

## 14. *BILLY BUDD* AND THE DUTY TO ENFORCE THE LAW: A SKETCH OF SOME OF THE MAJOR MORAL ISSUES

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**ABSTRACT.** Herman Melville's *Billy Budd* presents a classic example of a legal official legally required to enforce a law he believes or knows to be unjust. Although there has been considerable discussion of a citizen's moral duty to obey unjust laws, there has been little consideration of a legal official's duty to enforce unjust laws.

In this paper I take the central moral dilemma of the novel--a legal official's moral duty to enforce a valid law of a legal system vs. his moral duty not to do or to contribute to injustice--and discuss various moral considerations that would bear on this dilemma. By doing this I hope to contribute both to the moral issues involved as well as, to some extent, the literary criticism with regard to *Billy Budd*.

### I.

Billy Budd, a foretopman of the British man o'war, the *Bellipotent*, was falsely and maliciously accused by the Master of Arms, Claggart, of conspiring to organize and organizing men on board the *Bellipotent* to commit acts of mutiny. Claggart, in accusing Budd, not only lied about Budd's involvement in a non-existent mutiny plot, but had arranged to have men falsely testify against Budd in this charge.<sup>1</sup> When confronted by his accuser before Captain Vere, Budd was quite literally struck dumb. A speech defect which manifested itself only when he was under extreme pressure rendered Budd unable to speak or utter any sound in his own defense.

Though at the time Captain Vere was quite ignorant of Billy's liability to vocal impediment, he now immediately divined it, since vividly Billy's aspect recalled to him that of a bright young school mate of his whom he had once seen struck by much the same startling impotence in the case of eagerly rising in the class to be foremost in response to a testing question put to it by the master. Going up close to the young sailor, and laying a soothing hand on his shoulder he said: "There is no hurry, my boy. Take your time, take your time." Contrary to the effect intended, these words so fatherly in tone, doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance--efforts ending for the time in confirming the paraly-

sis, and bringing to this face an expression which was a crucifixion to behold. The next instant, quick as the flame from a discharged cannon at night, his right arm shot out, and Claggart dropped to the deck. Whether intentionally or but owing to the young athlete's superior height, the blow had taken effect full upon the forehead, so shapely and intellectual-looking a feature in the master-of-arms; so that the body fell over lengthwise, like a heavy plank tilted from erectness. A gasp or two, and he lay motionless.<sup>2</sup>

Motionless he remained for he was dead.

Melville summarizes the problem for us.

In the jugglery of the circumstances preceding and attending the event on board the "Bellipotent" and in the light of that martial code whereby it was formally to be judged, innocent and guilt personified in Claggart and Budd in effect changed places. In a legal view, the apparent victim of the tragedy was he who had sought to victimize a man blameless; and the indisputable deed of the latter, navally regarded, constituted the most heinous of military crimes. Yet more. The essential right and wrong involved in the matter, the clearer that might be, so much the worse for the responsibility of a loyal sea commander, inasmuch as he was not authorized to determine the matter on that primitive basis.<sup>3</sup>

Because of the circumstances in which Billy's deed was performed, the captain decided that a trial should be held and Budd's guilt or innocence disposed of immediately. During the trial, Vere, agreeing that Budd is "innocent in the eyes of God", argues that he should be punished. Not only should the officers ignore the "palliating circumstances" and take into account only Budd's overt act, but, since they owe an allegiance to the King, he argues they must enforce the King's law.

Our avowed responsibility is in this: that however pitiless that law may operate, we nevertheless adhere to it and administer it.<sup>4</sup>

The principal philosophic issue raised by the novel concerns a legal official's duty to enforce a law of a legal system which he believes or knows to be unjust. There has been considerable discussion, in the context of civil disobedience, of citizens' moral obligations to obey valid laws of the legal system. Strangely, there has been almost none of an official's duty to enforce the law. I hope to begin to remedy this deficiency in the present paper by considering some of the major moral considerations bearing on the duty to enforce the law.

By setting this philosophic task, however, I hope also to contribute in a small way to the literary criticism of *Billy Budd*. By isolating some of the particular reasons Vere and the court might have to enforce any law of their legal system, these reasons have certain presuppositions which must be satisfied if they are to be good reasons in the context. Whether or not the presuppositions obtain in the novel is a matter of literary criticism.

Before we can discuss the dilemma facing Vere and the court, several issues should be separated so we can properly frame the question to be answered.

- 1) Captain Vere claims that there is a legal duty to enforce British Naval Law in general and the Mutiny Act in particular; thus the choices seem simple.

He may apply the law against his conscience. He may apply conscience and be faithless to the law. He may resign. Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality.<sup>5</sup>

These choices, however, are too restrictive as analysis will show. The second alternative is especially problematic, as we will see, for one can remain faithful to the legal system as a whole, yet refuse to enforce a particular law.

However, simply because the court has a legal duty to enforce the law, it does not follow that they have good reason to,<sup>6</sup> if they are conscientious moral agents. As discussions of civil disobedience have shown, the mere fact that the legal system validly imposes legal duties on citizens to submit to draft laws or to observe segregated lunch counters does not necessarily provide conscientious moral agents with good reasons for fulfilling such legal duties.<sup>7</sup> The case is not obviously different for legal officials. They have good reasons to enforce each and every law of the legal system only if there are *prima facie moral duties* for them to enforce *every law apart from its content*. Let me explain.

- 2) In discussing moral duties, we should distinguish between *prima facie* duties and duties all things considered. Following others<sup>8</sup> I will say that a person, S, has a *prima facie* duty to do an act X if, and only if, there is a moral reason to do X which is such that, unless S has a moral reason not to do X at least as strong as his reason to do X, S's failure to do X is wrong. A person, S, has a duty all things considered to do X, if and only if considering all moral reasons for and against S's doing X, S's failure to do X is wrong. (There are different theories about how one ought to balance moral reasons against one another, some of which I touch on below, but I cannot discuss these in any detail.)
- 3) As a further refinement of the issues facing Vere and the court, we should distinguish between a *prima facie* duty to enforce every law irrespective of its content and the duty to enforce a law because it has a certain moral content. Legal officials may have duties to enforce laws, not simply because they are valid laws of the legal system, but because they forbid conduct which is morally wrong or which would cause great harm to others, or because they are such that failure to enforce them would cause great damage to the community. When laws forbid wrongful conduct, one reason for enforcing them is dependent upon their content: the forbidden conduct. Our concern, however is whether Vere and the court have a reason to enforce every law of the legal system, including the Mutiny Act, regardless of its content. This issue is crucial, for the Mutiny Act as applied to Billy Budd

may or may not forbid conduct which is always morally wrong. Consequently, if they have a duty to enforce every law, then they have a duty to enforce the Mutiny Act. However, even if the court does not have a *prima facie* duty to enforce every valid law of the legal system, there may still be a reason for them to enforce the Mutiny Act because of features peculiar to it. For example, enforcement or non-enforcement of it may be such a visible act and may have such consequences as to provide them with reasons to enforce it. Consequently, even if we conclude there is no *prima facie* obligation to enforce every valid law of a legal system, we must complicate our discussion and ask whether there is a *prima facie* obligation to enforce the Mutiny Act.<sup>9</sup>

- 4) The other half of the moral dilemma facing Vere's court is realized if, as the officers believe, the Mutiny Act in itself or as applied to Budd's case is unjust, for then they have a duty not to treat others unjustly or at least a duty not to permit injustice to be done.

