id.*

234. *Id.*

235. See SMITH ET AL., *supra* note 4, at 72 ("One of *Billy Budd's* great ironies is that Vere's honesty in admitting counterargument has provided his critics the words with which to condemn him."). We, however, suggest that this is Melville's way of intimating that there is a potential defense that is not being lodged.

236. MELVILLE, *supra* note 1, at 362.

237. See *id.* at 360-61.

laws, or even tout the kind of justice that, tempering legal positivism with “moral scruple—scruple vitalized by compassion,” can save Billy’s life.²³⁸

Vere does not just juxtapose legal positivism with natural justice, but also manipulates other ostensible dichotomies. In his rhetorical march toward death, Vere pits society against the individual, the head against the heart, and the masculine against the feminine:

But the exceptional in the matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool. Ashore in a criminal case, will an upright judge allow himself off the bench to be waylaid by some tender kinswoman of the accused seeking to touch him with her tearful plea? Well, the heart here, sometimes the feminine in man, is as that piteous woman, and hard though it be, she must here be ruled out But something in your aspect seems to urge that it is not solely the heart that moves in you, but also the conscience, the private conscience. But tell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated in the code under which alone we officially proceed?²³⁹

Vere artfully weaves a tapestry of judicial weakness, one in which natural law is the warp and feminine heart the weft. Vere appears to be arguing that natural law upheaves rightful order by elevating the hot heart over the cool head and condoning female dominion over men. Vere’s thinking here is reminiscent of Milton’s *Paradise Lost*, especially the scene in which uxorious Adam, attempting to blame Eve for the sin, is admonished with the question, “Was she thy God?”²⁴⁰

For Milton, Adam’s sin of uxoriousness, which upset the rightful hierarchy of man over woman, led to his fall.²⁴¹ Vere’s point is that a result other than the death penalty is as wrong as Eve’s dominion over Adam and that the adjudicators will transgress against King and martial law if they let private conscience and their hearts (the weaker female within) to be their God.²⁴² In all of this, through point-

238. *Id.* at 361.

239. *Id.* at 362.

240. JOHN MILTON, *Paradise Lost, 1658-1663 The Tenth Book*, in THE COMPLETE POEMS OF JOHN MILTON, 290, 294 (1909):

To whom the Sovran Presence thus replied:—

“Was she thy God, that her thou didst obey

Before his voice? or was she made thy guide,

Superior, or but equal, that to her

Thou didst resign thy manhood, and the place

241. *See generally id.*

242. *See* Koffler, *supra* note 150, at 10 (“By a double process of metaphor, first making himself the judges’ paternal authority, and then making the judges feel responsible for instructing an infantile crew, Vere subtly conforms the judges to act against their so-called “feminine,” that is, “weaker,” instincts, even though in fact these instincts are “strong as wind and rain” and would save Billy Budd from the halter.”); West, *supra* note 150, at 15 (“Would

counterpoint, the closing argument summons up the missing voice, the one that might have and could have advocated a form of justice that imbibes the very forces that Vere has evicted, that balances both head and heart, that reconciles private conscience with the formulations of the code, and that endorses the sparing of a life.²⁴³

Other strategies, based on intent and policy, are at work in Vere's closing argument. After stating that "Budd's intent or non-intent is nothing to the purpose,"²⁴⁴ Vere deftly pushes the mutiny alarm button:

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 juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline.²⁴⁵

What Vere has done here is put the quick kibosh on what is one of Billy's potential defenses, lack of criminal intent, which he then eclipses with a broad policy argument that a display of clemency could spark insubordination. What essentially surfaces here is the notion that it is better to execute an innocent man than to unleash chaos.

What is intriguing is that this portion of the speech belies Vere's true identity: he is someone controlled by a fear (and perhaps a justifiable one) of losing control. He is the obsessive disciplinarian, who must be at the helm at all times. It is this fear of disorder that compels him to assume the multiple roles in Billy's trial, a status that effectually blocks the intrusion of any other voice that could persuade or gain even a modicum of support. Vere, the control freak, is essentially the personification of an imbalanced legal system, one that fears the disruptive participation of lawyers.

