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THE LETTER OF THE LAW V. THE SPIRIT OF THE LAW:  
A STUDY OF THE BINARY'S REPRESENTATION IN LITERATURE

LAURA BELTZ  
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Reviewed and approved\* by the following:

Rosa A. Eberly  
Associate Professor of Communication Arts and Sciences and English  
Thesis Supervisor

Lisa Sternlieb  
Associate Professor of English  
English Honors Adviser

\* Signatures are on file in the Schreyer Honors College.

## **ABSTRACT**

This paper examines one of the most important binaries in the study of law: making judicial rulings based on the letter of the law v. the spirit of the law. The Code of Hammurabi, the Twelve Tables, and the Bible were chosen as the foundational texts that have most significantly influenced Western Law. While scholars have studied the legal contributions of these texts in the past, this paper specifically examines the way these codes founded the issue of letter v. spirit of the law. One way that they founded the letter v. spirit of the law debate is by influencing the way the general public would perceive the binary, which would surface in popular Western literature. Shakespeare and Melville, though both focusing on the letter v. spirit debate in their works, portray the binary differently because of their specific historical and cultural contexts. Public perception of this binary is therefore dynamic and dependent upon an individual's attitude regarding the social good.

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## **Chapter 1**

### **Introduction**

Law, as an essential part of a functioning society, has been represented in literature for as long as literature has existed. Authors, guided by their own personal experiences with law, represent legal themes in ways guided by those experiences. These representations shape how the greater public perceives law, how that public subsequently interacts with law, and law itself. This endless cycle has made law and literature a popular area of study for legal theorists and literary scholars alike as they search for what can be learned from the connection between the two.

The study of this connection is divided by law and literature scholars into two categories: law in literature and law as literature. Law in literature focuses on the representation of legal themes in literature, while law as literature studies legal rhetoric, such as judicial opinions, as literary works. While I take the first approach, I do find that the two subcategories are not as distinct as some scholars may suggest, and that the influence of historical legal context on literature is reciprocal, as my study could be extended to examine legal rhetoric.

The legal area that experiences the most interplay with literature is judicial opinions. The ways certain rulings from particular judges are represented in a text act as an argument of policy from the author. The author is writing from the context of how law is interpreted in his or her society, and argues for the way law should be interpreted in the future. When authors describe court scenes in texts, they create a sort of cultural

“precedent” for legal thinking in real courts. Law, therefore, both influences the way it is described in literature, and in turn is influenced by that representation. One of the most important issues surrounding judicial interpretation is the letter of the law v. the spirit of the law binary, or enforcing the concrete application of a law as opposed to following its general principle. Leading law and literature scholar Richard A. Posner argues that this binary is often the reason that people find the administration of law to be so frustratingly arbitrary (Posner 22). It has thus been a constant source of debate in the legal world and in literature, and its origins must first be examined before analyzing how it has been portrayed in literature.

Western law, and therefore judicial opinions as a part of that legal system, has been heavily influenced by three founding texts; the Code of Hammurabi, the Twelve Tables, and the Bible. I chose these particular texts to study for three reasons. First, all three texts have been well-preserved, giving us the exact wording of the statutes that they contain and, therefore, a good understanding of how particular laws would have been received. The Code of Hammurabi, while the one of the oldest written legal codes, has physically survived for centuries. Some clay tablets of particular statutes exist, and the large diorite pillar on which all 282 statutes are carved still survives intact and sits in the Louvre. We are, therefore, able to review the text in its entirety, as well as the introduction and conclusion that were written by King Hammurabi, which contextualizes the text. The Twelve Tables were likewise the earliest surviving codified law of the Romans, yet were also able to survive centuries. The Twelve Tables were engraved on large bronze slabs, which have been recovered archeologically. Some of the tablets found were fragmentary, but writing from various scholars of the time allow for the piecing

together and confirmation of those fragments. Last, the Bible, although a dynamic and living text, is one that has been protected and passed down over centuries of religious use and scholarly study.

Second, the three documents were chosen for their direct influence on the spirit of the law v. letter of the law debate. The Code of Hammurabi is a text that has very clear procedural information and prescribed punishments. The Code does not leave room for exceptions to the law; nor does it list defenses, beyond one religious exception. All decisions were, however, carefully recorded, creating precedent that could be followed and making the system of law far more homogenous. The Twelve Tables are similarly precise with the law, advocating a letter of the law reading that would treat the two classes of ancient Rome more equally. Finally, the Bible has representations of both a strict reading of the law and a merciful reading of the law. The Old Testament stories suggest a strict adherence to God's law, with the "an eye for an eye" principle of justice. The New Testament, however, tells stories of a Christ who is a merciful judge who makes exceptions.

Third, it would be impossible to cover each source of influence on Western Law, yet these three provide an adequate starting point. If possible, one could delve into everything from the writings of Plato and Aristotle to the Justinian code of law of Rome, but I have chosen the sources that I found had the most profound impact on both their societies at the contemporary time as well as on more modern law and legal culture. Focusing on three sources rather than ten allows for a thorough study of those three topics rather than a cursory review of many documents.

Following the study of these founding codes of law, I will discuss how two works of literature were influenced by the legal cultural tradition of those three texts, particularly looking at how they represent judicial rulings based upon the letter of the law v. the spirit of the law binary. Two works over the course of Western literature pick up on the two sides of this debate in particularly significant ways: William Shakespeare's *The Merchant of Venice* and Herman Melville's *Billy Budd*. Shakespeare's play was written and performed during a time in England when the Common law legal system was changing and political and religious forces were influencing the courts. Melville's novel was written in the wake of the American Civil War, in a time when individual rights were more secure yet national unity and security were in danger, and the rules regarding law during wartime were still being determined. The context of these two works therefore influenced the way the authors represented this foundational legal binary. Their arguments in turn continue to influence the debate over letter of the law v. spirit of the law, with applications in the way that Supreme Court judges interpret the constitution to arrive at opinions and beyond.



## Chapter 2

### The Code of Hammurabi

According to legal historian Donald G. McNeil, recorded history, and therefore recorded and codified sources of law, necessarily began with the invention of writing by the Egyptians in circa 4,000 BCE (McNeil 444). The Valley of the Nile was at this time the center of civilization and intellectual growth. The Nile River provided the means for a sophisticated agricultural system as well as a transportation system that would both support Egypt's densely populated cities. During this time, the Egyptians created a calendar, built elaborate temples and monuments, and created an organized governmental state. Historians find, however, that the legal system was most likely not formalized as no record to suggest one has been discovered, despite extensive search into this area (McNeil 444).

Next, the center of the civilized world shifted from the Nile to the Fertile Crescent of Mesopotamia, known as Babylonia, between the years 3000 and 2000 BCE. The area had been long contested due to its potential for farming (McNeil 444). The Sumerians were the first to take control of Babylonia, developing an agricultural economy that would support its cities while simultaneously building relationships with foreign cities for a lucrative system of trade. The Sumerians were then conquered by the Semitic tribe of the Akkadians, who would rule for 1000 years before being in turn taken over by another Semitic tribe, the Amorites (McNeil 445).

One King of the Amorites, Hammurabi, would reach particular success during his reign in Babylonia, and his legal code would influence law, including Western law, for centuries after its creation. Hammurabi ruled for about 42 years, from circa 1792 to 1750 BCE. Most significantly, during his rule Hammurabi was able to unite areas of Babylonia once disparate due to tribal divisions with his clear and unifying Code of Law. In addition to his legal strides to unite the area, he repaired damages from previous wars, he rebuilt cities, he developed trade, he improved agriculture by developing a system of irrigation and canals, and he encouraged progress in infrastructure, like organizing the roads of Babylonia at right angles (McNeil 445). Hammurabi was thus embraced as a strong and successful leader of the Babylonians, and his code of law was his greatest legacy as their King.

The Code of Hammurabi created and enforced a well-ordered and functioning society with a similarly well-ordered judicial system, which made it an example for law throughout the civilized world for centuries, and therefore continues to influence legal thought through the development of law in England and the United States. The Code of Hammurabi was discovered during a French archeological expedition into the Zagros Mountains of Iran in 1901. The statutes of the code are inscribed on a pillar of black diorite standing 8 feet tall with a 5-6 foot circumference (McNeil 444). At the top of pillar is a carving of the sun god Shamash, handing down the code to Hammurabi (Walsh 10). This link to an honored deity was a powerful way to lend authority to Hammurabi and the code of law itself.

The use of a link between deities and purveyors of justice is one that would continue to be utilized throughout the history of codified law, for example being used in

the Judeo-Christian tradition when God hands down the Ten Commandments to Moses. Drawing a link between a god and a human leader has the power to instill authority in both the ruler and the law itself. Hammurabi would have used this image of Shamash for both of these two reasons.

First, with regards to the authority of the ruler, Hammurabi would have been seeking to create an image of exclusive control, particularly with his challenge of uniting a divided tribal nation. Hammurabi took control after the death of his father, Sin-Muballit, and would need to assert the value of his ascension to the throne. Alliance with a deity would portray his authority as being both enacted and approved of by the gods. The image at the top of the stele, or the stone slab, shows Shamash sitting on a throne receiving Hammurabi. Shamash is the dominate figure in the image, as he is seated on the throne, wearing a crown, and is gesturing towards Hammurabi with a staff. In addition, Hammurabi has his hand raised in reverent prayer towards Shamash. Hammurabi being in the same image at all with the god and being shown as the same size as the god is showing that he has a personal relationship with the gods that other mortals do not have (“Stele..” 1). This again shows that the gods have chosen him as a divine ruler and that the gods approve of his decisions in his rule.

Second, the link to the deity shows that the laws are not simply written by man, yet are from the gods and therefore are absolute. In the philosophy of law, there are those who support “natural law” as law that is universal and True and is created by some kind of divine being. Natural law is seen as superior to positive law, which can be flawed and therefore is not as respected. If a ruler represents the law he is presenting as natural law

passed down from the gods rather than positive law created by the government and himself, the laws are much more likely to gain support from the public.

The Code of Hammurabi contains 282 sections of law separated into 45 columns carved into the pillar. In Hammurabi's Babylonia, status was very important, which is reflected in the code itself. At the top of society was the Amelu, who were chief advisers to the king and other officers of the state including judges, as well as land owners. Below the Amelu were the Muskenu, or the middle class of the society that consisted of the majority of the population. The Muskenu were free men who could own slaves yet were of a lesser status and thus up for conscription to the service of the state. This class included merchants, soldiers, the lower level of public officials, and the ancient Babylonian equivalent of nuns. Below this large class were the Ardu, or the slaves (McNeil 445). As the judges were of the highest Amelu class, the Muskenu and Ardu classes would have necessarily been arguing legal cases in front of their superiors, and many prescribed punishments for crimes had different sentences for members of different classes.

This presents a problematic element in the letter of the law v. the spirit of the law debate: when a judge is ruling over a member of a less powerful group there is a potential for abuse. This issue is handled in varying ways across the history of the letter of the law v. spirit of the law debate, with varying levels of corruption caused by this power relationship. The benefit, however, of having a codified law, regardless of how it may favor one class of people, is that it at least provides the public with a set of expectations of the law.