Budd seems to be treated unjustly, not because he did not intend to kill Claggart nor because he did not intend to commit an act of mutiny, but because he was not permitted to plead provocation as a defense: He was so provoked by Claggart's accusation that neither he nor any law-abiding sailor could reasonably be expected to restrain himself under such circumstances.<sup>10</sup> If no law-abiding sailor, accustomed to the rigors of military discipline, could restrain himself, then he ought not be required to do so. Any just legal system should allow a defense of provocation to a charge of striking or killing another person. Since the British naval legal system does not, it is unjust.<sup>11</sup>

With these preliminaries in mind, we want to know in section II under what circumstances a legal official has a *prima facie* moral duty to enforce every valid law of a legal system apart from its moral content. If there are no such circumstances, we can still ask when a legal official has a *prima facie* duty to enforce the Mutiny Act in the circumstances in which Vere and the court find themselves. Finally, in section III, since it is agreed by all that the Mutiny Act as applied to Billy Budd is unjust, under what circumstances does the court have a moral duty, *all things considered*, to enforce this unjust law?

## II

Vere's only explicit argument that he has a duty to enforce the Mutiny Act is that he owes allegiance to the King. I take this to mean merely that he has a moral commitment to the King to enforce the laws. However, this does not take us very far because we need to know the reasons for his commitment. When we know this, then we can know how to balance the injustice to Billy Budd against any duties to enforce the law. In what follows I consider first the duties arising from agents' voluntary acts; next, duties based upon the justice of the legal system, and finally, duties arising from utilitarianism.

### A. Duties Arising from an Agent's Voluntary Acts

The seemingly most plausible reason that Vere might have a moral commitment to the King and *prima facie* ought to enforce the law is that he has promised to do so. We might suppose that, as part of his oath in becoming an officer of the British Navy, he promised to uphold and faithfully execute its laws, including those that are part of the Mutiny Act.

Such argument presupposes that Vere has made a *bona fide* promise to enforce the law, and that all *bona fide* promises obligate him. First, under what conditions has he made a *bona fide* promise? The following are typical.

For example, in order to make a binding promise one must be fully conscious, in a rational frame of mind, and know the meaning of the operative words, their use in making promises, and so on. Furthermore, these words must be spoken freely or voluntarily, when one is not subject to threats or coercion, and in situations where one has a reasonably fair bargaining position, so to speak. A person is not required to perform it if the operative words are uttered while he is asleep, or suffering delusions, or if he was forced to promise, or if pertinent information was deceitfully withheld from him.<sup>12</sup>

Normally, when a person takes an oath of office we would expect these conditions to be satisfied. Hence, normally Vere would have validly promised to enforce the law.<sup>13</sup>

However, even if one has promised to do something, it does not always follow one is obligated, even *prima facie*, to do it. Philosophers and lawyers articulate the slogan that immoral promises (or contracts) do not count as promises--they are void. This is misleading, however, for they should more properly say that the substance of what one has promised to do may defeat the obligation to keep a valid promise. To use the legal analogue of promises, contract law, as an example, contracts to commit felonies, torts, and more serious law violations are non-enforceable.<sup>14</sup> Thus, even if Jones has paid Smith \$10,000 for Smith to print a slander of Brown in Smith's paper, and Smith takes Jones' money but fails to print the slander, Jones cannot go to court to recover his money or legally compel Smith to print the slander.

The slogan is an oversimplification. Taken literally it is false. If we are to discover whether a promise to enforce each and every law is binding, even when the law may be unjust and hence immoral, we must consider a more complicated principle than the slogan. According to the American Law Institute's *Restatement of the Law of Contracts Second*

- 1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
- 2) In weighing the interest in the enforcement of a term, account is taken care of a) the parties' justified expectations, b) any forfeiture that would result if enforcement were de-

nied, and c) any special public interest in the enforcement of the particular term.

- 3) In weighing a public policy against enforcement of a term, account is taken of a) the strength of that policy as manifested by legislation or judicial decisions, b) the likelihood that a refusal to enforce the term will further that policy, c) the seriousness of any misconduct involved and the extent to which it was deliberate, and d) the directness of the connection between that misconduct and the term.<sup>15</sup>

As examples of promises or contracts which are unenforceable the ALI mentions serious crimes or torts.<sup>16</sup> Promises to violate licensing or parking ordinances which are *unrelated to public welfare* may be enforceable.<sup>17</sup> In difficult cases the ALI suggests that "Only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term, will enforcement be denied."<sup>18</sup>

If we take the contract law as evidence of the principles which are accepted in our common institution of promising, what can we say about promises by legal officials to enforce each and every law? Recall we are considering not the legality of such promises, but their morality.

By analogy with the ALI reasoning expressed above, it seems that promises to commit *serious moral wrongs* are "unenforceable" in the moral institution of promising. That is, even if one would have a reason to keep a promise to enforce every law, if the law were seriously unjust as written or applied, its injustice would outweigh the reason of promising to enforce it. This seems obvious enough when the promisor at the time of promising is aware of the wrongfulness of his act. But what about indefinite commitments which might require one to commit, in the future, a wrong of which one is not aware at the time of promising? Promises to enforce each and every law are instances of such commitments. Again, the ALI comments suggest that if one makes an indefinite commitment to another, e.g., to help him next Saturday, it should be understood that if the aid would require one to commit a serious wrong, e.g., to rob a bank, then would not have reasons of promising, given the nature of the act, to do it.<sup>19</sup> Another way of describing the same principle is to say that our institution of promising provides that indefinite commitments count as valid promises with the understanding that the obligation to keep them is defeated if what is promised turns out to be a serious moral wrong. The qualifications would be built into our understanding of the rules of promising.

So far I have not argued for the moral analogue of the ALI principle, but have merely relied upon analogues and examples to try to make the point. Several considerations favor it. First, holding promises to be morally unenforceable which require seriously immoral acts serves deterrence aims. If people believed the proposed principle for definite and indefinite promises, they might be much more reluctant to enter into them. Or if they entered into indefinite promises, they would do so with the understanding that they were not obligated to perform acts which turned out to be serious moral wrongs. Such deterrence seems to be a good thing. In addition, one of the primary benefits for having the institution of promising is that it enables us to set up small-scale schemes

of cooperation, to stabilize relations with one another and to provide for stable, predictable futures.<sup>20</sup> However, if such predictable futures will require an agent to participate in seriously wrong activities, or if the schemes of cooperation will result in seriously wrong actions, then those "benefits" should not be sanctioned within the institution of promising.

The preceding considerations suggest that if Vere and other members of the court have promised to enforce each and every law, including the Mutiny Act, this must be with the understanding that any reason of promising to enforce laws that would treat someone seriously wrongly is easily outweighed by the wrongness of the act. If, as they believe, the Mutiny Act requires them to treat Billy Budd unjustly, then they cannot be obligated by a promise to do this. They may have other reasons for punishing Budd, but not reasons of promising. Consequently, it does not follow that simply because they have promised the King or the navy to enforce all laws that they thereby have even a *prima facie* duty to do so. Hence, they do not have a *prima facie* duty to enforce the Mutiny Act, and they do not have a reason of promising to punish Billy Budd until they have ascertained that on other moral grounds that it is the morally permissible thing to do.