Even Posner, a self-professed member of the Vere camp, has found this part of the closing argument "unsettling" because it "puts the reader in mind of the most disturbing implication of utilitarian ethics: . . . [by] countenanc[ing] the sacrifice of an innocent person for the sake of general good."²⁴⁶ Posner, however, ultimately defends Vere when he states: "But before accusing Vere of a particularly nasty form of utilitarian thinking, remember that Billy was in the eyes of the

a female Vere suggest to female officers that they must vanquish the feminine, silence the feminine voice, and subordinate female compassion, kindness, and maternal care to masculine, paternal, and patriarchal duty?").

243. See MELVILLE, *supra* note 1, at 361-64.

244. *Id.* at 363.

245. *Id.* at 364.

246. Posner, *supra* note 4, at 77.

law guilty of a capital crime.”²⁴⁷ This part of Vere’s speech is certainly “unsettling,” but not because it caricatures the Bentham mind set and even arguably takes it to some savage extreme, but because it unrequitedly invites a rebuttal that Billy is not guilty in the “eyes of the law”²⁴⁸ and that such a conviction serves no real policy.²⁴⁹

Ex-judge and scholar, Edmund Spaeth, Jr., proposes such a rebuttal in his article outlining a course designed to explain to non-lawyers the primary responsibilities of judges.²⁵⁰ Spaeth, who has built *Billy Budd* into his curriculum, relates that when he presented the Captain’s speech to a group of trial and appellate judges, some thought that there was a more powerful argument for an acquittal, one which he shares:

All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime [striking Claggart], but on his having done it in a certain state or frame of mind or will. . . . The authors of the Mutiny Act, as civilized representatives of a civilized king, it might be argued, must have known this general principle. Therefore, when they wrote that it was a capital offense to strike a superior, they must have assumed that the reader would understand that they meant, to strike with the intent to kill or do substantial harm, without their having to say so explicitly. At the very least, if they meant that it was a capital offense to strike a superior even without such an intent, they should have said so. As for Captain Vere’s deterrence argument: it proves too much. The threat of execution may deter someone from acting with bad intent; it cannot deter someone who acts in understandable anger maliciously provoked.²⁵¹

What seems an impulse on the part of Spaeth’s judges to construct a defense argument has to derive from their legal instinct that something was missing from Budd’s capital trial. They, in essence, do a fine job supplying some ingredients of that missing refutation, particularly with respect to answering Vere’s prosecutorial bludgeon that “Budd’s intent or non-intent is nothing to the purpose.”²⁵²

There might also be a supplement to the judge’s proposed defense of Budd: that is, contrary to Vere’s contention that a “clement sen-

247. *Id.* Posner also contends that “[t]he essential point that Weisberg overlooks in denigrating Vere’s person and conduct is that Vere is in sole command of a major warship in a major war[, which] Melville regards . . . as an awesome responsibility.” *Id.* at 76. It could be argued, however, that Vere was also risking a mutiny by executing such a popular member of the crew. See *infra* notes 253-255 and the accompanying text.

248. *Id.* at 77.

249. *Id.*

250. Edmund B. Spaeth, Jr., *How Do Judges Decide? A Course for Non-Lawyers*, 106 DICK. L. REV. 773 (2002).

251. *Id.* at 778-79; see also Jack W. Ledbetter, *The Trial of Billy Budd, Foretopman*, 58 A.B.A. J. 614, 616 (1972) (“Billy might have raised a defense of temporary insanity, or accident, or fear for his life to offset the evidence and legal presumptions, but his failure to do so permitted the presumptions to stand unchallenged and his guilt to be established.”).

252. MELVILLE, *supra* note 1, at 363.

tence” could spawn mutiny, draconian adherence to black letter law could likewise provoke revolt.²⁵³ That is, “know[ing] what sailors are[.]”²⁵⁴ they might feel an allegiance not just with the accused morally innocent sailor, but also with justice that accommodates natural law, or as Vere put it, allows for a touch of feminine heart.²⁵⁵ Such “sailors” might be inclined to rebel against a cold military rule mandating the death of a loved colleague. In short, while the loss of control contention can minister to either side of the issue, what makes the *Bellipotent* jurisprudence imbalanced is that there is no one aboard to do what some of Spaeth’s judges instinctively did—that is, provide some lawyering for Billy Budd.