The Code of Hammurabi touches on a wide host of subjects, including torts, crimes, inheritance, marriage, trusts, transportation, and warehousing. Individuals in each class had particular responsibilities that the Code laid out, again with various privileges awarded to particular groups. For example, status determined medical fees, as is outlined in Sections 215-217,

If a physician operate on a man for a sever wound... he shall receive ten shekels of silver (as his fee). If he be a freeman, he shall receive five shekels. If it be a man's slave, the owner of the slave shall give two shekels of silver to the physician. (McNeil 445)

These types of fixed fees, creating a managed economy, meant that the Code was not intended to last any extreme amount of time or to be applied to societies other than its own, as it did not account for inflation, a change in monetary system, or a differing monetary system of another society. These exact fees additionally imply that the letter of the law is fairly strict, directing judges to apply specific prescribed punishments rather than creating a sentence of their own to match the specific crime.

It was important for Hammurabi that a clear and precise legal system was maintained throughout Mesopotamia. Legal documents, usually in the form of small rectangular cakes of clay, were prepared by professional scribes who followed a standardized system. In order to ensure honesty and fairness in the courts, those who committed perjury were severely punished. In a death penalty case a perjurer was subject to death, and in a commercial case for grain or money, the perjurer was subject to the entire amount of damages in the case (McNeil 446).

There are additionally specific references and instructions for judges found in the Code of Hammurabi. Babylonian judges were of high rank in their tiered society, and had jurisdiction over cases in the district that they lived in (McNeil 446). The legal process was very similar to the one that is used in the United States today. The complaining party would bring the case, and written pleadings would be used. Both written and oral evidence would be employed, and witnesses would be brought and sworn under oath before testifying. Unlike the system in the United States today, however, the Babylonians never used attorneys or any kind of similar hired counsel to present cases, instead arguing their own cases in front of judges. The decisions from cases were written down by scribes, even when the case was settled before being formally litigated (McNeil 446). Both parties would agree to the stipulations of the decision that was made, and three copies would be made. Each party would take a copy with them, and another copy would be placed in the archives for future review (Johns 9).

At times, the statutes are so precise that the unique court procedure for a particular crime is laid out after the crime is described. For example, section nine reads

If any one lose an article, and find it in the possession of another: if the person in whose possession the thing is found say ‘A merchant sold it to me, I paid for it before witnesses,’ and if the owner of the thing say, ‘I will bring witnesses who know my property,’ then shall the purchaser bring the merchant who sold it to him, and the witnesses before whom he bought it, and the owner shall bring witnesses who can identify his property. The judge shall examine their testimony -- both of the witnesses before whom the price was paid, and of the witnesses who identify the lost article on oath. The merchant is then proved to be a thief and

shall be put to death. The owner of the lost article receives his property, and he who bought it receives the money he paid from the estate of the merchant. (King 3)

The court system was, therefore, to follow specific procedures in court for each type of case, and the judges had very particular sentencing guidelines. This was the highly standardized system that allowed Hammurabi to combat a divided kingdom in order to unite all groups under his rule.

There is no evidence that any kind of appeal could be made after a judge had made a decision other than possibly arguing the case to the King (McNeil 446). The Babylonians were therefore at the mercy of whatever way that particular judge wanted to rule, regardless of whether it departed from the statutes written in the code or decisions from previous cases. This was detrimental particularly for members of the lower classes, who would not enjoy the mercy of a sympathetic judge of the higher class. The Code did, however, instruct that if a judge altered a judgment in any way, that he must pay twelve times the amount of the decision and would then be dismissed from his position as judge (McNeil 446).

The code is almost completely devoid of special defenses or excuses, therefore favoring a strict adherence to the law rather than a flexible interpretation for special cases (Wacks 5). For criminal law, the guiding principle was *lex talionis*, or the literal “eye for an eye” principle of justice. The choice of punishment was often highly symbolic, for example cutting off a hand of a thief or the loss of an eye of someone who was caught spying (Johns 7). The death penalty was utilized as a punishment in many cases, and in many cases the administration of death was also symbolic. Some of the categories of

death and corresponding crimes include hanging for stealing, getting a slave brand removed, or hiding a husband's death; burning for incest; drowning for adultery, rape, bigamy, or seduction of a daughter-in-law. The most common punishment in the code, however, was a fine based on the social class of the criminal (Johns 8).

Despite these clear crimes and rulings, judges did have some room for interpretation when considering the intention in crime, which was a consideration in the Code. For example, Section 206 states "If during a quarrel one man strike another and wound him, then he shall swear, "I did not injure him wittingly," and pay the physicians" (King 206). If a brander who had been convinced to remove a slave's branding pleaded ignorance he would go free. While these situations require the defendant to swear before the judge lets him free, thus removing the need for much interpretation, there were cases where judges would have to make determinations. For instance, poverty excused bigamy on the part of a wife who had been deserted, yet determining this poverty and the level that was required for an acquittal would have been up to the judge (Johns 8). Beyond these few exceptions, excuses were not heeded by judges of Babylonian courts.

The Babylonians did, however, allow for just one overall exemption to the rules, through a kind of test of the gods. The defendant would cast himself into the Euphrates River, and if he reached the shore alive he would be considered innocent, but if he drowned he would be considered guilty (Horne 1). At this time the ability to swim in such a large river was uncommon, so surviving the pull of the currents of the Euphrates was considered to be divine intervention from the gods. This is another example of how the law of a god or gods would take precedent over man-made law.



The expansion of the Babylonian Empire under Hammurabi eventually led to its downfall under the rule of his successors. Hammurabi's annexation of Mari in the northwest and Eshnunna in the east meant that there was no longer a separation of land between Babylonia and the powerful Hittite Empire and the Kassite tribes in the Zagros Mountains. Unable to fight off attacks from these groups from all directions, Hammurabi's successors began to lose control of the empire over the next few hundred years. In 1595 BCE Hittite King Mursilis I conquered the Babylonians, raiding Babylon and gaining control over the area (Lending 2).

The influence of the Code of Hammurabi did not fade, however, as his empire's power did. The specific statutes laid out in the sections of the Code continued to influence future societies as they were passed down through the Hebrew and Greek scholars whose roots laid in the Fertile Crescent.

Many legal issues that had not been previously codified or attached to specific laws were first written down and considered law in the Code of Hammurabi. For example, the first laws regulating abortion, an issue facing heated debate throughout history and continuing today, were in the Code of Hammurabi (Walsh 267). In section 211 it states, "If a woman of the free class lose her child by a blow, he shall pay five shekels in money" (King 1). There were therefore stipulated fines for causing miscarriage. The earliest known writings on prostitution are also in the Code of Hammurabi, in which prostitutes are given certain rights in six of the 282 statutes (Walsh 259). Most of the statutes govern the kind of inheritance that children born of prostitutes may seek from their fathers, for example section 193 states, "If the son of a paramour or a

prostitute desire his father's house, and desert his adoptive father and adoptive mother, and goes to his father's house, then shall his eye be put out” (King 8).

The “eye for an eye, tooth for a tooth” principle of justice is the most famous legacy of the Code. The Code states in section 196 that, “If a man put out the eye of another man, his eye shall be put out” (King 9). A form of the phrase has appeared in numerous future codes of law and guidelines of morality and justice, most famously in the Old Testament of the Bible, familiar to Christians, Jews, and Muslims. This code of legal justice emphasizes revenge over mercy, which aligns it more on the side of the letter of the law rather than the spirit of the law debate, which hands out merciful judgments for particular cases that seem to be exceptions to the rule.

The Code of Hammurabi was thus able to bring together the Empire of Babylonia to be a unified state under one code of Law. While the Code solidified the powerful rule of King Hammurabi across Babylonia, it did emphasize the supremacy of natural law of the gods over the positive law of man. The Code was strict and had precise rules for punishment for judges to follow. These punishments depended heavily upon the social class of the criminal, showing how the social class and thus interests of judges can guide the interpretation and ruling on a law. Special defenses or excuses are not listed in the Code, which indicates that it would have been followed strictly to the letter of the law, rather than providing mercy for exceptional cases. It additionally was the origin of the “eye for an eye” principle of justice, which emphasized strict enforcement of law over mercy. This text therefore influenced the debate over the binary between interpreting law based on the spirit vs. based on the letter for centuries to follow.

## Chapter 3

### The Twelve Tables

The next text of note that would build upon the letter of the law v. spirit of the law debate was the legal system of the ancient Roman Republic. This civilization was based in the city of Rome, which was founded in the year 753 BCE by its king, Romulus. Rome began as a single city state in Central Italy and as a monarchy, yet went through several other systems of government and law before its fall in the year 1453 CE (Damerow 1). The focus of this study will be on the period when Rome was a republic, from 509-264 BCE. It was during these years when the Law of the Twelve Tables was created and put into place, a set of statutes that governed Roman law during this time and influenced Western law for centuries to come. The Twelve Tables specifically touched upon the debate over the letter of the law v. the spirit of the law, and would again return to the issue of judges as a part of a ruling class making interpretations that did not favor criminals of a lesser status.

Like the Code of Hammurabi, the Twelve Tables sought to define what illegal interaction between members of the social classes was. In Ancient Rome the social classes were highly stratified, dividing citizens between the Patrician and the Plebeian groups. Patricians were the aristocratic class whose membership was determined solely by birth. The name for patricians comes from the Latin word for father, *patre*, which is what early Roman Senators were called, whom the patricians claimed to be descended from (McManus 1). Plebeians were the remaining Roman citizens who were not

Patricians. As Plebeians and Patricians were not permitted to marry, there was no way for a family's position to move from one class to another.

A struggle for power between these two classes and how they would interact with each other shaped the development of the Roman Republic's government and laws. In this time period the Patricians controlled all religious and political offices, including positions of power in the legal system (McManus 1). Without a codified system of law, the Plebeians argued that the Patricians were making decisions based upon ancient customs that the Plebeians had no way of knowing. Plebeians found that judges were biased in favor of the patricians, upholding unwritten custom that was known only to the Patricians (Adams 1). The Plebeians additionally felt that the Patricians were taking advantage of them as they had no way to appeal court decisions passed down by the Patricians (McManus 2).

The advantage that the Plebeians did hold over the Patricians was their strength of numbers. The Plebeians threatened the Patricians with secession or a withdrawal from the Roman Republic during times of crisis, when manpower was necessary in order to build up a strong military (McManus 2). The First Secession of the Plebs occurred in 494 BCE. The Plebeians created their own assembly called the Concilium Plebis, and elected their own magistrates, called the Tribunes and the Plebeian Aediles (McManus 3). The Patricians needed to act in order to bring the Plebeians back into the republic.

In the year 462 BCE, a Tribune by the name of Terentilius proposed that a committee of five men should be elected in order to create laws that would limit the absolute power of the Patrician leaders. The Patricians of course opposed the proposition, and so in the next year the Tribunes returned with a modified proposition, suggesting that

five men would be selected from each class in order to make laws that would be advantageous for both classes. The proposition also required that judges would enforce these laws equally for both classes in order to remedy the issue of Patrician judges favoring Patrician defendants under traditional and secretive law.

In the year 454 BCE, the Senate sent a group of three men to travel to Athens and other Greek cities in order to learn all that they could about their laws (G. Long 1). While the Ancient Greeks tended to be suspicious of foreign ideas, the Romans attempted to learn all that they could from existing civilizations about law.