In addition to his promise to enforce and uphold British Naval Law as part of his duty as an officer, Captain Vere is no doubt under a legal contract to do so. Consequently, while Vere is receiving money for this purpose, he has a continuing legal duty to do what he has contracted to do. However, even if Vere has a legal duty to enforce every naval law that is legislated, by the argument in the preceding paragraphs he has no moral obligation to honor his contract in this particular case.

A second possible ground for Vere's duty to enforce the law is gratitude. That is, we might suppose that he has voluntarily accepted various benefits from the British Navy or the King. Since he has, does he not have a debt of gratitude to render a similar service to his benefactor, which in this case requires him to enforce the law?

However, merely because a person voluntarily accepted benefits from someone, it does not follow that he thereby has a debt of gratitude to his benefactor. For example, if the godfather confers benefits on me or gives me a job, not because I need it, but because he needs someone to do his work for him, it is not clear that I have a debt of gratitude to him. If I were desperately in need of a job and one was offered to me for this reason, then I might have a debt of gratitude to the beneficent employer. This suggests that before one could have a debt of gratitude to an employer, one must need (desperately?) a job, the job must be offered *because one needs it*, and one must accept the offer voluntarily. But, even if these conditions were sufficient, which I doubt, they have not obviously been fulfilled by Captain Vere, nor are they obviously fulfilled by any and every legal official. If they are not, then the claim that Vere (and any legal official) has a duty to enforce the law out of gratitude is unjustified.

Furthermore, even if Vere has a duty of gratitude to the King, it does not necessarily follow that he thereby has a duty to enforce each and every naval law. As Kant reminds us,<sup>21</sup> a duty of gratitude requires us to render a similar service or benefit to the benefactor, e.g., we should be prepared to loan money to a friend in need who loaned money

to us when we were in need, or, failing that, to render a similar benefit to someone else. However, it is not clear what would count as a similar benefit to be rendered to a governmental agency for employing one (even one in need). However, it does seem that one is not obligated in perpetuity to continually render benefits to one's benefactor. Such obligations would seem to violate the equivalency requirement between benefits received and benefits given in return to satisfy the duty of gratitude. Hence, even if we were to grant that a legal official has a duty of gratitude in some cases to provide a benefit to the institution that employed him, it does not follow that in order to fulfill it he must enforce each and every law in perpetuity.

In addition, even though Vere has no duty of gratitude to enforce all naval laws, he might have one to enforce the Mutiny Act because of its special nature. But I can find no property peculiar to it which makes it enforceable because of gratitude when others are not. Thus, I conclude that he does not have a *prima facie* duty of gratitude to enforce the Mutiny Act and punish Billy Budd according to it.

The third argument from the voluntary acts Vere has performed is the argument from fairplay. According to one formulation of the fairness principle:

A person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests provided that this institution is just or fair.<sup>22</sup>

Consequently, using this formulation, Vere has an obligation out of fairness to do his part as specified by the rules of naval law, if the British naval legal system or the British legal system as a whole is reasonably just and he has voluntarily accepted benefits from it or taken advantage of opportunities it offers to advance his interests. The idea is that he owes a duty of fairplay to those whose sacrifices have made the institution possible, e.g., by paying taxes to support it, and to those who have been asked to comply with the institution's rules before him. In short, Vere's enforcement of the law is one of the burdens he must bear in return for others making the benefits and opportunities of the office of captain possible.

However, even if we accept Rawls's principle of fairness, does it follow that Vere has a duty to enforce all laws of the British Navy? First, there may not be a duty to fairplay at all, for the institution of the British Navy may not be sufficiently just. If it is not, then he fails to have a duty of fairness to enforce its laws as part of his duty as captain. The text of *Billy Budd* is silent on the justice of both the British Naval law and the British legal system as a whole. (Although Melville suggests by his symbolism that British Naval law is so unjust it would punish a Christ-like or angel-like person such as Billy.)<sup>23</sup>

Even if British naval law and the British legal system were sufficiently just, it is still not clear that *prima facie* there is a duty of fairplay for Vere to enforce each and every statute. As others have pointed out,<sup>24</sup> one has a duty of fairplay in circumstances of *perfect cooperation* to fulfill one's duties in a reasonably just institution from which one has benefited only if fulfilling those duties benefits (or does not harm)



those who have sacrificed to make benefits to the agent possible or provide benefits to the institution as a whole. Analogously, if an agent's enforcement of the law will not benefit someone who has antecedently sacrificed to provide benefits to the agent, or if his failure to enforce the law will not harm the community in some more indirect way, then it is difficult to understand why an agent must enforce every law out of fairness. There may be various trivial or non-beneficial (or even harmful) laws, e.g., traffic laws, licensing laws, etc. whose non-enforcement will neither harm any assignable individual nor impose some indirect harm on the community.

For example, suppose that a policeman, hidden from a driver's view, knows that this is the best and most conscientious driver in the county, that he has no bad driving habits, and that he is only running a stop sign because of its isolated location and the late hour, and because it is safe to do so. In this case the officer may have no duty of fairplay to enforce the law. Fairplay does not logically require an official to enforce each and every law of a legal system in every circumstance. Hence, Vere and the officers do not necessarily have a duty to enforce the Mutiny Act simply because it is a valid law.

However, our problem is more complicated than the previous paragraph suggests. Even if out of fairness the officers do not have a duty to enforce every law of the naval legal system, they may still have a duty to enforce the Mutiny Act because of its peculiar nature or because of the circumstances in which enforcement occurs. The Mutiny Act is not a trivial or pointless law as are some traffic or licensing laws; nor is it obviously harmful as it would be applied most of the time. And, because of the circumstances of its enforcement, whether it is enforced or not will be highly visible to sailors on the *Bellipotent*. The extent to which a law or its enforcement is visible to those living under a legal system will in part determine the consequences of its enforcement or non-enforcement. On the other hand, the law is harmful to Billy and to others in similar circumstances. Consequently, some considerations suggest the law ought to be enforced while others tell against its enforcement. However, we cannot settle these issues until we have better information about the consequences of enforcement and non-enforcement. But this information awaits further interpretation of the text, which we consider in section III.

#### B. Duties Arising Independently of an Agent's Voluntary Acts

Up to this point we have considered moral principles that might require Vere and the court to enforce each and every law, which principles depended upon the voluntary actions of the officers. However, since not all moral duties arise as a result of our voluntary actions, I next discuss several that arise in alternative ways.

If we assume for the purposes of argument, which may not be true, that British naval law is just or nearly so, then one of the most important duties a naval officer might have is the natural duty to support and to promote just institutions. John Rawls in *A Theory of Justice* has most ably and articulately defended this principle.

This duty has two parts; first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of

just arrangements when they do not exist, at least when this can be done with little cost to ourselves.<sup>25</sup>

Rawls claims that this duty provides the best reason for an ordinary citizen to obey a valid law of a legal system. It also seems to provide a good reason for a legal official to enforce the law. Rawls claims that the duty requires one to comply with and to do one's share in just institutions when they apply to one. From this it seems to follow that a legal official has a duty to do his part and enforce every law of the legal system.