D. The Voiceless Execution

Despite the fact that he literally has his final say, Billy Budd’s execution is voiceless as well.²⁵⁶ According to Weisberg, it was well-settled procedure for the court-martial convenor to obtain review on the highest level before an execution and “[t]hus, even if Vere deemed his hand-picked court to satisfy all the other procedural exigencies of the Articles of War, he had no legal right to bring to fruition its severe sentence.”²⁵⁷ If Weisberg is correct, Billy went to his death without the requisite opportunity to appeal to and, thus, speak to reviewing authorities. But even if Melville was not aware of such a procedural impropriety, what is unmistakable is the author’s discomfort with the execution.²⁵⁸

What we know is that before the hanging, the *Bellipotent* chaplain, who “was a discreet man possessing the good sense of a good heart,” paid convicted Budd a visit.²⁵⁹ This chaplain, sensing Budd’s innocence, something that he “felt . . . was even a better thing than religion wherewith to go to Judgment,” actually “[s]toop[ed] over, [and] . . . kissed on the fair cheek his fellow man, a felon in martial law, one whom though on the confines of death he felt he could never convert to a dogma; nor for all that did he fear for his future.”²⁶⁰ Through the chaplain, Melville communicates tragedy, reminding us that a pure and morally innocent being is about to be put to death.

253. *Id.* at 364.

254. *Id.*

255. *Id.*

256. *See id.* at 370-76.

257. Weisberg, *supra* note 5, at 28.

258. *See MELVILLE, supra* note 1, at 370-76.

259. *Id.* at 373.

260. *Id.*

The good chaplain is there “attending” Budd at the hanging, which serves, along with Budd’s last utterance, to stress that the death is undeserved:

Under an arm of that yard the prisoner was presently bought up, the chaplain attending him. It was noted at the time, and remarked upon afterwards, that in this final scene the good man evinced little or nothing of the perfunctory. Brief speech indeed he had with the condemned one, but the genuine Gospel was less on his tongue than in his aspect and manner towards him. The final preparations personal to the latter being speedily brought to an end by two boatswain’s mates, the consummation impended. Billy stood facing aft. At the penultimate moment, his words, his only ones, words wholly unobstructed in the utterance, were these: ‘God bless Captain Vere!’²⁶¹

What we know from a close reading of this scene is that something is awry because the execution should have taken place from the “foreyard,” but “[i]n the present instance, for special reasons the mainyard was assigned.”²⁶² We also know that the good chaplain is deferential in “aspect and manner” toward the convicted Budd, who is “spiritualized” and whose “syllables” are likened to the “clear melody of a singing bird on the point of launching from the twig.”²⁶³ Even at such an emotional apex, however, contrast intercedes: Captain Vere exhibits a “stoic self-control” and an ability to “stand erectly rigid as a musket in the ship-armorer’s rack.”²⁶⁴ That is, Melville has counterposed the heart-infused final moments of the young sailor’s life with the stiff, rigid, cold, head-ruled Vere. Thus, even at the very last, the prosecutor-jury-judge (and now executioner) is ostensibly deaf to the voice of the convicted. What is ironic, however, is that the last words that Vere says are “‘Billy Budd, Billy Budd’[,]” suggesting that he has heard or felt something from all of this, but only when it is simply too late to do anyone any good.²⁶⁵

While many scholars have praised Vere for his handling of the Billy affair,²⁶⁶ it cannot be said that the author himself is at ease with the coda, the hanging, which is one of the most heart-wrenching scenes in the novella. In fact, one scholar, H. Bruce Franklin, finds it “astonishing” that “nobody seems to have noticed that central to the [Billy Budd] story is the subject of capital punishment and its history.”²⁶⁷ Franklin’s research revealed that during the years that Mel-

261. *Id.* at 375.

262. *Id.*

263. *Id.*

264. *Id.* at 376.

265. *Id.* at 382.