The recent tumultuous political past of Athens would provide lessons for the Romans on how to implement legal reform, particularly when looking at the example of Solon. The political system of Athens went through several stages over the course of ancient Greek history. Over time, stratified social classes formed in Athens as the wealthier families retained control of the land that yielded the best crops, passing down this land to their children after each generation, and essentially creating a system of serfdom by the year 700 BCE (Jones 3). The political breakthrough came in 594 BCE when a statesman named Solon became the chief magistrate of Athens. Solon instituted a series of reforms that sought to involve more people in government, including the “Council of the 400” which included the heads of the more powerful families, and an “Assembly” that included all males of military age. These first strides towards democracy were innovative, but were too radical for Athens at the time, as revolts against his ideas broke out following his death. In 508, however, Athenian Aristocrat Cleisthenes extended Solon’s discarded reforms, creating the first true Athenian democracy, and creating an example that the Roman delegates would be able to learn from (Jones 4).

When the three men returned from their trip to Greece in 452 BCE, the Patricians agreed that a committee to create these laws could be formed, yet that it would be composed of ten Patrician men who would agree to keep the interests of the Plebeians in mind. The Patricians assented, and the committee was formed, including ten elected men and the three men who had traveled through Greece. During this year the committee compiled a set of ten tables of laws, which were confirmed by the Senate. In the year 450 BCE it was found that more laws needed to be added, so a second committee was elected. This committee contained both Patricians and Plebeians in order to serve the interests of both groups. Following the formation of this committee, two additional tables were added to the previous ten (G. Long 2).

The completed Twelve Tables were first published in the year 449 BCE. The Tables were carved into bronze tablets that were displayed in public squares of Roman towns in order to inform the public of the specific statutes (G. Long 2). It is reasonable to assume that Roman citizens learned the Twelve Tables as a part of their basic education, as Cicero writes of learning their principles as a boy (G. Long 2). The public display and instruction Twelve Tables were therefore an effective way to ensure that all citizens of Rome could be informed about the laws that governed the entire Republic. It also answered the Plebeian complaint that Patricians were unfairly advantaged in court because they were aware of the ancient customary laws whereas the Plebeians were not and were therefore disadvantaged. A public knowledge of laws would keep the judges who interpreted them in check, forcing them to make reasonable decisions based upon precedent.

The laws themselves cover a host of issues that would have been relevant to the ancient Romans, such as debt, guardianship, inheritance, land rights, and torts. The first and second Tables covered trial procedure. The most significant way that legal procedure in the Twelve Tables differs from modern legal procedure is that the state did not arrest or otherwise bring a man accused of a crime into court. Instead, the complainant would summon another person into court or resort to personal violence himself. With no intermediation or enforcement by the state, dispute resolution was a very personal issue, reflecting more ancient systems of personal revenge. In this society crimes had therefore not transferred over philosophically to be seen as an act against the state; they were instead acts against other individuals.

The procedure in Table I is very specific, giving instructions down to the time the cases should be presented to judges and at what time judges should make their rulings. In Section 9, the code goes as far as saying “If both are still present, sunset shall mark the termination of proceedings” (Halsall 2). This brief amount of time for each case, restricted to just one day, shows that the procedures must have been primitive. It also shows that judges would have needed to make prompt decisions.

Also of significance in Table I is that there is no mention of written documents in trial. This means that all evidence and testimony presented would be in speech rather than provided through documents. It also implies that, unlike the Code of Hammurabi, decisions were not recorded in the court room itself. This departure is indicative of the emphasis that the Ancient Romans placed upon the oral performance of arguments, showing that they were an oral society rather than a documentary society.

Although the Tables were meant to address the issue of judges who belonged to the upper class and were thus biased against the lower class, it still contained laws that were biased against certain groups. For example, Table VIII section 2 states, “If one has broken a bone of a freeman with his hand or with a cudgel, let him pay a penalty of three hundred coins. If he has broken the bone of a slave, let him have one hundred and fifty coins” (Horne 2). Judges were therefore continuing to enforce laws that would hold their own class above others. They were, however, instructed to interpret that law equally for all classes in a strict fashion, which would have addressed the original concerns of the Plebeians.

The Twelve Tables saw a lasting influence on law that was not significantly altered until the Justinian Code. The strong oral tradition of Rome that valued memorization and repetition meant that centuries of Romans would be guided by its words. In *De Oratore*, written by Cicero about 400 years after the Tables were first published, Cicero wrote,

Though all the world exclaim against me, I will say what I think: that single little book of the Twelve Tables, if anyone look to the fountains and sources of laws, seems to me, assuredly, to surpass the libraries of all the philosophers, both in weight of authority, and in plenitude of utility. (Horne 1).

It therefore had a lasting impression on the society it originally governed. The Twelve Tables additionally had an impact that reached beyond Rome itself. The Twelve Tables would be the primary basis of Roman Civil Law, which has influenced the majority of modern legal systems in the world (Walsh 374).



The Twelve Tables, therefore, had a great impact on Western Law. The statutes would be utilized and adapted for centuries, and principles of the code remain in use in modern law today. The Tables, like the Code of Hammurabi, are extremely precise in their suggested rulings, including extensive details. Table I section 3 for example states that when summoning a man before a magistrate, there are certain regulations that that individual must comply with, and that “If illness or old age is the hindrance, let the summoner provide a team. He need not provide a covered carriage with a pallet unless he chooses” (Horne 1). This shows that the law is very precise, and was intended to be universally enforced to this level of precision across the Roman Republic.

Also in similarity to the Code of Hammurabi, the Twelve Tables do not allow for special defenses or exceptions when violating a statute. As the Plebeians were so concerned with the previous corruption of Patrician judges, the law would be enforced equally and to the letter of the law when the Twelve Tables came into effect. The complaint that the upper class had the advantage in the courts was addressed by the fact that everyone had knowledge of the criminal statutes and that judges swore to deliver consistent and standard rulings in all cases, regardless of the defendants social status or to a particular situation. This is therefore a code that is most similar to the letter of the law standard of interpretation, though the defense of swearing intention opened the door for special defenses or excuses in particular cases in the future of the letter of the law v. the spirit of the law debate.

## **Chapter 4**

### **The Bible**

The third and possibly most important influence on the letter vs. spirit of the law debate and Western law itself comes not from a legal code or text but a religious one. Both the Old and New Testaments touch on this binary, and although it speaks more to the treatment of others rather than how specifically judges should rule, the principles have always guided and continued to guide judges in interpreting law.

The development of the text the Bible is complicated, as it is truly many texts from many authors. Over the course of history, the traditions of religions have begun with oral transmission, in forms such as myths, hymns, legends, laments, and proverbs. Pre-literate societies would often designate specific members of their groups to serve as the performer of religious traditions, and the stories would be performed at public events for the community (Long 1). This kind of oral transmission created a kind of “living” text, as the story would differ each time it was performed due to the subjectivity of an oral performance rather than a written down and standardized text. Both the Old and New Testament were founded upon stories transmitted through an oral tradition (Long 2).

After writing was developed by the Egyptians, written languages spread throughout the Ancient Middle East. The Hebrew alphabet, which would first be used to compose the Jewish scriptures, or the Old Testament, and the Greek alphabet that would first make up the Christian scriptures, or the New Testament, emerged after this development, with scribes recording stories on scrolls of papyrus or parchment. As the

stories from the oral tradition moved to scribal transmission, the content would have been impacted by both scribal revision and scribal error. Scribal revision refers to editing that individual scribes may have performed intentionally on the stories to suit their own individual preference. Scribal error simply refers to unintentional errors that may have altered the content of the texts (Long 2).

After the stories became more stabilized due to popularity and thus an increased conformity to the most common version of the text, they were assembled into manuscripts known as the Old Testament the New Testament. The oldest surviving manuscripts of the Old Testament are included in the Dead Sea Scrolls from the third to second century CE. It is theorized, however, that examples of the Old Testament would have existed thousands of years before this, and were largely destroyed by Christians and other groups who destroyed Jewish artifacts. The oldest copies of the New Testament are from the mid-to-late second century CE (Long 3).

A text as comprehensive as the Bible, particularly as a text that provides instruction on how a person should live and interact with others, discusses law in many of its books. While the instructions on law and legal judgments seem similar to previous legal codes of the Ancient World, the difference is in the source of authority for that law. Although previous rulers had aligned themselves with deities, such as Hammurabi being pictured with the sun god Shamash, the direct source of authorities on law was typically the monarch rather than the deity, and the punishment was carried out by the monarch or other agents of the state. In the Bible, however, the source of the authority is God. Moses and other intermediaries who communicate God's Laws were seen as exactly that; intermediaries who would transmit God's Laws to the people rather than the authority

and enforcer of punishment as a monarch like King Hammurabi was. In this system of justice, obeying a law was not necessarily a legal requirement to the state but instead a religious requirement that would have spiritual consequences. Breaking a law meant that you could be punished in the secular world, yet it more significantly meant that you were disobeying a Law of God and therefore were committing a sin (“Law” 5).

According to Albrecht Alt, in his essay “The Origins of Israelite Law,” there are two forms of law represented in the Bible. The first he called “casuistic law,” and the second he named “apodictic law”. Casuistic law takes the form of an “if... then” statement, showing that certain behavior has particular consequences. The second form of laws, apodictic, takes the form of absolute pronouncements. These are most often imperative statements like “Thou shalt not,” instructing specifically on what not to do (“Law” 4). Many of these examples of law, in both forms that Alt identifies, make direct valuating statements regarding how judges should interpret law and punish criminals. These principles on law have shaped the way law was interpreted in the countries of England and the United States, which were both founded on Judeo-Christian values.

The closest thing to a codified legal text within the Bible is the Ten Commandments, the set of laws passed down from God to Moses. The story from Exodus is that God inscribed the Ten Commandments on two stone tablets, which he passed down to Moses on Mount Sinai. These laws are examples of the apodictic laws that take the form of imperative statements, such as “Thou shalt not steal” (*King James Bible*, Exodus 20.15). The entire Bible, however, works as a kind of code of laws, and the punishment of breaking these laws is not a punishment from the state but instead the punishment of committing a sin against God. Furthermore, the way that the Bible

instructs individuals to live influenced how lawmakers across centuries made moral judgments in declaring what was against the law and in determining sentencing.

One significant example of judgment and punishment that would influence sentencing comes from Genesis 4, the story of Cain and Abel. Cain commits the first murder by killing his brother, and God must punish him when he does not confess. God tells Cain that he is now cursed from the earth and that when he attempts to till the ground that it will not yield to his efforts, saying, “When thou tillest the ground, it shall not henceforth yield unto thee her strength; a fugitive and a vagabond shalt thou be in the earth.” (*King James Bible*, Genesis 4.12). God therefore selects a punishment that is specifically chosen for that individual in order to punish him the most. A standard punishment that judges could hand down to murders is not given, instead Cain, a farmer, is punished by not being able to farm land. If Abel, a shepherd, had killed Cain, God would most likely have punished him in different way in order to hurt his livelihood. This kind of retributive justice advocates for judges who are guided by the principles of God and rule strictly against those who sin against God on a case-by-case basis, rather than using a codified and standardized law to apply to all criminals.

Turning to a psalm attributed to David, Psalm 19 of the book of Psalms addresses the nature of law directly. The psalm describes the law of God, which is natural law rather than man-made positive law. It says that “The law of the Lord is perfect, converting the soul: the testimony of the Lord is sure, making wise the simple. The Statutes of the Lord are right, rejoicing the heart: the commandment of the Lord is pure, enlightening the eyes” (*King James Bible*, Psalm 19.7-8). This shows that the law descending from God is pure and wise and perfect for all individuals equally.