However, there is an inconsistency between what Rawls says the natural duty is, namely, a duty to *support* and *further* just institutions, and what he claims the duty requires one to do. In short, one can support and further just institutions without complying with every requirement of them, and perhaps without, in every instance, doing one's share as required by them. Complying with and doing one's share in a just institution implies that one is supporting and furthering it, but the converse is not true. Given these inconsistencies, which description of the natural duty of justice should we follow?

If we follow the requirement that one has a duty to comply with and to do one's share in just institutions, then the issues seem settled. We should not follow this prescription, however, for we still want to know why we should comply with and do our part even in a just institution and this account of our duty does not provide that reason. The only reason Rawls suggests is:

. . . there is every reason for the parties [in the original position] to secure the stability of just institutions, and the easiest and most direct way to do this is to accept the requirement to support and to comply with them irrespective of one's voluntary acts.<sup>26</sup>

However, even if this is the easiest and most direct way to provide for the stability of just institutions, it does not follow that it is the right way. If just institutions have pockets of injustice in them, complying with the rules may stabilize them, but may not be right. Rawls' argument supports a duty of justice for perfectly just institutions, but we must consider the appropriate principle for imperfectly just ones. Consequently some weaker principle is needed, one which will require enforcement when it does not impose significant injustices, but one which will permit non-enforcement when enforcement would greatly contribute to injustices. However, if such a principle is employed, then a citizen would not have a duty to obey and legal official would not have a duty to enforce every law of a legal system.

To put the issue facing Vere and the court oversimply: are they to uphold and support the *institution* and its general reputation for justice or to support a just outcome in this instance? This is especially critical when failure to enforce the law has some chance of sparking a rebellion, thus endangering the whole institution.

Ordinarily, legal officials do not face this choice because it is rare that that whole institutions are threatened by a failure to enforce an unjust law. However, Melville has constructed just such a case for us.

In order to resolve the dilemma of *Billy Budd*, we need to decide whether the officers' factual beliefs are correct; our task in section III.

Finally, several versions of utilitarianism fail to support Vere's suggestion that the officers have a duty to enforce each and every one of the King's laws. Clearly, an act utilitarian principle which says that one ought to do that act which produces or is likely to produce a greater net balance of good over evil than any alternative act open to an agent does not entail that every valid law must be enforced.<sup>27</sup> It is easy to construct counterexamples to such a claim, so I do not pursue this further.

There are a variety of rule utilitarian theories we might consider, but I look at only two. The first, simple rule utilitarianism or utilitarian generalization, says that one ought to do that act, the generalized consequences of which act types produce a greater net balance of good over evil for all concerned than the generalized consequences of any alternative act type open to the agent.<sup>28</sup> In short one must ask, 'What if everyone did that?' where 'that' is replaced by a proper description of the act. Again, it seems that the generalized consequences of an official's enforcing each and every law of a legal system as opposed to not always doing so will not be as great as the consequences in the latter case. If one can occasionally increase good consequences without any additional bad consequences by not enforcing the law, as seems the case, then one has a duty to do that. Hence utilitarian generalization does not obviously require the enforcement of each and every valid law.

A second kind of rule-utilitarianism seems no more successful. According to such a theory one ought to do that act which falls under a rule which would be part of a set of ideal rules everyone's *accepting* which in a community would produce a greater net balance of good over evil than everyone's accepting any alternative set of rules.<sup>29</sup> We can suppose that one possible rule regulating official behavior is 'Enforce each and every valid law of your legal system'. While utilitarianism no doubt does give considerable weight to supporting legal systems because of their general benefits, this rule seems less defensible on ideal rule utilitarian grounds than a rule which allows some latitude in enforcement. Such latitude might be permitted because of pointless, cruel, or trivial laws, or because of the circumstances of enforcement. Consequently, if these reasons for allowing latitude are correct, then ideal rule utilitarianism fails to provide a *prima facie* reason for Vere and the court to enforce every law. None of the utilitarian theories seems to support a *prima facie* obligation to enforce the law in each and every case, for all to be defensible must allow for exceptions. However, does any of the utilitarian theories support a *prima facie* obligation to enforce the Mutiny Act? We cannot answer this question in absence of some facts and further conceptual distinctions which we will develop in the next section, so we will postpone consideration of it until then.

### III

We have now considered arguments from gratitude, promising, fairplay, utility and justice none of which obviously supported the claim that Captain Vere and the court have a *prima facie* duty to enforce each and every valid law of the legal system. In order to decide whether they have a duty to punish Billy Budd under the Mutiny Act, we need

further factual information. In addition, however, the question with regard to the novel is whether the court did its duty all moral considerations taken into account.

Before considering the on balance case for and against punishment some further distinctions are called for. We need to know whether the officers did their objective, subjective, or putative duty all things considered. A person does his objective duty

if and only if it [what he does] is consistent with a complete set of general principles of obligation which are coherent with what our corresponding attitudes would be if we were impartial, fully informed, and in a normal frame of mind.<sup>30</sup>

A person does his subjective duty on the other hand, if he does

what would have been his duty in the objective sense, if the facts of the particular situation had been as he thought they were, except for corrections he would have made if he had explored the situation as thoroughly as a man of good character would have done in the circumstances.<sup>31</sup>

Finally, a person does his putative duty whenever

he does what he honestly thinks is objective duty<sup>32</sup>

The last kind of "duty" is consistent with one making not only factual mistakes, but errors in moral reasoning or holding mistaken moral principles. Melville tells us what the court's on balance putative duty is: they did what they honestly believed.<sup>33</sup> But since this is compatible their having made such errors it does not follow that they did either their objective or subjective on balance duty.

Intuitively the difference between objective and subjective duty is that one's objective duty expresses what one ought to do if one is fully informed of all the facts that apply to a situation and reasons correctly from them in light of the correct moral principles. Thus, this presupposes that one has a god's eye view of the facts of the situation and that one correctly reasons from these facts and correct principles. Since it is not always possible for a moral agent to have complete information about a situation, we need the notion of subjective duty: what an agent ought to do given all the information of which a conscientious agent would be aware in a particular case.<sup>34</sup>

In discussing further whether Vere and the court did the right thing, all things considered, we want to know whether they did their on balance subjective duty, and whether they did their on balance objective duty. Melville suggests that there may be factual differences between what Vere and the court *believed* and what in fact was the case as it pertained to their decisions regarding Billy Budd, and these differences may be critical in deciding whether they did their objective and subjective duties.<sup>35</sup>

They believe that the sailors will construe the court's failure to punish Billy as a sign of the officers' weakness and fear of the men.<sup>36</sup> Because of this there is a risk of mutiny with its attendant loss of life

to officers and sailors alike. Further, they seem to believe that punishing Budd will serve deterrence aims and that the crew will not be upset or disturbed by their punishing him. Given these beliefs, enforcement of the Mutiny Act will help to prevent risk of harm to the reasonably just and defensible (I am assuming for the purposes of argument) British Navy and its legal system and to unnamed individuals. Consequently, the court must weigh the certainty of treating Budd unjustly, if they enforce the law, against a risk of bringing harm to unnamed other individuals and to a reasonably just legal system, if they do not enforce the law.

We have argued to here that there are not *prima facie* duties of fidelity or gratitude to enforce every law of the legal system, or to enforce the Mutiny Act. Whether there are *prima facie* duties of fairplay, justice, or utility to enforce the Act depends upon the facts of the novel.