266. See *supra* notes 4-11 and accompanying text (discussing the plethora of praise for Vere).

267. Franklin, *supra* note 139, at 337.

ville was writing *Billy Budd* “national and international attention was focused on the climax of a century-long battle over capital punishment unfolding in the very place where Melville was living—New York State.”²⁶⁸ He elaborates:

Like many of the arguments raised against the death penalty between the 1790s and the 1890s, *Billy Budd* strips away the illusions of justice and deterrence to reveal the essence of capital punishment: human sacrifice, a ritual of power in which the state and the ruling class demonstrate, sanctify and celebrate their ultimate power—the power of life and death—over the classes they rule.²⁶⁹

While *Billy Budd* unavoidably propels us into death penalty questions and it is apparent that Melville himself is troubled by them, what makes the execution and prelude to it most unsettling is Billy’s voiceless solitude. Throughout his entire ordeal, Billy has had no one to stand up and fight for him, something which must have irked Melville’s own sensibilities. By the time, Melville was writing *Billy Budd*, colonial legislatures had already recognized that legal assistance for defendants in criminal trials was necessary and in some colonies, defendants facing a capital sentence were deemed entitled to assigned attorneys if they could not themselves afford to retain one.²⁷⁰ That is, although the whole Billy fiasco concededly occurs in a pre-*Powell*, pre-*Gideon*, pre-*Massiah*, pre-*Williams* world,²⁷¹ Melville was and had to be cognizant that a lawyer can make a difference in a capital case and that that difference can mean life or death.

There are, however, more facets to the lawyering role than the United States Supreme Court has expressly acknowledged in the seminal Sixth Amendment cases and in the Fifth Amendment *Miranda* context.²⁷² As discussed above, the therapeutic jurisprudence movement has focused on how lawyers foster a sense of voluntary participation which is essential to a good legal system.²⁷³ It is, thus, important that individuals experience the system as fair and respectful. This is partly because the participants in such proceedings tend to be more inclined to accept responsibility for their own conduct, take charge and reform.²⁷⁴

268. *Id.*

269. *Id.* at 351-52.

270. See *supra* notes 55-60 and accompanying text (discussing the pre-*Powell* law regarding legal representation and America’s abandonment of the English rule).

271. See *supra* Part II of this essay (discussing the seminal decisions with respect to the Sixth Amendment right to counsel).

272. See *id.* (discussing the right to counsel, *Miranda*, and the importance of having counsel present at the interrogation of an accused).

273. See *supra* notes 126-138 and accompanying text (discussing voice and validation and how it contributes to an effective, therapeutic legal process).

274. *Id.*

As therapeutic jurisprudence scholars have pointed out, core components of a healthy process are voice and validation: litigants should have a sense of “voice,” or a chance to tell their story to a decision-maker and should emerge with at least a modicum of “validation” or the feeling that the tribunal has really listened to, heard, and taken seriously their stories.²⁷⁵ In this regard, the attorney is key because he or she functions as the client’s voice. It is the lawyer who can tell the story to the tribunal, and help effectuate that salutary validation.

In a death penalty context, the importance of the lawyer as voice is greatly amplified. Criminal trials, as do all trials, contain narratives.²⁷⁶ The impressions that decision-makers derive from such narratives shape the outcomes. Defense counsel, thus, faces the daunting task of effectively conveying the accused’s story to the tribunal, and in a capital case, that story can literally spell life and death.²⁷⁷ As one co-author, likening the capital case decision-maker to the “tympanic membrane,” has elaborated:

Sometimes even where the defendant’s story is not particularly compelling, it may be all the accused has—a whisper of a hope at salvation. Such defense stories can sometimes create a sense of commonality between the individual on trial and the decision-makers. Specifically, images of the accused’s world can even, albeit sometimes seemingly mysteriously, build the semblance of a bridge from the defense table to the jury box. In a capital case, such a construct can become the very conduit of life.²⁷⁸

Although, of course, Melville was not a card-carrying member of what is the contemporary therapeutic jurisprudence crusade, he understood and expressed so well in *Billy Budd* what happens in an anti-therapeutic system without voice and validation; one lacking that cru-