The psalm is also celebrating the infallibility of God's judgment on the basis of his law, saying "The fear of the Lord is clean, enduring for ever: the judgments of the Lord are true and righteous altogether" (*King James Bible*, Psalm 19.9). God is a unique judge in that he is infallible. His statutes are perfect and therefore his judgments are always just. This psalm therefore is advocating for law that has been passed down from God. If natural law makes up the laws of a society then the laws will be just and interpretation and application will always be just. The letter of the law and the spirit of the law then are one and the same in an Old Testament reading.

The New Testament departs from the Old Testament teachings on law through an emphasis on mercy for specific cases rather than a strict adherence to God's law. First, this departure is specifically addressed in the fifth chapter of the book of Matthew in the first portion of the Sermon on the Mount. Jesus states that he has come to fulfill the law of the Old Testament and of God, not to destroy it. However, in lines 38-39, Jesus states, "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also" (*King James Bible*, Matthew 5.38-39). Jesus therefore is criticizing the Old Testament maxim and saying the "eye for an eye" principle of justice encourages personal and retributive vengeance. Limiting personal vengeance is important for placing the role of interpreting crimes in the context of law and doling out punishment based on that law in the hands of an agent of a government rather than an individual.

The New Testament again instructs against the "eye for an eye" principle of justice in the parable of the unforgiving servant from Matthew 18. Peter asks Jesus "Lord, how oft shall my brother sin against me, and I forgive him? till seven times?," to which

Jesus replies “I say not unto thee, Until seven times: but, Until seventy times seven” (King James Bible Matthew 18.21-22). Jesus is yet again preaching forgiveness of wrongs rather than retributive individual justice. Judgment is not in the hands of man but is instead in the hands of God. Jesus concludes the story by telling the men that they cannot possibly provide a one-for-one repayment of their sins against God, therefore they cannot expect this from other men, saying “So likewise shall my heavenly Father do also unto you, if ye from your hearts forgive not every one his brother their trespasses” (King James Bible Matthew 18.35). In Matthew 6, where what is known as the Lord’s Prayer is written, the sentiment again is of forgiveness rather than retribution, with the words “And forgive us our debts, as we forgive our debtors” (King James Bible Matthew 6.12). The New Testament is therefore clearly against the “eye for an eye, tooth for a tooth” *lex talionis* principle of justice that began with the Code of Hammurabi and was echoed in the Old Testament.

Another example of the New Testament’s view of law comes from what is known as the “The Pericope Adulterae”, or the scene with Jesus and the woman caught in the act of adultery. In this story, Jesus goes to the Mount of Olives and the scribes and Pharisees bring an adulterous woman to him. They tell him that the Law of Moses of the Old Testament instructed that the punishment for this act was stoning, but they ask Jesus what they should do. Jesus replies “He that is without sin among you, let him first cast a stone at her,” and the scribes leave, leaving her with Jesus (*King James Bible*, John 8.7). Jesus tells her that he cannot condemn her for her sin, but that she is to “...go, and sin no more” (*King James Bible*, John 8.11). Jesus is therefore preaching message of tempering justice with mercy. Jesus was presented with a clear-cut case where a woman had committed a

crime and had knowledge of the prescribed punishment, but instead of following the letter of the law he made an exception and let her go. This “ruling” of Jesus therefore favors a merciful judgment in a special case rather than a strict adherence to the letter of the law.

The Old Testament and the New Testament therefore both provided arguments that would build upon the letter vs. spirit of the law debate in the future. Although previous sources of law like the Code of Hammurabi had been tied to a deity as a way to gain ethos with the citizens, Biblical law is natural law rather than positive law, with consequences that go further than punishment from a King. The Old Testament favored retributive justice and the *lex talionis* principle. God made judgments specifically tailored to punish an individual, rather than using punishments laid out by a codified text of law. The New Testament, however, favored merciful judgments that considered the situation of each individual, and sought to forgive sins. The ultimate punishment to be levied out would be judgment from God, based upon your sins. These ideas about judicial interpretation would influence philosophical thought, literature, and legal practice in Western Culture through the writing of Shakespeare and Melville alike.



## Chapter 5

### Shakespeare

The specific contexts under which Shakespeare and Melville wrote would affect how they addressed the judicial interpretation debate. First, a background of the state of the legal world at the time of the British Early Modern period when Shakespeare was writing is necessary to understand the laws of that country and how the letter vs. spirit debate played out in that specific legal environment.

A large portion of the world, including Europe, South America, Asia, and West Africa, uses a system of law derived from Roman Justinian Code of Law that is known as civil law. England, however, developed a common law system over the centuries that its colonies subsequently adopted (Wacks 11). The development of this system and how it was being used during the early modern period informs a discussion of how Shakespeare represented judges during this time and how this writing impacted the future of common law, both in England and in the United States where common law would be adopted.

The expansion of the Roman Empire brought the concept of Roman civil law to the majority of Europe, yet specific Roman statutes did not have as much of an impact on existing British law. The Norman Conquest of 1066 brought feudal law to the Germanic tribes, which served as the basis for the English common law system that would develop over the next several hundred years (Walsh 58). The first official major legal reforms came from Henry II, who reigned from 1154-1189. Henry II is known as the “father of the common law” for the standard body of law that was enacted during his rule. Judicial

holdings about the law were written down and explained in a book called *Treatise on the Laws and Customs of the Realm of England* by Ranulf de Glanvill, Henry's chief justice. This effort meant that there was now precedent for judges to base decisions on, making the interpretation of law more homogeneous than ever.

Next, in the year 1215 a group of English barons met with the goal of limiting the legal power of the state, especially of the King, and to assert certain individual rights of the people. In creating this "great charter," the Magna Carta, the men first established some rights that are quintessential parts of American law today like the right to a trial by jury and protection against self-incrimination. The charter also established proportionality of punishment to crimes, which would be instrumental in guiding the holdings of judges in the future (Walsh 58).

Following the specific rights asserted by the Magna Carta, In 1260 Henry de Bracton's *On the Laws and Customs of England* continued to build on the common law that was being constructed. Bracton argued that judges should interpret law based upon precedents set by previous cases, rather than some code of law derived from God or some other authority. His book was a compilation of judicial rulings from previous cases, explaining in each case how the decision should guide future cases of a similar nature. For this reason, Bracton is commonly referred to as the "father of case law" (Walsh 59). At first, judges had few written down decisions to base their rulings on and had to create precedent themselves. As time went on, however, judges relied more and more on previous rulings as they were increasingly written down, and the courts in England were moving in the direction of standardization.

In conjunction with the common law, during the medieval era another system of courts was established based upon the principle of equity. Equity refers to a remedy for a wrong that was not directly recognized under the common law. This principle means that a judge could create a more just remedy for a wrong as he saw fit if one was not provided by existing legal statutes. During the thirteenth century the common law had become extremely inflexible, and judges tended to follow the letter of an ancient law rather than searching for intent and ruling based upon the spirit of a law. The rulings of these judges left many feeling unjustly treated by the law, and they brought their grievances to the king. As a response, a new arena to deal with these issues was created, called the Court of Chancery (Walsh 43). Judges who presided over these courts were encouraged to make rulings based upon fair standards and principles that could be flexible to each individual case. Rather than replacing the common law, Courts of Chancery were a companion created in order to balance it (Walsh 43).

The War of the Roses, the series of wars fought between the Lancaster and York houses for the throne of England in the fifteenth century, sparked the next shift in England's judicial system. As the Tudors came to power, the legal business boomed, bringing about legal innovation and the further expansion of the courts. Henry VIII's break with Rome and the Catholic Church expanded the legal power of the state in ecclesiastical matters as well as secular suits that had been previously handled by bishops and the church (Zurcher 29). Additionally, the flourishing of the printing press during the sixteenth century meant that case law and other legal literature was able to circulate further and more often than ever before (Zurcher 29).

The government during this time was a limited monarchy, meaning that the government was conducted according to legal procedures and that the king was subject to the law just as the rest of the citizens of England were. The king could not change or break the law; only Parliament could create legislature (Baker 2). Of course, as the judicial system of Early Modern was not independent from Parliament, the party that was in power impacted the court system (Baker 3). Furthermore, the monarch himself had power over the interpretation of law by judges, for example in the case of Lord Dacre of the South in 1534. In this case, the government had been seeking change in legislation on the Statute of Uses, yet had been defeated in Parliament. After being promised the king's "good thanks," a group of judges ruled against precedent in the case, finding that the uses of land could not be left by will. This conveniently enabled Thomas Cromwell, chief minister of King Henry VIII, to pass the Statute of Uses through Parliament, as this upheaval of case law had undermined the opposition (Baker 3). There was therefore corruption in the courts due to the influence of both Parliamentary politicians and the monarch on the way judges ruled on certain cases.

Beyond this kind of corruption of judges, the courts of the London area were very confusing during this time period, which was a problem for the citizens of England when seeking justice. During this time there were two major courts for cases: the Court of Common Pleas for civil cases, and the King's Bench, which traditionally sat in front of the King and handled criminal matters (Zurcher 30). After the expansion of courts during the Tudor era, the percentage of cases being handled by the King's Bench plummeted, meaning that the King was making far less money from that revenue source (Zurcher 31). Attorneys doctored information in cases and judges allowed for cases that should not

have been tried in the King's Bench to be tried there, expanding the civil power of the court. Parliament responded to this problem by creating a new court called the Exchequer Chamber, which specifically addressed errors that had been made in the King's Bench. The confusion that this kind of expansion and change of the legal system made it easy for opportunistic attorneys to take advantage of gullible clients, and corruption and poor legal practice was rampant throughout the courts (Zurcher 32).

The abuse of the legal system, from both outside influences on judges from Parliament and the King as well as opportunistic attorneys, did not go unnoticed by governmental officials during this time period. In 1605, during the rule of James VI, Parliament passed "an Act to reforme the multitudes and misdemeanours of Attorneys and Sollicitors at Law, and to auoyde saundry and vnnecessarie Sulites, and charges in Law" (Zurcher 29). Despite efforts for reform, the public was highly suspicious of the courts, judges, and lawyers during Shakespeare's time (Zurcher 32).

*The Merchant of Venice* was most likely written by Shakespeare in the mid-to-late 1590s, near the end of the reign of Queen Elizabeth I. As the conflict of the play centers around an agreement between a Christian and a Jew, another important context to consider when studying law in *The Merchant of Venice* is the history of Jews in early England.

People of the Jewish faith were first documented to be living in England in the year 1075. For more than a century, Jews lived relatively peacefully amongst their Christian neighbors, yet they were not considered citizens. Jews could not own land or take part in many other professions, and they could not be members of the artisan guilds, which were valuable support systems for Christians (Rogers 1). Christians, however,

were barred by the Church from working as money-lenders, leaving room for Jews to take up this profession. Money lenders, or those who practiced usury or the lending of money with interest, often had to collect debts from those who owed them, which made them an object of resentment. This image of the evil debt-collector came to be associated by Christians with Jews during this early time (Rogers 2).

As Christians prepared for the Third Crusade in the late 12<sup>th</sup> century, anti-Semitic sentiment was at all all-time-high. This sentiment turned to violence in two major massacres of Jews in England. Tension between the two groups continued to grow, and in 1275 several edicts, or legal proclamations, were implemented against Jews. All Jews over the age of twelve needed to pay taxes, Jews needed to wear special badges that identified them as Jews, and they were forbidden from continuing to be money-lenders. At this point, with their primary source of income forbidden, the King no longer saw Jews as a value to the state. In the year 1290 the Jews were expelled from England (Rogers 2).