Given the officers' beliefs at the time of the trial, it seems that they have a *prima facie* reason to enforce the Mutiny Act, because failure to enforce it poses a risk to the institution and because the crew knows or will soon find out that Billy struck Claggart, making enforcement or non-enforcement a highly visible act. Consequently, if they are to show their support for the law as required by the duty of natural justice and utility, and if they are to avoid risk to the institution, they have reasons of utility, fairplay and support for a just institution to enforce the law. On the other hand, they know that enforcing the Mutiny Act will certainly treat Billy unjustly, hence they have a *prima facie* duty not to do that. How are we to weigh these conflicting duties against one another?

In order to answer this question we should distinguish between the weight of a moral consideration, if it obtains, and the probability that the consideration will obtain. If men were gods and could foresee the future, there would be no reason to raise the issue of probability. But since they are not, the decisiveness of a moral consideration for a certain course of action is a function of the weight or gravity of the consideration and the probability that it will obtain. Consequently, the factual beliefs of Vere and the court and the facts of the novel are crucial as these provide information about the probabilities as they saw them.

Even if there were no difficulty with the probabilities, there is no accepted procedure for deciding when one moral consideration is more weighty than another. That is, there is no accepted theory of lexicographical ordering,<sup>37</sup> no way of attaching cardinal values to each consideration,<sup>38</sup> no way to say that one kind of duty (perfect) is more weighty than another (imperfect),<sup>39</sup> in order to settle such moral conflicts. Thus, the best we can do in what follows is to look carefully at the facts of the case, the probabilities that those facts suggest, and then attach what we think to be the appropriate weights to each of the moral considerations bearing on the court's decision. In what follows I consider four subcases to make organization easier.

(1) Assuming that the legal system is reasonably just, and hence that there may be duties of fairplay and justice to enforce the law, did they do their subjective duty? Of course, since the court members believe there is a certainty of injustice to Billy, this is a quite weighty

consideration in a decision calculus. In addition, they believe that there is considerable risk of sparking mutiny on the *Bellipotent* and rekindling it in the British Navy. Thus, although there is not a certainty of mutiny, they believe it has a high probability. Hence, a high probability of damage to a reasonably just institution makes the reasons of fairplay, justice and utility quite heavy considerations in the decision calculus. I conclude that, if the members' beliefs are those of a conscientious moral agent would have, given the information available to him in the circumstances, then the reasons of fairplay, justice and utility to protect a valued institution outweigh the injustice to an assignable individual. This judgment is made given the constraints Melville has placed on the decision; that it must be made immediately, that it cannot wait until the *Bellipotent* returns to the fleet, and that they cannot convict and mitigate the penalty.

However, Melville also suggests that they may not have accurate knowledge of the crew's sentiment towards Budd's punishment. The evidence is not clear to be sure, but he suggests that at the time of Budd's hanging the crew believes he is treated wrongly.

The silence at the moment of execution and for a moment or two continuing thereafter, a silence emphasized by the regular wash of the sea against the hull or the flutter of a sail caused by the helmsman's eyes being tempted astray, this emphasized silence was gradually disturbed by a sound not easily to be verbally rendered. Whoever has heard the freshet-wave of a torrent suddenly swelled by pouring showers in tropical mountains, showers not shared by the plain; whoever has heard the first muffled murmur of its sloping advance through precipitous woods may form some conception of the sound now heard. The seeming remoteness of its source was because of its murmurous indistinctness, since it came from close by, even from the men massed on the ship's open deck. Being inarticulate, it was dubious in significance further than it seemed to indicate some capricious revulsion of thought or feeling such as *possibly implying a sullen revocation on the men's part of their involuntary echoing of Billy's benediction*. But ere the murmur had time to wax into clamor it was met by a strategic command, the more telling that it came with some abrupt unexpectedness: "Pipe down the starboard watch, Boatswain, and see that they go".<sup>40</sup>

This quotation suggests the crew had some anger toward Vere for his execution of Budd. It leads to the speculation that had Vere known his men better and had he known what they thought about Billy, he might have seen that the crew did not believe Budd capable of committing a mutinous or murderous act nor of harming another unless greatly provoked (which of course he was). If they had believed him incapable of such acts, then failure to punish him for striking Claggart would be less likely to kindle mutiny on the ship. In short, Melville's remarks suggest that if Vere had had better information about his crew, he need not have worried so much about the risks of mutiny. If he had had better information, his probability judgment of such risks would have been lower. Thus, the on balance case for punishing Budd would have been much less strong and the on balance case for exonerating him much stronger. It is not at all clear that when we have all the facts available

to Vere (but all of which he did not use) that he did his subjective duty. Thus, on the one hand, had he known his crew better, his probability assessments regarding possible mutiny might have been lower and hence the case for punishment of Budd weakened. On the other hand, it is clear that a greater number of moral considerations favor Budd's punishment, e.g., fairplay, justice and utility, than count against it. Hence, even if the probability of mutiny was lower than Vere believed, a number of moral considerations dovetail to make the case for punishment.

However, these judgments about Vere's conduct are difficult. Whether one thinks Vere and the court did their subjective duty will rest on one's larger interpretation of the novel.

(2) If we assume that the legal system is not reasonably just, then it is less clear that the court members did their subjective duty in punishing Budd. If it is not just, then the duty of fairplay and the duty to uphold and support just institutions do not provide them with reasons to enforce the law at all. Further, utilitarianism, whether act or rule versions, gives less reason to enforce the law. There may still be a number of bad consequences to the navy, to the officers, and to the British conduct of the war, but a mutiny might result in desirable changes in an unjust or disutilitarian institution, which changes are certainly good consequences. Consequently, even if the officers make decisions based upon their actual beliefs, assuming that the legal system is not reasonably just, they may have acted wrongly. Injustice to an assignable individual in order to protect an institution which is not reasonably just seems wrong. If this is correct, they did not even do their putative duty (defined earlier). And, it seems clear that they did not do their subjective duty. Their subjective duty is identical with their putative duty, if, as conscientious moral agents, they could not have known the crew's sentiment toward Billy. Their subjective duty is distinct from their putative duty, if they could have known such information. In either case it seems they failed to do their subjective duty.<sup>41</sup>

(3) The next question is whether Vere and his officers did their objective duty. Several further facts of the novel bear on this question which do not bear on whether they did their subjective duty.