275. See *supra* notes 134-138 and accompanying text (elaborating on the meaning of “voice” and “validation”).

276. Amy D. Ronner, *When Judges Impose the Death Penalty After the Jury Recommends Life: Harris v. Alabama as the Excision of the Tympanic Membrane in an Augmentedly Death-Biased Procedure*, 23 HASTINGS CONST. L.Q. 217, 228 (1995) (stating that “[i]n a capital trial . . . the jury’s reactions to an accused’s story can literally make the difference between life or death” and “[o]ne problem that the defense typically faces is how to effectively transmit the accused’s story to the decisionmakers.”); see also Ronner & Winick, *supra* note 126, at 502 (discussing how lawyers in criminal appellate proceedings can effectively tell client stories and relay defense narratives to a tribunal); Charles B. Blackmar, *Representing Death-Sentence Appellants*, 5 J. APP. PRAC. & PROCESS 275, 281-85 (2003) (discussing the importance of the statement of the facts in the death penalty appeal process and pointing out the importance of getting the true story across to the court); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1837-38 (1994) (explaining how the best quality representation should be afforded to persons facing loss of life and pointing out the importance of good lawyers that can provide juries and judges with critical information).

277. See generally Ronner, *supra* note 240.

278. *Id.* at 229.

cial "bridge"²⁷⁹ from the accused to the decision-makers, one in which there is no "conduit of life."²⁸⁰ Billy is hyperbolic voicelessness, an accused who is mute at his own cloistered interrogation, silently invisible at his own trial, and powerless to utter magic words at his own efficient execution.

The voicelessness of the innocent is also underscored by Melville's postscript, the falsified "account of the [Billy] affair" that appears in an "authorized weekly publication."²⁸¹ This rendition portrays Claggart as the hero who "discover[ed] . . . [a] plot . . . incipient among an inferior section of the ship's company,"²⁸² with Billy Budd as the villainous "ringleader."²⁸³ It relates that

[t]he enormity of the crime and the extreme depravity of the criminal appear the greater in view of the character of the victim, a middle-aged man respectable and discreet, belonging to that minor official grade, the petty officers, upon whom, as none know better than the commissioned gentlemen, the efficiency of His Majesty's navy so largely depends.²⁸⁴

If we trust our narrator, who tells us point blank that the facts in this naval chronicle are "deflect[ed]" and "falsif[ied]," we must grasp the real point that the product of voiceless death is nothing less than the immortality of a lie.²⁸⁵ That is, not only did Billy's story not get told, but the story told, the enduring one, is a concocted whopper that reverberates over time.

Justice William Brennan once made some astute observations about death penalty procedures:

It is tempting to pretend that [those] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.²⁸⁶

279. *Id.*

280. *Id.*

281. MELVILLE, *supra* note 1, at 382.

282. *Id.*

283. *Id.*

284. *Id.* at 383.

285. *Id.* at 382.

286. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting); *see also* Bright, *supra* note 276, at 1878 (quoting Brennan in arguing that there is a "constitutional responsibility of the judiciary and members of the legal profession to ensure that even the most despised defendants still receive the highest quality legal representation in proceedings that will determine whether they live or die").

Melville also appears to suggest that the “reverberations”²⁸⁷ of justice without defense counsel is not justice, but as perjurious and “ultimately corrosive” as Claggart himself.²⁸⁸

CONCLUSION: VOICE AS EQUALIZER

Such thoughts of Melville and Brennan are, of course, not to be dismissed as antiquated curios, lacking relevance to today’s world. “The terrorist attacks of September 11, 2001 that killed [so many] innocent”²⁸⁹ people have caused us to consider how to keep our citizens safe without extinguishing constitutional rights.²⁹⁰ The challenging question before us is whether we can effectuate a delicate balance between maintaining security and preserving the civil liberties that have become synonymous with the American way of life.²⁹¹ In this regard, Melville has left us his legacy of wisdom.

The divine implications of Billy Budd’s last words, “God bless Captain Vere,”²⁹² cannot be ignored.²⁹³ Such words, of course, could

287. *McCleskey*, 481 U.S. at 344.

288. *Id.*

289. Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamadi*, 30 AM. J. CRIM. L. 225, 225 (2003).