After the Expulsion, the only Jews living in Europe would have been either those who had actually converted to Christianity or those who were practicing their religion in secret (Rogers 2). Without any examples of the contrary, fantastical myths about Jews were able to take root in English culture over the next few centuries. It was widely believed, for example, that Jews would kidnap children at Easter in order to use them in ritual practices. Another popular myth was that Jews would take Christians and drain their blood to use for Passover ceremonies. Although these myths obviously had no basis in fact, there was again no evidence to the contrary for the British and they were spurred on by the fear of the unknown (Rogers 3).

When Elizabeth I ascended to the throne in 1558, she needed to assert her authority and silence those who spoke against her and her ascension. She dealt with threats ruthlessly, and many of her enemies were beheaded. The conflict was largely religious, as Elizabeth's father Henry VIII had broken with the Catholic Church. By the time Elizabeth had taken the throne, the Pope and other Catholic powers in Europe were fighting to return a Catholic ruler to the head of England. Elizabeth thus needed to assure the public that her place on the throne was justified and she needed to suppress Catholic uprisings. This was therefore a time of religious intolerance and strict punishment in England (Rogers 3).

Despite the Expulsion, a small group of Jews had taken refuge from the Spanish Inquisition in England during this time (Rogers 3). These Jews, known as Marranos or Conversos, had converted publicly to Christianity yet still maintained Jewish heritage and sometimes even practice in private. A group of these Marranos even worked as musicians at the court of Henry VIII. While most of these Jews were able to live out their lives in England without persecution, Jews were particularly punished by the previously described corrupt legal system of the time (Rogers 4).

One notorious event of this nature, which could not have escaped notice by Shakespeare, occurred in the year 1594, just a few years before *The Merchant of Venice* was written. Elizabeth I's physician and Marrano Roderigo Lopez was alleged to be in league with the King of Spain to poison her. Despite professing innocence, Lopez was convicted of treason and was publicly hanged, drawn, and quartered. The fact that Lopez was a Marrano led to another wave of Anti-Semitic sentiment through English people during this time (Rogers 4).

The legal and political environment that Shakespeare was writing out of was, therefore, a tumultuous one. The power of judges to interpret the law as they please, as well as their choice to rule by the letter of the law or by the spirit of the law, is one that arises from this tumultuous environment, and is a central theme in his play *The Merchant of Venice*. The play also emphasizes the religious conflict during the time that Shakespeare was writing, bringing attention to the ability of judges to discriminate against minority groups and to manipulate the law in order to rule in favor of decisions in their own best interests. While some scholars argue that Shakespeare's portrayal and punishment of Shylock participates in the anti-Semitism of the time, others find, and I agree, that this exposure of anti-Semitism in fact is drawing attention to an additional aspect of corruption in law.

Legal and political corruption, as well as religious intolerance, particularly against Jews, then set the stage for Shakespeare's discussion of the binary between the letter of the law and the spirit of the law in *The Merchant of Venice*. The play is a tragic comedy that centers around the conflict between a Venetian merchant named Antonio and a Jew who lends him money named Shylock. Antonio borrows the money for his friend Bassiano so that he can court a beautiful heiress named Portia. When Antonio defaults on his loan, Shylock insists that the terms of their agreement, the payment of a pound of Antonio's flesh if the bond is broken, must be met. A trial is held, yet it is tried by Portia, who is disguised as a law clerk. Portia reviews the contract and agrees that it is binding, yet reminds the court that if he spills the blood of this Venetian he will be punished and his property will be given to the state and to Antonio. Trapped in this quandary, Shylock agrees to a compromise by Antonio. While Portia utilizes a strict reading of the law in



order to reach a desired ending, Portia in fact advocates a merciful reading of law that employs equity. Law is portrayed as a tool, which a virtuous Christian individual can employ and negotiate in order to reach the best end. The Christian will, therefore, reach a favorable ruling in court, preserving his interests while ignoring those of the minority individual.

In Scene 1 of Act 1, the reason for the deal with the moneylender is first introduced. Bassanio needs money in order to travel to Belmont and make a grand presentation to an available heiress named Portia. He asks his friend Antonio to borrow money, yet Antonio has invested his money in ships that are making their way to various ports. Antonio instead promises Bassanio that he will find someone to lend him the money he needs in Venice on the basis that he is a merchant and therefore will be able to repay the loan, saying “Go presently inquire, and so will I, / Where the money is, and I no question make / To have it of my trust or for my sake” (Shakespeare 1.1.182-184). Although this play takes place in Venice, the English Early Modern viewer of the play would have applied their knowledge of money-lending practices to the play and would already be imagining the type of person that this money-lender would be, immediately having a negative association due to the Jewish stereotypes and general religious intolerance of the time period.

The viewer first meets Shylock in Scene 3 of Act 1. In the stage directions Shylock is listed as “Shylock the Jew,” whereas the rest of the main characters are identified simply by name. This suggests that Shylock’s religion is the characteristic that will guide his character and actions during the play, and will have bearing on the final legal decision of the play. In negotiating the loan with Bassanio, Shylock admits that

“Antonio is a good man” (Shakespeare 1.3.10). Bassanio interprets this as an evaluation of his general morals, yet Shylock corrects him, explaining that he meant Antonio is typically a good credit risk. Shylock is, however, concerned about Antonio’s investments, which are vulnerable to mutiny, rats, thieves, and the forces of nature. For this reason, he insists that Antonio must be fetched in order to negotiate a bond. Bassanio offers Shylock an invitation to dine with them, yet Shylock refuses, stating “... I will not eat with you, drink with you, nor pray with you,” emphasizing his Jewish faith, which prevents him from eating pork with the Christian men, and setting him apart both from the characters in the play and from the Early Modern Christian audience. (Shakespeare 1.3.27-28).

When Antonio comes into the scene, Shylock has an aside where he discusses his feelings towards Antonio and Christians in general. Looking at Antonio, he bitterly says “I hate him for he is a Christian” (Shakespeare 1.3.32). Shylock’s hatred for Antonio is more complicated than that, however. According to Shylock, Antonio and the other Christian merchants of Venice rail against he and the other Jews of the city. Additionally, Antonio lends money to people without charging interest, which would be undermining his money-lending business that charges interest. This introduces the idea of Shylock as a sympathetic character, even to an anti-Semitic audience.

Shylock then continues to negotiate the deal with Antonio, using the story Jacob from Genesis 30:25-43 in order to justify charging interest. Antonio, however, responds by arguing that “The devil can cite Scripture for his purpose” (Shakespeare 1.3.89). Although this first serves to say that even a Jew like Shylock can take a passage from the Bible and use it to disguise bad intentions, I find that it also foreshadows the ultimate legal issue that plays out in the later acts. Law can be used as a tool by the devil to

achieve his aims, so it is important that law is in the hands of a good judge who can find an equitable solution to issues.

After the argument continues, Shylock agrees to give Antonio the loan interest free. He does, however, say that as a “merry sport” they should add in a special clause to the bet (Shakespeare 1.3.137). The bond is legal, as Shylock insists that they have it sealed in front of a notary. Antonio accepts the deal, confident that he will have three times what he needs within the allotted time period of three months. Antonio finds the entire exchange so amiable that he says “The Hebrew will turn Christian; he grows kind” (Shakespeare 1.3.170). Bassanio is still suspicious, however, warning his friend by saying “I like not fair terms and a villain’s mind” (Shakespeare 1.3.171). This hesitation mirrors the sentiment in the “The devil can cite Scripture for his purpose” passage, as it asserts that villainous people can manipulate good laws for their evil purpose. This additionally foreshadows the way Portia will in the later acts manipulate the law for her advantage, but as a good person rather than evil.

The legal issue comes to the forefront of the play when Antonio’s ships wreck, destroying his investments and allowing Shylock to claim his debt. Despite many sources pleading with Shylock to let the debt go, Shylock refuses to have mercy. Shylock sees the payment of the debt as the just thing to do, saying “The Duke shall grant me justice” (Shakespeare 3.3.9). When Antonio asks Shylock if he will hear him speak, he responds “I’ll not be made a soft and dull-eyed fool, / To shake the head, relent, and sigh, and yield / To Christian intercessors” (Shakespeare 3.3.14-16). Shylock therefore seems to be refusing to hear any kind of argument that Antonio’s case is a special case, instead finding that the letter of the law must be followed, regardless of extenuating

circumstances. An intercessor, or a mediator who negotiates between parties, will not be able to present any evidence that would sway Shylock's view of how the case should be interpreted. By using the qualifier of "Christian," he paints mercy as a Christian quality that is foolish to pursue.

Shylock's stubbornness seems unreasonable, yet is explained in an earlier soliloquy from Act 3 Scene 1 when he debates what course of action to take. Shylock questions the fact that Christians are valued above Jews in society and is challenging the idea that there are really essential differences between Jews and Christians, famously asking "If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us shall we not revenge?" (Shakespeare 3.1.47-49). Shylock argues that when a Jew wrongs a Christian, that the Christian takes revenge, and that he has only been taught by Christians what to do when the positions are reversed. Shylock then is questioning the idea that mercy is truly a Christian quality, and is drawing attention to the idea that minority groups are wronged by the individuals in power, in this case the Christians..

When Shylock leaves after discussing his intentions about the bond with Antonio in jail, Antonio's friend Solanio tries to reassure Antonio, telling him that the Duke will surely not allow the bond to be upheld. Antonio, however, surprisingly insists that the Duke cannot "deny the course of law" (Shakespeare 3.3.26). He explains that if the Duke undermines the law by making an exception for Antonio, that the rule of the law and the state will be undermined. As the stability of the Venetian state is what keeps trade flourishing for Merchants like themselves, Antonio acknowledges that this is unfortunate yet necessary. Antonio sees no way for the rule of law to be upheld while sparing his life.

Later, at the trial, Shylock echoes this warning when speaking to the Duke about mercy. He warns, "If you deny it, let the danger light / Upon your charter and your city's freedom" (Shakespeare 4.1.38-39). Shylock therefore agrees that if the Duke shows mercy and does not follow the letter of the law, that this will undermine the laws of the city and will cause injury to the order the state and the rights of the people. The Duke reminds him that ultimate justice awaits him and that if he does not show mercy now here on earth that he will not receive mercy later at that judgment. Shylock, however, replies that he has done nothing wrong; therefore, he has nothing to fear. The Duke finds that whether or not positive law brings justice, that the natural law of God will punish those who sin. The Duke and Shylock disagree, however, that a sin has been committed in this particular case.

Bassanio's betrothed, Portia, devises a plan to use the power of the letter of the law in order to reach an equitable solution to the legal issue. Portia arrives at court, dressed as a "doctor of laws". Portia begins by stating that Shylock's case is of a "strange nature" yet Venetian law cannot stop him from proceeding (Shakespeare 4.1.172). Portia then explains why Shylock must show mercy in this case. She says that mercy is higher than the law of kings and is instead "an attribute of God himself" (Shakespeare 4.1.190). She continues by arguing that kingly power is the most like God's power when the king tempers justice with mercy. She concludes by stating that he should give up his case, yet if he pursues it that the strict court of Venice would carry out the sentence. To this, Shylock responds "My deeds upon my head! I crave the law, / the penalty and forfeit of my bond" (Shakespeare 4.1.201-202). Shylock has therefore been warned that the responsibility for showing mercy was in his hands, and that the court will be sticking

strictly to the letter of the law. Shylock accepts this and insists that he wants the law to be carried out in this way.