First, Melville suggests that on his deathbed Vere did not have remorse for his treatment of Billy Budd:

Not long before death, while lying under the influence of that magical drug which, soothing the physical frame, mysteriously operates on the subtler element in man, he was heard to murmur words inexplicable to the attendant: "Billy Budd, Billy Budd." That these were not the accents or remorse would seem clear from what the attendant said to the Bellipotent's senior officer of marines, who, as the most reluctant to condemn of the members of the drumhead court, too well knew, though here he kept the knowledge to himself, who Billy Budd was.<sup>42</sup>

Thus, this is some evidence that Vere, perhaps making a more objective retrospective judgment on his deathbed than under the stress of warfare and the trial, believed he made the right decision, all things considered. But, next, the crew's sullen revocation of Billy's benediction

seems to be evidence that the court acted wrongly. And, third, Melville says that the crew honored pieces of the yardarm on which Billy was hanged as they would a piece of the Cross. Then he adds:

Ignorant though they were of the secret facts of the tragedy, and not thinking but that the penalty was somehow unavoidably inflicted from the naval point of view, for all that, they instinctively felt that Billy was a sort of man as incapable of mutiny as of willful murder.<sup>43</sup>

The latter two considerations suggest, but only suggest, that if Vere and the court had had complete information about the crew's sentiments regarding Budd they would have known that the crew would not have been disposed to doubt the officer's discipline nor disposed to mutiny as a result, even if they had not punished Billy.<sup>44</sup>

The objective evidence suggests that there was no threat of mutiny on board the *Bellipotent* because of Budd's act. Thus, even assuming that the legal system was reasonably just, given little likelihood that there is a threat to the legal system, the duty to support and uphold just institutions would lose most of its force in the decision procedure. Similarly, utilitarian considerations lose much of their force. The main utilitarian consideration favoring enforcement are 1) deterrence of others by making an example of Billy, 2) protection of the institution by discouraging mutiny, and 3) the general consideration of upholding the law so sailors won't be tempted to violate it. Reasons 1) and 2) lose their force if the men would not commit mutiny, while 3) retains some of its weight. Even if the men would not mutiny, were Budd not punished, their law abidingness may need some reinforcement. That is, just because they would not mutiny it does not follow that their inclination to obey would not be weakened were Budd not punished. The duty of fairplay retains some of its force, even if the men would not mutiny. There may be minimal benefits to the legal system by punishing Billy" reinforcement of the men's habit of obedience. However, the greatly weakened considerations of utility and fairness must be weighed against the certainty of injustice to Billy. In that circumstance, the injustice to a nameable individual surely outweighs the weak considerations of utility and fairness. Thus, given an objective view of the facts, and granting that the legal system is just, it seems the officers failed to do their objective duty.

(4) Finally, if we assume that the legal system is not reasonably just, then the duty of fairplay and the duty to uphold and support a just institution do not apply. Similarly, utilitarian considerations lose most of their force. Thus, it seems that on the assumption that the legal system fails to be reasonably just, Captain Vere and the court failed to do their objective duty. Taking an objective view of all things considered Billy Budd was treated unjustly, hence wrongly.

To conclude these four subcases, it seems the officers' subjective duty was to punish Billy, if the legal system was reasonably just and if even a conscientious agent would not have known of the crew's sentiment. For all other assumptions (subcases 2-4), it seems that all things considered they failed to do their duty. Except for subcase (1), moral considerations and evidence in the novel suggest that all things considered on balance Billy was treated wrongly.



The arguments suggest these observations on the moral general question of a legal official's duties to enforce the law. We have considered a variety of arguments which might support a *prima facie* duty to enforce each and every law, some of which would support such a claim and some of which would not. Nevertheless, even for those that would support the claim, what we might call the interest in having the law enforced is quite diffuse. By this I mean several things. First, no individual person, assignable or otherwise, is necessarily wronged or even harmed, if the law is not enforced. Contrast this with cases of individual injustice; their characteristic is that assignable individuals are necessarily wronged and probably harmed. Next, a single failure to enforce the law does not normally threaten the existence of the entire legal system. To this extent the existence of a legal system is, or is like, a public good, one of the characteristics of which is that failure of one person or even of a small number to abide by the rules protecting it does not necessarily deprive others of its benefits. Failure to enforce the law on any single occasion when an official has the opportunity to do so or not, does not deprive others of the benefits of living under a legal system, benefits such as security from violations of the criminal law for ordinary citizens and whatever benefits legal officials may receive. Thus each person has a somewhat diffuse interest in having the law enforced: no person is necessarily harmed or wronged should it not be enforced, at least in Billy Budd's case, and no citizen necessarily loses the benefits which he ordinarily receives from living under a legal system, if it is not enforced. We can imagine circumstances in which assignable individuals would be harmed or wronged were the law not enforced, for example, if a policeman failed to stop a burglar or murderer from the commission of a crime, some particular citizen would be wronged and probably harmed. We can even imagine circumstances in which the general benefits that accrue to citizens from living under a legal system might be lessened or disappear altogether, e.g., when failure to enforce the law jeopardizes the existence of the entire legal system or substantial portions of it, as might be the case when failure to enforce the law leads to a revolution or rebellion.

Contrast the somewhat diffuse interests from having the law enforced (described above), however, with the very obvious and "concentrated" interests someone such as Billy Budd has in not be treated unjustly. If he is treated unjustly he is both harmed, for he will be dead, and wronged, for his moral and perhaps his legal rights will have been violated.

In the arguments we have just considered concerning Captain Vere's and the Drumhead Court's duties to enforce the law and punish Billy Budd, we weighed the principles supporting a diffuse interest to enforce the law against the principle that Budd not be treated unjustly, a principle supporting a very "concentrated" interest of Budd's. Furthermore, we have seen that the probability that the legal system is threatened, while not perhaps high, is non-negligible, but Billy Budd faces a certainty of harm, if he is punished. Thus, depending upon the subcase in question, we have weighed a low to nonexistent probability of harm to an institution in which participants have a diffuse interest against a certainty of harm to Billy Budd's very "concentrated" interest in not suffering injustice. People may differ in their intuitions regarding the balancing of such diffuse interests against Budd's very particular interest. I have implicitly argued that his interest has great weight in the on balance scales of justice, and, given the interests

arrayed against his and the different "facts" from the novel, have argued that his interest is quite difficult to overcome. Others may read the novel differently or weigh the competing interests differently.

Finally, there is one other consideration that bears on the outcome of the above arguments that may help account for our unease with the duty to enforce the law. The Drumhead Court faces the problem of enforcing a law, not to protect assignable other persons, but to punish Budd. Punishment typically stands in need of justification, but the problem is somewhat more acute, as David Lyons has recently argued, and most dramatically illustrated in the case of retributive theories of punishment. A theory of legal punishment should show how publicly "authorized penalties may be imposed for wrongdoing, to the exclusion of private retribution . . ." when even private retribution may be difficult to justify.<sup>45</sup> What is it that justifies the state in inflicting suffering on another, for "[f]rom the premise that someone deserves to suffer because he is wicked, it does not follow that I or anyone else has the right to impose punishments in order to insure that result".<sup>46</sup> (Of course, in Budd's case we do not even have the wickedness.) The answer he suggests is that for state infliction of suffering to be justified it must be useful, it must have some utilitarian component to it. We have just seen, however, that the utilitarian (and means-end) considerations<sup>47</sup> that might make punishment useful are the quite diffuse interests in having the law enforced in order to continue and support the existence of the legal system as a whole and do not easily override Budd's concentrated interest in not being wronged. Thus, it seems to me it is difficult to make an on balance case for punishing Budd except in very special circumstances.

#### IV

In closing consider two additional points: (1) the contrast between a citizen's duty to obey the law and a legal official's duty to enforce the law and (2) the point that an official's office in a legal system would make a difference to the moral obligations which bear on enforcing the law (although the contrary was assumed to this point in the discussion).