290. *See id.* at 225-26 (“The terrorist attacks of September 11, 2001 . . . have forced us to re-evaluate the appropriate balance between security and civil liberty to preserve our way of life and the constitutional values our ancestors fought and died for.”); *see also* Frank Davies, *Military Lawyer: Terror Trials ‘Unfair,’* MIAMI HERALD, Jan. 22, 2004, at A1, available at 2004 WL 56367502 (“A Marine Corps major and lawyer . . . criticized his commander in chiefs [sic] military commissions, set up to try terrorism suspects held at Guantanamo Bay, as a fundamentally unfair system designed to produce guilty verdicts.”). In the newspaper article, “Navy [Lieutenant Commander] Charles Swift, [who was] assigned to defend a Yemeni, Salim Ahmed Hamdan,” was quoted as saying, “When I fight for my client, I’m [sic] going to point out every injustice, and this system is not representative of military justice.” *Id.* Unfortunately, this situation in which “one branch . . . controls a closed system; filing charges, setting the rules, appointing officers as judge and jury, and retaining the final say on verdicts and sentences,” has its haunting analogue in the ubiquitous prosecutor-jury-judge Vere. *Id.*

291. *See supra* Part II (discussing the seminal decisions with respect to the Sixth Amendment right to counsel).

292. MELVILLE, *supra* note 1, at 375.

293. *See generally* SMITH ET AL., *supra* note 4, at 79 (“As recompense for ridding the *Bellipotent* of the agent of evil, however, God then sentences Adam to death, enabling Billy’s allegorical referent to shift from Adam to Christ.”); Braswell, *supra* note 4, at 146 (“Vere dies murmuring of the crucified Billy Budd.”); Richard Harter Fogle, *Billy Budd: The Order of the Fall*, 15 NINETEENTH-CENTURY FICTION 189, 205 (1960) (“Critics have frequently noted the supernatural aura surrounding the death of Billy, so that he becomes momentarily a second Christ.”); G. Giovanni, *The Hanging Scene in Melville’s Billy Budd*, 70 MODERN LANGUAGE NOTES 491, 494 (1955) (“The ascension of Billy into ‘the full rose of the dawn,’ and the backdrop of ‘vapory fleece . . . shot through with a soft glory as of the fleece of the Lamb of God seen in mystical vision,’ transform the hanging scene into a symbolic and Divine tableau.”) (internal citation omitted); Rathbun, *supra* note 139, at 30 (“The suggestion of sacrifice evokes the memory of the greatest sacrificial victims of all, and with Billy’s Death Melville turns to the symbol of Christ.”).

be dismissed as a homage to Billy, the proverbial loyal sailor, who even at the halter honors his Captain, or, perhaps intuiting Vere's mutiny-phobia, channels his last breath into the performance of his final duty of placating what probably was a turbulent crew.²⁹⁴ Budd's words are also Christ-like, suggestive of an empyrean ability or power to love his executioner and peacefully embrace his sacrificial fate.²⁹⁵ Melville's description nurtures that Christ allusion:

At the same moment it chanced that the vapory fleece hanging low in the East was shot through with a soft glory as of the fleece of the Lamb of God seen in mystical vision, and simultaneously therewith, watched by the wedged mass of upturned faces, Billy ascended; and, ascending, took the full rose of the dawn.²⁹⁶

What Melville conveys here is that human fallibility inevitably spawns imperfect institutions and that the only attainable perfection perhaps belongs to God alone. We are left with the sense that the *Bellipotent* is a microcosmic mortal sphere with its manmade rules, and that it, like Captain Vere is "unhinged"²⁹⁷ or "aberrat[ed]."²⁹⁸ For all things mortal, including martial and positive law, impairment is unavoidably preordained.

As discussed above, what fuels the tragedy in *Billy Budd* is the sense that the *Bellipotent* is a lopsided universe. Billy, who is innocent, direct, and speech-infirm is alone and effectually hobbled before inordinately powerful opponents: He is no match for Claggart, his accuser, who is not just a master of deception but also a champ at wielding language, and no match for control-obsessed Vere, who mutates into the ubiquitous prosecutor-jury-judge-executioner with an eloquence that moves the tribunal to a death verdict. In all of this imbalance, Melville so artfully pays tribute to the one officer that is so conspicuously absent from the ship—the lawyer, the one that could have and might have tipped the scales.