When Portia asks if they are able to supply the money for the bond, Bassanio offers to repay the sum ten times over and begs Portia to circumvent the law. He says,

If this will not suffice, it must appear

That malice bears down truth. And I beseech you,

Wrest once the law to your authority.

To do a great right, do a little wrong,

And curb this cruel devil of his will. (Shakespeare 4.1.208-212)

Bassanio is therefore presenting the classic argument on the other side of the letter versus spirit of the law debate. He argues that following the law in this particularly case would cause malice to overwhelm righteousness. He begs that she, for once, forcibly subjects the law to her personal authority of interpretation, and argues that a little wrong would lead to a great right; therefore the end would justify the means.

Portia, however, again asserts the authority of the letter of the law, answering “It must not be. There is no power in Venice / Can alter a decree established” (Shakespeare 4.1.213-214). There is therefore no authority in Venice who can change the law that has been established in order to suit the needs of a particular case. Furthermore, she outlines the possible negative consequences of such a decision, saying “’Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state. It cannot be” (Shakespeare 4.1.215-217). Portia here is explaining the power of judicial activism. When a judge interprets the law in a way that differs radically from previous rulings, a new precedent is created. This new way of interpreting the law could lead to poor

decisions in the future, which is dangerous for the state of Venice. Shylock praises her resolve as a judge and when Portia reminds him one last time that he could receive his money rather than the bond, Shylock replies that he has made an oath in heaven and does not wish to perjure his soul by disobeying it.

Portia then delivers the verdict, telling Antonio to bear his chest and prepare it for a knife. She announces that a pound of Antonio's flesh now belongs to Shylock; the law allows it, and the court awards it. While Shylock is celebrating, however, she tells him that there is more to the ruling. Portia warns that in cutting away the pound of flesh, if one drop of Antonio's blood is shed, that Shylock's lands and goods would then be confiscated into the ownership of the state of Venice. When Shylock asks if this is actually the law, Portia responds, "Thyself shalt see the act; / For, as thou urgest justice, be assured / Thou shalt have justice, more than thou desir'st" (Shakespeare 4.1.309-311). Portia is therefore using the strict reading of the law, which Shylock argued for himself, to trap Shylock and provide a merciful end for Antonio. Portia explains that Venetian law states that if a foreigner tries to kill a citizen that the person he tried to kill will receive one half of the foreigner's goods, with the other half going to the state. As a Jew, Shylock would be a foreigner rather than a citizen of Venice. Portia additionally says that whether or not Shylock lives is up to the Duke. The Duke comes forward and says that he will return his actions and show him no mercy. He says that he must pay half of his goods to Antonio and half to the state.

When Shylock insists that he cannot give away all of his property, it is Antonio who shows a kind of mercy. Antonio says that Shylock must give the money in a trust to Shylock's daughter and son in law. He additionally requires Shylock to convert to

Christianity. Portia asks if Shylock consents to these terms, and he does. Shylock's differentness as a Jew is therefore destroyed, as he is forced to convert to Christianity. In order to show that the rule of law has continued to govern the strange proceedings, Portia asks a law clerk to draw up a deed of the gift to be signed by both parties.

Portia was therefore able to use a strict adherence to law in order to reach an equitable decision for the friend of her betrothed. When Shylock insisted that justice would be served to the letter of the law, Portia found a law that forced him to in fact punish himself. This was the best decision both for the safety of Antonio as well as the safety of the state. If Portia had simply ruled that Shylock was being cruel and forced him to drop the bond, she would have been undermining the laws of Venice and she would have been setting a poor precedent for the future, leading to corruption of the state. Portia instead found a solution that allowed for precedent to be maintained, yet kept her betrothed friend Antonio safe.

When Shylock stubbornly insists on a letter of the law reading, he is punished severely. If Shylock had simply shown mercy to Antonio he would not have been punished in this way. Thomas C. Biello points out that equity is found not only in the courtroom but also on a personal level in his essay "Law, Equity, and Portia's Con". He argues that just as a judge must be guided by equity when applying law, that individuals must treat each other equitably when making private transactions. Although we may sympathize with Shylock as the member of the powerless minority group that is being manipulated by Portia's biased ruling, Shylock is at fault in the way he has carried out his deal with Antonio. Biello explains that Shylock's repeated demands for the payment of his bond, and thus justice from the court, ignore the injustice that carrying out the bond



would represent on a personal level between himself and Antonio (Jordan 115). When Portia manipulates the letter of the law in order to achieve a spirit of the law ruling, she is justified on this individual level.

Shakespeare is therefore arguing for the equitable interpretation of laws based on the spirit of the law rather than the letter of the law. This was an important argument to be made in a time that a strict reading of the law could be excessive and unjust, and appeal would be difficult. He does, however, place an emphasis on the individual who applies this merciful reading of the law. Just as “The devil can cite Scripture for his purpose,” a corrupt judge can cite a particular law in a certain way in order to come to a corrupt ruling that he favors. Judges then must be good and fair, and must apply the law both responsibly and equitably. This is an important distinction to be made in a time when so many judges’ rulings had been corrupted by the monarchy as well as the party in control of Parliament.

Finally, the anti-Semitism addressed in the play draws attention to the fact that judges who belong to the group that is in power have the ability to continue harmful discrimination against that group. When Portia forces Shylock to convert to Christianity, she as a judge is forcing citizens to conform to her values. This sinister aspect of the conclusion of the play reminds the reader that while the spirit of the law interpretation can be equitable for some, it can discriminate against others. Shakespeare, however, uses this tension to bring attention to the responsibility of individuals to conduct themselves fairly with others. For Shakespeare, individuals have the personal responsibility to interact equitably in their transactions with others, which aligns more with natural law

than positive law. Whether or not it is supported by law, showing another man mercy is preferable to a stubborn insistence on the upholding of law.

## Chapter 6

### Melville

Although it was written about three hundred years after *The Merchant of Venice*, Melville's novel *Billy Budd* emerges from the same Western Common Law traditions that Shakespeare's play does. This novel picks up the debate between a judge's interpretation of the law based on the letter of the law v. the spirit of the law in significant ways. The vastly different direct contexts under which the novel was written, however, impacts how this debate was represented. In *Billy Budd*, the sympathetic protagonist does not meet an equitable end by the law as Shakespeare's Antonio does. It instead uses such a sympathetic case to emphasize the position that during times of war absolutely no exceptions can be made to the law.

First, one must consider the development of the legal system in the United States in order to fully contextualize the attitudes towards law at the time that Melville was writing. The United States, like other territories of the British Empire, developed a legal system derived from the English Common Law system. The United States did incorporate some elements of law from other sources such as Civil Law as the country was influenced by other nations, for instance through the influence of France in Louisiana.

American law has four major types of sources: the Constitution, Legislative Statutes, Executive Agency Rules and Decisions, and Judicial Cases (Walsh 61). A constitution is the primary source of law as it literally constitutes a government. The

United States Constitution trumps all other legal sources beneath it, as legislation is enacted by the Legislature under the authority that the Constitution grants it. Acts of legislature make laws, yet the Constitution still has overriding power as the Supreme Court has the power to declare laws unconstitutional. Administrative regulations are another form of legislation, which can be enforced by courts just as a statute would be. Administrative regulations are typically issued by agencies of the executive branch, which derive their authority from the power of the executive branch as granted by the Constitution, or independent agencies that are created by the power of the legislature granted by the Constitution (Walsh 61).

The fourth source of American law is judicial cases, as under the common law system every final decision by a court serves as legal precedent. The courts in the United States are guided by the legal principle known as *stare decisis*, meaning “let the decision stand”. Under *stare decisis*, if there is a decision that has been made on a legal issue of a similar case, the court must be guided by that prior decision and must apply that same legal principle to the current case. This precedent governs decisions made by all lower or inferior courts. This means that if the Supreme Court of a state rules in a particular way, all lower courts of the state must follow this precedent. Courts in other states may use this precedent to guide their ruling, yet the precedent does not restrict them from ruling in another way. If the United States Supreme Court, however, rules in a particular way, all courts in all states must rule that way (Walsh 61).

While it seems that the Constitution and the additional three sources of law that stemmed from it would guide the clear creation and enforcement of American law to come, the century following its inception was a time of tumultuous development. The

American legal system was still growing and changing, and the Civil War was a time when laws of war needed to be established. This time period, while about forty years before Melville would begin to write *Billy Budd*, would be influential to his work, particularly to its strong legal themes.

During the antebellum era, the Constitution was not viewed as the universal standard of human rights for the world as many Americans see it today. The United States Constitution, as well as the constitutions of the individual states, was domestic law that did not apply to military enemies and other noncitizens of the United States (Kent 1852). The Civil War thus presented an issue of Constitutional interpretation for the United States. The Confederate States of America declared themselves an independent foreign nation, yet the United States did not recognize their secession. The United States government therefore needed to decide whether or not members of the CSA were protected by the Constitution, laws, and courts of the United States (Kent 1853).

Generally, if an alien of the United States was peaceably spending time in the country during peacetime, he or she would be deemed to owe a “temporary allegiance” to the government and therefore was under the protection of the United State Constitution and laws (Kent 1856). If that alien’s home country went to war with the United States, however, they would be considered an “enemy alien” and would be out of the protection of the laws while in the country, including a writ of habeas corpus (Kent 1858). At the same time, being outside of the protection of law also meant that these illegal aliens would be outside of the accountability of certain laws. For example, they could not be criminally prosecuted under the laws of the United States for conduct during a wartime visit (Kent 1859).

Under the principles of the Common Law governing the United States during this time, American citizens were still under the protection of the United States laws and Constitution, even when forming allegiances with enemies or directly levying war against the United States, such as becoming a part of the CSA. Traditionally these individuals would instead be tried for treason or other crimes, yet when prosecuted would still be entitled to the protection of the American legal system rather than being subject to military detention or trial (Kent 1859).

The Civil War, and issues of secession, called these traditional principles into question. Abraham Lincoln was elected president in November of 1860, yet would not succeed James Buchanan until March. Meanwhile, South Carolina and Georgia had begun to take real steps in order to secede from the Union, raising money and military forces. Buchanan's Attorney General Jeremiah Black delivered an address on the succession that both declared the action unconstitutional and limited the amount of military force that could be used by the federal government. Buchanan concluded that if the federal courts of the seceded states closed, that there would be no criminal processes to be aided by the use of troops, and therefore any military action on the part of the United States government would be illegal and would be "simply making war" on the seceded states and their people. Under this kind of absurd reasoning the United States government would need to concede defeat to the seceding states as soon as federal courts and offices shut down (Kent 1862).

By December of 1860, while Buchanan did essentially nothing, federal judges and other government officials began to resign from offices in Georgia and called for a convention to be held in order to form the Confederacy. Next, by the beginning of

February, Florida, South Carolina Mississippi, Alabama, Louisiana, and Texas had all seceded from the United States, had raised independent militias, and had seized federal property. That same month, the states created the Confederate States of America, instituting a Congress of the CSA and electing Jefferson Davis as their provisional president (Kent 1862). Lincoln was inaugurated on March 4<sup>th</sup>, and about a month later the Confederacy attacked a South Carolina outpost called Fort Sumter, becoming the first battle of the Civil War (Kent 1863).