With regard to the first point, a legal official's *prima facie* duties to enforce the law tend to be weightier than a citizen's duties to obey the law. For example, many commentators have argued that a citizen does not have a *prima facie* duty of promising to obey each and every law of a legal system. The difficulty with claims that there is a duty of promising to obey is that most citizens cannot plausibly be said to have made such a promise.<sup>48</sup> While I have argued that an official does not have a duty of promising to enforce every law, including obviously unjust laws, the reason is not that officials fail to satisfy the conditions of making a valid *promise*, but that the promise once made does not override duties not to do injustice. In addition, while it is implausible to argue that citizens have a *prima facie* duty of fair play to obey the law<sup>49</sup>, as the earlier discussion indicated, it is quite plausible to argue that legal officials do provided the legal system is suitably just. Officials much more clearly seem to benefit from advancing their careers in the legal system. Finally, it is plausible that legal officials have a much stronger *prima facie* duty to uphold and support just institutions than do citizens, for officials can do much more in this regard. Thus, on the one hand, in several cases, legal officials have *prima facie* duties to enforce

the law where citizens do not have *prima facie* duties to obey the same laws, or legal officials' *prima facie* duties to enforce the law may be stronger than citizens' *prima facie* duties to obey. On the other hand, as noted in the previous section, sometimes an official's duty to uphold and enforce the law requires him to punish people, an action particularly difficult to justify. In addition, as we have seen, the justification of capital punishment in Billy Budd's case may be especially difficult to defend.

It is difficult to come to an overall conclusion about the similarities and differences between an official's duty to enforce the law and a citizen's duty to obey, for it is not clear how the greater number and weight of an officials' *prima facie* duties to enforce the law should be balanced against the difficulty of justifying an official's imposition of punishment of an offender and how both of these should be compared with citizens' duties to obey. These two observations, while seemingly inconsistent, are explicable. The strength of an official's *on balance* duty to enforce the law depends crucially on what exactly he or she has a duty to do; and, when an official has a duty to punish an individual, his *prima facie* duty to enforce the law in this way will be much more difficult to justify. What one has a duty to do in turn depends on the particular role in a legal system an official occupies. Thus, to have a fully adequate theory of an official's duty to enforce the law, one would have to look at how an official's role would modify such obligations.

At the outset of this paper I assumed, for purposes of simplification, that the justification of an official's duty to enforce the law could be discussed independently of the position in a legal system which he holds. That assumption was an oversimplification to facilitate discussion. Thus, consider a sketch of what a more fine-grained analysis of an official's duty to enforce the law would have to address. In the Anglo-American legal system we might think of three offices that are important in charging, trying and convicting someone who has broken the law: prosecutor, judge and jury. In Billy Budd these have been collapsed into one office and even, Melville suggests, into one person.<sup>50</sup> Some differences in these offices make a difference in the officeholder's obligations. For example, on the one hand, a prosecutor typically works in considerable obscurity and has wide discretion in bringing criminal cases to trial. On the other hand, prosecutors sometimes have to bring to the bar cases in which the evidence does not obviously favor success—that is part of their job. To the extent that a prosecutor's actions are less visible and to the extent that legally he has greater discretion than perhaps judges do, however, his *prima facie* obligation to enforce seriously unjust laws would seem to be correspondingly weaker.

Judges have much more visible offices, and it is traditional in a democracy that judges must enforce a constitutionally valid law the legislature enacts no matter what it is. If this is correct, judges would seem to have a much stronger *prima facie* moral obligation to enforce unjust laws.<sup>51</sup> If judges and not juries have the duty to set punishment, however, their carrying out this duty may be much more difficult to justify.

Juries are yet another matter, for they are always instructed (and they often even promise) to apply the law as the judge describes it without deviation, yet the doctrine of jury nullification permits less stringent obligations to enforce the law. According to this traditional

doctrine affirmed by the Supreme Court, in a criminal proceeding a jury may declare a person innocent whom they know to have violated a law on the books, and their verdict is final and nonreversible on appeal.<sup>52</sup> The principal rationale for this is that a jury is the democratic safeguard in the trial setting. That is, if a jury of peers selected at random, presumably representing a cross section of the electorate, finds that a person is treated unjustly by a law, their declaration of innocence in full knowledge of the law and its application is representative of what a more enlightened legislature would enact. Consequently, the jury has the greatest obligation to see that defendants are not treated unjustly and the weakest *prima facie* obligation to enforce each and every law, even unjust ones, regardless of content. Furthermore, if juries are charged with deciding the kind and amount of punishment, as they often are in capital cases, their on balance duty to enforce unjust laws and punish persons under such laws will be correspondingly weaker.

As these brief remarks indicate, a more detailed treatment of Billy Budd would separate these offices and ask what each person's on balance obligation is to uphold and enforce the law depending upon his office.

Finally, we should realize the moral dilemma Melville presents is a very special one. The law as it is applied to Billy Budd is unjust. It is unjust because it does not allow certain mitigating or meliorating defenses. In addition, assuming that the legal system is otherwise just and that Vere and the court's factual beliefs were conscientiously acquired, it is the court's subjective duty to enforce the law primarily because of the perceived real and immediate threat to the legal system as a whole. This second condition, however, rarely obtains in actual legal systems. We should realize that the novel *Billy Budd* provides a poor model for a legal official's duty to enforce an unjust law, because the circumstances described in the book are so special. This suggests the conclusion that, when an official is faced with enforcing an obviously unjust law, it is difficult to justify enforcement on most grounds unless very special circumstances obtain.<sup>53</sup>

#### ENDNOTES

<sup>1</sup> See Herman Melville, *Billy Budd*, ed. by Harrison Hayford and Merton M. Sealts, Jr., (Chicago: The University of Chicago Press, 1974), 79-80, 87-90, 95-97, 103, 106, for some of the evidence concerning whether Claggart lied or not. The balance of evidence strongly favors the hypothesis that he did.

<sup>2</sup> *Billy Budd*, 99.

<sup>3</sup> *Billy Budd*, 103.

<sup>4</sup> *Billy Budd*, 111.

<sup>5</sup> Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975), 6, sets this choice matrix, then discusses in the course of his book its defects and its application to judges' decisions in the Fugitive Slave cases.

<sup>6</sup> See M.B.E. Smith, "Is There a *Prima Facie* Obligation to Obey the Law?" in *The Yale Law Review*, Vol. 82, No. 5, 950-76 for an article which considers the extent to which legal duties are morally binding.

<sup>7</sup> See Richard Wasserstrom, "The Obligation to Obey the Law", *UCLA Law Review*, Vol. 10 (1963), 780-807, for one who considers this claim directly, especially section II.

<sup>8</sup> Smith, "*Prima Facie* Obligation to Obey?", 951.

<sup>9</sup> One simplifying device which I use in section III is to consider what an official's duty is apart from the particular position he/she holds. This assumption may be controversial, but it is necessary and only temporary. It makes some difference to one's moral obligations whether one is in the role of judge, prosecutor, or jury. Also, I ignore the duties of the policeman. This simplifying assumption is lifted in the final section for a brief consideration of the different considerations that apply to different offices.

<sup>10</sup> See Sanford H. Kadish and Monrad G. Paulsen, *Criminal Law and Its Processes* (Boston: Little, Brown and Co., 1969), 288-302, for some leading cases on provocation. It is important to note that Budd was the supremely law-abiding sailor, for he had seen a flogging administered to another and resolved never to disobey; *Billy Budd*, 68.