What Melville has shown us in *Billy Budd* has a logical nexus with Professor James J. Tomkovicz's discussion of the belly of the Sixth Amendment right to counsel:

294. See Watters, *supra* note 4, at 48 (Budd's "dying words, 'God bless Captain Vere!'" show that he not only forgave the captain and condoned the judgment, but glorified the whole act, since under his influence the entire crew, as if they were 'the vehicles of some vocal current-electric [sic],' returned a sympathetic echo of the same words. In short, at the moment of his death Billy healed any breach his execution might have caused in the respect and affection of the crew for the captain.") (quoting MELVILLE, *supra* note 1, at 375).

295. See *supra* notes 293.

296. MELVILLE, *supra* note 1, at 376.

297. *Id.* at 352.

298. *Id.* at 353.

Counsel serves to equalize and to prevent imbalance. The balance provided by counsel promotes not just reliable outcomes, but several other equally important values. Our system demonstrates respect for individual worth, dignity, independence, and autonomy by according defendants opportunities to construct defenses and to protect themselves against state power and authority. We derive satisfaction, strength and self-respect from staunch refusal to take advantage of a lesser opponent and from the willingness to grant to all the chance to contest charges and to defend against accusations. Equalization of the accused represents, and gives content to, several of our societal commitments.²⁹⁹

Melville also prefigures the words of Justice Frankfurter, that “[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues”³⁰⁰ along with Justice Stewart’s admonition in the landmark decision, *Brewer v. Williams*, that “a resolute loyalty”³⁰¹ to the Sixth Amendment guarantee is “imperative”³⁰² precisely when “[t]he pressures on state executive and judicial officers charged with the administration of the criminal law are great.”³⁰³

Melville’s *Billy Budd* shares with the Sixth Amendment that respect for “reliable outcomes” and “individual worth” and an appreciation of the need of those accused to “protect themselves against state power and authority.”³⁰⁴ Melville also similarly suggests that emergencies, even ones as pressing and well-founded as Vere’s fear of mutiny, should endear us to, rather than alienate us from, our Constitutional “imperative.”³⁰⁵ The real tragedy of *Billy Budd* is that the solitary accused has no voice to “equalize and to prevent imbalance” or temper Vere’s putative navigation through a sea of potentially calamitous exigency.³⁰⁶ It is possibly the true task of law and literature to show us, rather than just tell us, what sacrosanct values undergird indispensable constitutional guarantees.³⁰⁷

This essay began with a quotation from *Billy Budd* and with Melville’s posing of the tough questions, “[w]ho in the rainbow can draw the line where the violet tint ends and the orange tint begins?” and “[d]istinctly we see the difference of the colors, but where exactly

299. Tomkovicz, *supra* note 55, at 49-50 (citations omitted).

300. *Haley v. Ohio*, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring).

301. 430 U.S. 387, 406 (1977).

302. *Id.*

303. *Id.*; see also *supra* notes 103-125 and accompanying text (discussing *Brewer v. Williams* as seminal right to counsel case).

304. Tomkovicz, *supra* note 55, at 49.

305. *Brewer*, 430 U.S. at 406.

306. Tomkovicz, *supra* note 55, at 49.

307. Cf. Soia Mentschikoff & Irwin P. Stotzky, *Law—the Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 700-01 (1986) (citations omitted) (“The best practical training a law school can give to any lawyer is the study of law as a liberal art. In this vision of legal education, there are three necessary components to a first rate education—the technical, the intellectual, and the spiritual.”).

does the one first blendingly enter into the other?"³⁰⁸ Although Melville is literally talking about sanity and insanity and the difficulty of finding the demarcation between them, what he says here rings true with respect to perhaps all things in life. It is, of course, just as unwieldy to parse innocence and guilt or prescribe a penalty, particularly one that divvies up life and death.

Although it appears that Melville subscribes to a *Weltschmerz*, a view that in our fallen, imperfect world, there is no and can be no perfect balance, he does latch onto some hope in the form of the equalizer, the voice of legal representation. While such a voice may not be able to actually decipher the line between the violet and the orange, he or she can argue that there is indeed a point at which one color in the rainbow "blendingly enter[s] into the other."³⁰⁹ It is perhaps not the ability to definitively answer the questions that matters, but rather the real advocacy job—the one that might have saved Billy Budd—that consists of raising the right questions and packaging the answers as plausible legal arguments.

308. MELVILLE, *supra* note 1, at 353.

309. *Id.*