President Lincoln found the actions of the seceding states unconstitutional, and disagreed with Jeremiah Black's position that the United States government could not legally use force to restore the Union. In a proclamation released on April 15<sup>th</sup>, he announced that the United States military would enforce the laws of the United States, that the rule of law must be restored, and that all "peaceful citizens in any part of the country" should be protected (Kent 1863). The policies that Lincoln would develop over the course of the civil war, however, would treat the American citizens in varying ways under the law. Some of Lincoln's war policies treated members of the CSA as enemies due to their residency, yet other policies used war powers exclusively against culpable individuals (Kent 1865).

While the aim of the President and his Congress was to bring the country back to the status quo and to protect all citizens, both members of the United States and members of the CSA, the President did take actions that treated citizens as military enemies, even those who lived in Northern states. In a case in April of 1861, Lincoln suspended the writ of habeas corpus in Maryland when groups of men were attacking federal soldiers and property in an attempt to separate Washington D.C. from the North. While some of the

arrested men had been in unorganized mobs and others were in organized groups, they were all treated as being a part of an enemy military action (Kent 1866). This controversial limitation of the rights of the people did not stop in Maryland, as Lincoln authorized the suspension of habeas corpus in militarily important areas of other Union states such as Delaware, Pennsylvania, Massachusetts, Missouri, New Jersey, and New York in 1861 (Kent 1867).

Despite the difficulty that came with the task of determining what constitutional rights a CSA citizen would have during a time of war, the Supreme Court repeatedly confirmed that war was not a time that the Constitution and other laws of the United States did not apply. During the Civil War the Supreme Court required the executive branch to comply with certain congressional statutes numerous times, showing that the balance of powers as dictated by the Constitution was still in effect during war. For example, the Court frequently intervened when lower executive officials failed to comply with the international law of prize, which the President and Congress had directed the courts to apply to the legality of seizures at sea during this time (Kent 1922). The Court also voided congressional statutes that limited the constitutional power of the President to pardon. Lower court rulings on rebel property seizures were reversed if due process had been violated. These examples show that while the government needed to adapt to the unique legal situation of a civil war, that the balance of power between the three branches of government was maintained, and national unity and security was valued above all other interests (Kent 1923).

It is important to keep the situation of the Civil War in mind when considering the setting that Melville chose in writing *Billy Budd*. The novel takes place not in the year it



was written, but nearly one hundred years earlier, in the year 1797, on board a British Royal Navy ship. This was a time of military uncertainty for England, as they faced threats from within the military as well as abroad from the Revolutionary French Republic (“Research...” 1). There was much unrest amongst the members of the English Navy, with many soldiers serving involuntarily, receiving minimal wages, and working under poor working conditions (Solove 2445) . As a result, the Navy had recently experienced two major mutinies known as the Spithead and Nore mutinies of 1797 (“Research...” 1).

The first of the two mutinies occurred in April when sixteen ships-of-the-line of the Channel fleet mounted a mutiny at Spithead, an anchorage near Portsmouth. The men were seeking improved pay, better conditions, the removal of certain unpopular officers, and better treatment in general. Despite a few brief skirmishes during negotiations, the demands of the crews were met within a few weeks and the crew members received a Royal Pardon for their actions (“Research...” 1).

The mutiny at Nore in May of 1797, however, went beyond the accepted demands at Spithead. These crews were seeking more shore leave, fairer distribution of prize money, and changes to the Articles of War. The mutiny additionally became much more serious than Spithead when the crews moved to blockade the Thames, an essential part of trade in London. The Admiralty, feeling that the government had been generous with the Spithead mutiny and that these mutineers were taking actions a step too far, did not wish to acquiesce to further demands. The term Admiralty refers to the group of three men with the titles Admiral, Vice-Admiral, and Rear-Admiral (“Nautical...” 2). The government demanded the suppression of the mutiny, and the Prime Minister at the time

introduced a bill to outlaw the mutineers. Eventually, the mutineers were sufficiently weakened and disbanded, leading to their severe punishment by the state. The leader of the group and a number of the other influential mutineers were court-martialed and hanged from the yardarm of a Royal Navy ship, while many other participants were imprisoned or flogged (“Research...” 1).

The British Government therefore had to stifle violence and unrest from within while fighting the Napoleonic wars, which they had been engaged with France in since 1793 (Solove 2445). In describing the atmosphere during the time of the setting of *Billy Budd* in the novel’s preface, Melville writes of the two mutinies, saying “It was indeed a demonstration more menacing to England than the contemporary manifestoes and conquering and proselyting armies of the French Directory” (Melville 11). Melville then found the threat from within more debilitating to England’s Navy than the outside threat of the French. In describing the tension aboard ships that followed the two mutinies, he wrote,

At sea precautionary vigilance was strained against relapse. At short notice an engagement might come on. When it did, the lieutenants assigned to batteries felt it incumbent on them, in some instances, to stand with drawn swords behind the men working the guns. (Melville 15)

This was an atmosphere of discontented soldiers and jumpy officers, waiting for a reason to act in order to prevent rebellion. We again see the tension of a class of people who have more control ruling as judges over those who have less control, and this imbalance of power had the potential for abuse. The condemnation of this abuse, however, is limited

by the necessity of preventing rebellion both directly dangerous to that ship and indirectly dangerous to the war as a whole.

Melville therefore chose to use the setting of a country that needed to make decisive rulings on law during a time of dynamic war. Melville is guided both by his experience coming out of the Civil War as well as the situation of the story in this particular time period. The use of a setting different from the current time and place yet analogous in its situation meant that Melville could explore the issue of the time fully in a hypothetical way. The final chapters of the novel, while are certainly ambiguous and have led scholars to various conclusions, particularly as the novel was published posthumously, have a clear message for the interpretation of law based upon the letter of the law v. the spirit of the law. I found that Melville argues in *Billy Budd* that law must be strictly upheld during times of war, despite a possible appeal for mercy.

Billy Budd is a sailor who is called into service on a ship of the British Royal Navy at the start of the novel. Budd is a man of unknown origin, a suspicious and worrisome quality during this time, yet most of the crew takes to his good looks and naturally charming personality. Budd works hard at his tasks aboard the ship, yet he always seems to be doing something wrong in the eyes of Master-at-Arms John Claggart. The Master-at-Arms during this time was the chief petty officer aboard a man-of-war who would attend to the police duties of the ship (“Nautical...” 6). According to Melville, Claggart was charged with the duty of “... preserving order on the populous lower gun-decks,” the area that Budd works in on the ship (Melville 18). Claggart is another man on the ship whose past is mysteriously unknown. There was a rumor that he

had volunteered into the King's Navy in order to repay a swindle of which he had been arraigned at the King's Bench, yet this went unconfirmed.

Although Budd is warned that Claggart seems to be biased against him by other members of the crew, Budd does not understand why Claggart would dislike him and therefore dismisses the warning signs. At one meal Billy accidentally spills his soup in the dining room, and it streams across the path of Claggart. Claggart at first has very little reaction, yet when he notices that it was Budd who had spilled the soup, "his countenance changed" (Melville 24). At first Claggart grimaces, yet he twists the expression into a smile and says "Handsomely done my lad! And handsome is as handsome did it too" after walking away from the scene (Melville 24). This is clearly a sign that Claggart resents Budd's good looks and charismatic charm, and has some kind of grudge against him. Budd, however, in his goodness and innocence, does not notice the involuntary smile and instead interprets the scene as a gesture of good faith between the Master-at-Arms and himself.

One night, Claggart goes to the Captain of the ship, Vere, with an accusation that there is a man who is attempting to lead a mutiny on the ship. Vere is described as a tough yet just man. When he is first introduced in the novel, Melville writes,

He had seen much service, been in various engagements, always acquitting himself as an officer mindful of the welfare of his men, but never tolerating an infraction of discipline; thoroughly versed in the science of his profession, and intrepid to the verge of temerity, though never injudiciously so. (Melville 15).

When Budd is accused, the reader therefore already understands that Vere is a man who is just yet as a Captain he does not tolerate any inappropriate action aboard his ship. Vere

asks Claggart who the villain is, and Claggart tells him it is William Budd. Vere is visibly astonished, and responds "...and mean you... the young fellow who seems to be so popular with the men – Billy, the Handsome Sailor, as them call him?" (Melville 39). Claggart agrees that he is handsome and seems to be good, yet claims that he is masking his ill intentions under this outward charm.

Vere is at first angry with and suspicious of Claggart, demanding evidence of his claim. This shows that Vere is the kind of judge who does not make decisions based on a whim yet instead wishes to gather evidence. Claggart goes into a series of words and acts to incriminate Budd, claiming that he has substantiating proof for what he has mentioned. Vere decides that a grand inquiry to discover if Claggart was telling the truth would raise too much commotion on the ship, and the order and stability of the men on the ship is Vere's first priority. He instead decides to observe how Claggart as an accuser and Budd as the accused interact.

Vere summons Budd to his cabin, and when Claggart repeats the accusation Budd is rendered speechless, unable to understand why he has been so falsely accused. Vere commands Budd to explain himself, yet Budd is still unable to respond due to a stuttering problem he suffers from when he experiences intense emotional situations. Budd instead suddenly reaches out and strikes Claggart in the forehead, knocking him to the ground. Vere dismisses Budd from the cabin and fetches the surgeon to examine the body. The surgeon pronounces Claggart dead, and Vere exclaims "Struck dead by an angel of God! Yet the angel must hang!" (Meville 44). Vere therefore is in anguish about the fate of Budd yet has already seemed to have made up his mind that for this crime Budd must hang, no matter what mitigating circumstances may have been in effect.

Next, Vere immediately calls a drumhead court comprised of the first lieutenant, the sailing master, the captain of the marines, and himself as the main witness. The term “drumhead court” refers to a court martial held while the ship is still at sea. The court would include only the senior naval officers and would be presided over by the ranking officer on the ship. This type of court had the full power to convict and sentence individuals while at sea (“Nautical...” 11). Vere instructs the men to keep the matter quiet, again wishing to maintain the order of the ship, which is his priority as Captain. He also acts with a sense of urgency in order to prevent mutiny, as Melville narrates in the following passage:

Feeling that unless quick action was taken on it, the deed of the foretopman, so as it should be known on the gun decks would tend to awaken any slumbering embers of the Nore among the crew, a sense of the urgency of the case overruled in Captain Vere every other consideration. (Melville 46)

Melville also comments, however, that Vere is no lover of authority for authority’s sake. Vere is not a senseless dictator of a Captain, yet he does value order in the wake of the mutinies at Spithead and Nore.

The court convenes, and Budd is brought in front of the group. Vere, as the sole witness, explains what happened to cause Claggart’s death. After Vere speaks, the First Lieutenant asks Budd if what he has said is the truth. Budd responds, “Captain Vere tells the truth. It is just as Captain Vere says, but it is not as the Master-at-Arms said. I have eaten the King’s bread and I am true to the King” (Melville 47). Budd admits that he did indeed strike Claggart, which caused his death, but he denies any intention of killing him. In American law, criminal intent refers to the mental purpose or desire to commit an act

(Walsh 117). Criminal intent must be proven in a case in order to prove criminal liability. During this time, during wartime, and on a ship, however, the Articles of War made striking an officer a capital offense (Solove 2446). When the court questions Claggart's accusations against Budd, Vere reminds them that whether or not they were lies does not matter in this case. He tells the group, "The prisoner's deed, - with that alone we have to do" (Melville 49).

After Budd explains his side of the case, Captain Vere says "I believe you, my man" (Melville 47). Yet, during the deliberation of the court, Captain Vere speaks against an equitable verdict for Budd. Vere first admits that it is an exceptional case, and that it would be one that moralists would study. He goes on, however, to say, "But for us here acting not as casuists or moralists, it is a case practical, and under martial law practically to be death with," telling the men not to make an exception for this case but instead to apply the practical law to the case.