<sup>11</sup> Of course, more argument is needed to rule out various other hypotheses of unjust treatment, but it is beyond the scope of this paper, and what has been presented is sufficient for our purposes. All we really need is that Vere and the court believe that the law is seriously unjust, but I think that the facts of the novel support the provocation hypothesis. They may also support the hypothesis that capital punishment for merely striking an officer is unjust. However, the reasons Vere and the court articulate, that Budd is unjustly punished for intending to commit murder or an act of mutiny when he obviously intended neither, are not plausible, for it was a capital offense merely to strike an officer.

One might argue that conditions of war would permit a just military system to eliminate a defense of provocation. This does not seem plausible for there must be provocations toward which even the best wartime-trained sailors could not control their reactions. Claggart's provocation of Billy seems to be one.

<sup>12</sup> John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 345.

<sup>13</sup> We can imagine circumstances in which the conditions for a valid promise do not obtain, e.g., an officer is coerced into taking his oath, is deprived of information pertinent to making the promise, or is even pressed into service, but I ignore those possibilities here, for I can find no general argument that they are realized always or often.

<sup>14</sup> For a general discussion of this problem in the law of contracts see *The American Law Institute Restatement of the Law of Contracts, Second*, Chapter 14.

<sup>15</sup> *Restatement of Contracts*, section 320, 53.

- <sup>16</sup> *Restatement of Contracts*, section 320, 55.
- <sup>17</sup> *Restatement of Contracts*, section 320, 55-56. (emphasis added).
- <sup>18</sup> *Restatement of Contracts*, section 320, 56.
- <sup>19</sup> The issue is somewhat more complex than the text suggests. An act of enforcing the law could be wrong because it treated someone, e.g., Billy Budd unjustly, but there might be other reasons, e.g., utility or fairness, for enforcing it. Is there a duty of fidelity to perform an act which is unjust but the utilitarian right thing to do in the circumstances? At minimum it seems that the duty of fidelity has no moral force for enforcing the law until the on balance rightness or wrongness of promised act is decided. In effect the moral force of the duty of fidelity is suspended until the moral rightness or wrongness of the promised act is clear: if the act, the duty of fidelity apart, is wrong all things considered, then there is no duty of fidelity to perform it. If the act, the duty of fidelity apart, is all things considered right, then there may be a duty of fidelity to perform it.
- <sup>20</sup> See Rawls, *A Theory of Justice*, 344-48, for one who makes this point.
- <sup>21</sup> Immanuel Kant, *The Metaphysical Principles of Virtue*, tr. James Ellington (New York: The Bobbs Merrill Co., 1964), 120.
- <sup>22</sup> Rawls, *A Theory of Justice*, 342-43.
- <sup>23</sup> See Billy Budd, 121-22, 124, 131, for some of the pertinent passages.
- <sup>24</sup> M.B.E. Smith, "Prima Facie Obligation to Obey?", 954-60.
- <sup>25</sup> Rawls, *A Theory of Justice*, 334.
- <sup>26</sup> Rawls, *A Theory of Justice*, 335.
- <sup>27</sup> See J.J.C. Smart, "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly*, Vol. 6, No. 24 (October 1956), 344-354, for a discussion and defense of act utilitarianism.
- <sup>28</sup> See Gregory Kavka, "Utilitarian Generalization and Extensional Equivalence" in *Theoria* (1974) for a definition of general utilitarianism.
- <sup>29</sup> See Richard Brandt, "Some Merits of One Form of Rule Utilitarianism", *University of Colorado Studies in Philosophy* No. 3, for a discussion of ideal moral code utilitarianism. We should note also that simply because all or nearly all accept a rule, it does not follow that they necessarily behave in accordance with it.
- <sup>30</sup> Richard Brandt, *Ethical Theory*, (Englewood Cliffs, N.J.: Prentice Hall, 1959), 361.
- <sup>31</sup> Brandt, *Ethical Theory*, 363.
- <sup>32</sup> Brandt, *Ethical Theory*, 366.
- <sup>33</sup> *Billy Budd*, 114.

<sup>34</sup> For example, through no fault of their own, doctors in the 1920's might have mistakenly tried to cure allergies by means of operations on patients' nasal passages. In light of 1970's information we know this would be a mistake, for they would have inflicted unnecessary suffering and expense on their patients without curing them. Nevertheless, it would be unfair to blame the doctors for their actions, provided they had been acting on the best possible information available to them at the time and in accordance with the proper medical and moral principles. Thus, they did their subjective, if not their objective, duty.

<sup>35</sup> We find evidence for those factual differences on pages 125-26 and 131 and we should note also Melville warns us against taking the objective point of view, 114.

<sup>36</sup> This problem may be heightened for the officers, if many of the sailors were impressed into service or taken from jails.

<sup>37</sup> See Rawls, *A Theory of Justice*, pp. 82, 108, 112, for one who discusses this principle.

<sup>38</sup> See Brandt, "Some Merits", who mentions this possibility.

<sup>39</sup> See Kant, *The Metaphysical Principles of Virtue*, 82, 108, 112 who suggests this.

<sup>40</sup> *Billy Budd*, 125-26, emphasis added.

<sup>41</sup> Perhaps one caveat should be entered here. Someone may object that it was in the self-interest of the navy and the officers to decide the case as they did, consequently they did the right thing. It is obviously in the self-interest of the navy for them to make the decision they did, and we can imagine that it is in their self-interest as officers to make the same decision; they risk getting killed if there is a mutiny, and possibly they would be punished if they decided the case wrongly. (The last seems unlikely, since as Melville says the captain has absolute authority on board ship.) However, even if it is in the self-interest of the navy and the officers to punish Budd, it does not follow that an act in their self-interest is the right thing to do. When self-interest and the duties of morality conflict, there is a wide consensus among philosophers, which seems right, that morality should prevail. Thus, even if punishing Budd is in their self-interest, it is not necessarily right. Perhaps this qualification is unnecessary, for Melville says that these men are all conscientious moral agents and there is no evidence of arguments of self-interest.

<sup>42</sup> *Billy Budd*, 129.

<sup>43</sup> *Billy Budd*, 131.

<sup>44</sup> Of course, there is no logically tight argument to show that if the crew believed Billy to be a supremely virtuous person, incapable both of wilful murder and of mutiny, they would not have been disposed to mutiny and rebellion should Billy not have been punished for striking and killing Claggart. They might have so hated the authority on shipboard, for instance, that they were disposed to be rebellious at the first sign of the officer's hesitation in meting out discipline, even to innocent men.

Nevertheless, I am inclined to believe that Melville suggests that if the officers had had a god's information about the crew (which perhaps they could not get in the circumstances), they would not have punished Budd.

<sup>45</sup> David Lyons, *Ethics and the Rule of Law* (Cambridge & New York: Cambridge University Press, 1984), 151, 151-52.

<sup>46</sup> Lyons, *Rule of Law*, 151.

<sup>47</sup> Lyons, *Rule of Law*, 155-69.

<sup>48</sup> See Smith, "Prima Facie Obligation to Obey:" for a discussion of this point.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Billy Budd*, 104-05.

<sup>51</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 84-86, for a forceful statement and some criticism of this argument (Chapter 4).

<sup>52</sup> See Sanford Kadish and Mortimer Kadish, *Discretion to Disobey* (Palo Alto, CA: Stanford University Press, 1973), 45-66 for some discussion of the concept of jury nullification. Note also the legal cases to which they refer.

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