He also admits that convicting such a good man, who only struck Claggart out of fear and confusion, would be against "Nature" (Melville 50). He is therefore saying that under principles of natural law, which is universal law derived from a higher power and the truth, that killing Budd would be wrong. Richard Posner argues that the jurors' misgivings at the hearing are based on how attractive and good they find Budd, rather than on issues of legality (Posner 214). These men are not trained in maritime law during war, but are instead making judgments about the case based upon their perception of Budd and Claggart's character. Natural law would guide these men to see Budd as sympathetic, particularly as a part of the Christian tradition, with Christ as the model for forgiveness. Posner sees that Vere is then put in a unique position, as the only witness to

the crime but also the man who must guide the jury into its outcome. Posner writes, “Isolated by his intelligence, role, and perspective, Vere has no one with whom he might take counsel or share responsibility for dealing with the consequences of Billy’s crime” (Posner 215). Vere is therefore left alone to guide the jury to their decision, as the superior officer and the man who is trained in the law.

In meeting this responsibility, after acknowledging the difficulty of their emotional choice, he goes on to say that this court does not uphold the laws of nature, but instead they follow the laws of the King. He uses the comparison of the men as officers of war who follow orders. If the men agree that the orders they have been given are the right actions, this is mere coincidence because they serve the King, not their consciences. Likewise, the men of this court serve the law, not their consciences. If the positive law made by the King and the English government aligns with their views then this is again mere coincidence. If it does not, this does not matter because as officers of the law they must uphold it, whether it conflicts with their views or not.

Vere warns the men that in making legal decisions, a judge must be rational rather than emotional. He reminds them that while their consciences may be telling them they should defend Budd, that their consciences should really have allegiance to the defense of England and the law. Vere strips the case down to the basic facts by saying “To steady us a bit, let us recur to the facts. – In war-time at sea a man-of-war’s-man strikes his superior in grade, and the blow kill” (Melville 51). The men begin to protest, saying that Budd did not intend either mutiny or homicide, and Vere agrees that in a “court less arbitrary and more merciful than a martial one, that plea would largely extenuate”



(Melville 51). Vere, however, continues to insist that the men should follow the strict letter of the law rather than the spirit of the law.

Vere then continues by warning of the consequences of a merciful ruling in this case. He insists that in a time of war, they must keep up the appearance of rule of law, as “War looks but to the frontage, the appearance” (Melville 51). He warns the men that they must set an example to other men of the English Navy that mutiny will be severely punished in order to maintain control and order of Navy ships. He tells them that if they acquit Budd that the news will spread throughout the British Navy. The men will “ruminate” over the issue, and they will come to believe that the officers are scared of the men and will not fight them when making future demands. Vere tells them that this single argues that ruling could send the Royal Navy into a series of dangerous mutinies and rebellions. Vere also warns that in a time of war, showing leniency and a lack of control over soldiers would leave the Royal Navy vulnerable to outside attack.

Arguing that the men must adhere to the letter of the law rather than making an exception for Budd, he guides their deliberation process. The court convicts Budd, sentencing him to be hanged. Typically in a drumhead court the sentence is carried out immediately, without any time for reconsideration or appeal. This trial, however, occurred in the middle of the night; therefore Budd was to be hanged in the morning. Budd’s last words are “God bless Captain Vere” (Melville 59). In later chapters, when Vere suffers a mortal wound during battle, his last words are “Billy Budd, Billy Budd,” yet Melville writes that “these were not the accents of remorse” (Melville 64).

I find therefore that Melville’s representation of Vere and the way he handles the Budd case shows that Melville is in support of an adherence to the letter of the law,

particularly during times of war. Melville writes that Vere is a man who follows the rules, is loyal to his position, and fairly punishes those under his command who break the rules. Melville tempers this description, however, by saying that his actions are just and that he does not love authority for authority's sake. When Vere presents the Budd case, he again follows the law. The section of the Articles of War that deals with mutiny specifically defines it as a capital offense, without any exceptions or defenses listed. Despite the fact that Budd insisted he did not intend to kill Claggart, he still committed the offense. The court therefore had to convict him, particularly due to the potential national consequences due to the crime as a wartime offense. By showing that Vere cared deeply about the case and was effected by Budd up until his dying moments, Melville paints Vere as a good man who is sympathetic, yet loyal to the law.

Posner argues that this perspective was not just invoking the letter of the law for the sake of upholding the law, but that he was more importantly arguing policy. This is the policy of utilitarianism, which treats society as a single organism whose welfare is to be maximized (Posner 219). If killing one individual is for the greater good of that society, then that is the natural course of action, similar to removing a cancerous organ from a body. This is in fact where the author of a literary work, in this case Melville, is able to prescribe a particular legal perspective; that of adherence to the law during war time in order to protect national security.

Melville's own father-in-law, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, needed to navigate the muddied waters of the American legal world during the antebellum period. Despite being a strong opponent to slavery both publically and privately, Shaw supported a strict application of the Fugitive Slave Act. Legal

scholar Robert Cover suggests that *Billy Budd* serves as an allegory for the condemnation of fugitive slaves during this time, and that Captain Vere stands in for Shaw. While Vere feels personally that Billy Budd should be spared, he must uphold the rule of the law, particularly in a time of war. Part of the Fugitive Slave Act prevented slaves from speaking during court appearances, mirroring the way Billy Budd is unable to speak. According to Cover, when applying the Fugitive Slave Act, the courts “paraded its helplessness before the law; lamented harsh results; intimated that in a more perfect world, or at the end of days, a better law would emerge, but almost uniformly, marched to the music, steeled themselves, and hung Billy Budd” (Solove 2448). Posner disagrees with Cover’s comparison, arguing that the law enforced by Vere was harsh but in no way as cruel as the judges who enforced the Fugitive Slave Act. For Posner, Vere’s situation was desperate, and he made the best decision possible in those circumstances (Posner 220). Regardless of the extent of this comparison, the text is clearly advocating the policy of the upholding of laws during wartime.

The novel *Billy Budd* is therefore a champion for a strict adherence to the letter of the law rather than an interpretation that favors the spirit of the law. It may seem that the power relationship between an officer and his subordinate would lead to corruption in the courtroom, yet military procedure must be upheld at all times for standardization and consistency. For Melville, mercy is a quality that has no place in the court room, particularly during a time of war when so much is at stake after a verdict is delivered. A position like this has far reaching consequences into the complexity of positions on law during wartime, particularly when debating judicial interpretations that rule on the basis of the spirit of the law or the letter of the law.

## Chapter 7

### Conclusion

Judicial interpretation, whether it uses the spirit of the law or the letter of the law for its basis, has been a controversial topic for centuries. The Code of Hammurabi advocated a strict reading of the law with few defenses or excuses made for special cases. The Twelve Tables similarly had a prescribed system of justice that was meant to be carried out in a standardized way in order to avoid corruption by the Patricians. The Christian Bible's Old and New Testaments have differing policies on law. The Old Testament advocates "an eye for an eye" justice, with a strict adherence to the letter of the law passed down by God. The New Testament, however, advocates mercy and equitable rulings in cases, with Christ as a forgiving judge who makes exceptions. The ultimate punishment for the Bible is not the state yet is instead judgment from God after death.

The play *The Merchant of Venice* picks up on this debate during the Early Modern Period when the legal system was corrupt in several different ways. Both the monarchy and the party in power of Parliament put pressure on judges to rule in certain ways, regardless of existing case law on the subject. A confusing and multi-tiered court system meant that lawyers themselves could take advantage of the people during this time. Shakespeare was therefore writing in a time where the character of the judge was important, and equitable decisions that would offset a corrupt ruler where appeal was difficult was favorable. Shakespeare's judge, Portia in disguise, preaches equity and mercy to the Jew Shylock, yet Shylock insists that the law is applied to the letter. When

Portia reveals that the strict letter of the law would in fact destroy Shylock's assets, he is cornered and must pay Antonio and his daughter. This play therefore instructs that it is better to show an enemy mercy than to stubbornly hold them to a punishment. The play also advocates equitable rulings by good judges, yet warns that a corrupt judge can use any law to achieve his aims. Similarly, the play also touches upon a central issue of the letter of the law v. the spirit of the law debate: that judges who are members of the ruling class can abuse their power over the lower classes. Portia, as a Christian, is able to assert her power over Shylock, delivering a biased ruling in Antonio's favor and forcing Shylock to convert to Christianity. While the play justifies this decision by condemning Shylock's stubborn merciless insistence on following the letter of the law, the conclusion does have sinister implications for the future, as judges have always needed to attempt to set aside their own interests when ruling in cases in order to achieve objectivity and justice.

Melville's *Billy Budd*, however, comes out of a time when law was changing and war between citizens of the United States was throwing the interpretation of law into question. Vere as a judge follows the letter of the law, and although Budd is an extremely sympathetic character, Vere must rule this way in order to protect the safety of the country during this time of war, both from internal and external attack.

While there is support for both sides of this debate across all eras in history, the way that the debate was represented in both Shakespeare's time as well as Melville's time was, therefore, heavily determined by their direct context of public attitudes on law, as well as what the legal system was like while they were writing. Their famous parts in this debate helped it to continue to be one of the most important binaries in law.

This theme has interesting applications when looking into the future. For example, when using Melville's perspective, war has impacted the interpretation and creation of law throughout American history. The rights of Americans have been curtailed during each major war that America has been involved in. During World War I, citizens of the United States who resisted the draft were persecuted. During World War II, Japanese-Americans were driven into internment camps against their will due to Anti-Japanese sentiment. During the Cold War, Americans who professed communist beliefs were hunted down, harassed, and prosecuted. In more recent history, during the War on Terror, the Bush Administration made several curtailments to American rights, including the Patriot Act, which reduced the restrictions on the government in collecting intelligence within the United States and broadened the ability of immigration authorities to detain and deport individuals suspected of terrorism-related activity. The Obama Administration's 2011 National Defense Authorization Act allows for the power to indefinitely detain United States citizens without trial. These situations provide an interesting possible future course of inquiry into how law is adapted during times of war, and how judges carry out particularly strict readings of laws during war in order to provide stability.

Another possible future course of study would be the formation of Supreme Court opinions throughout history, particularly during the modern era. Some theorists find that the Constitution should be interpreted as a living document that must change in order to suit the needs of a changing nation. These theorists argue that the founding fathers could never have anticipated the changes in technology that enable governments and individuals to oppress others. They instead advocate for a reading that attempts to

determine the spirit of the text and to make a ruling that is in line with that spirit. The other side of the debate is often known as Originalist. These theorists search for the precise intention of the framers of the Constitution when making rulings. This position finds that the other way of interpreting the Constitution allows for far too much judicial activism and input from the Supreme Court Justice in making their ruling. Justices instead must view the Constitution as a binding contract, and must neutrally and objectively rule in line with the text.

This is therefore essentially an extension spirit of the law v. letter debate, and it is an issue that has divided the Supreme Court since its inception. Judicial interpretation of law becomes particularly controversial when determining whether or not to follow the guiding Common Law principle of *stare decisis*, or making rulings that are consistent with previous rulings of similar cases. Breaking from precedent shows that this Judge is disagreeing with the way that the previous justice has interpreted the law, and necessarily means that they fall on a different area of the spirit of the law v. letter of the law debate. When the Senate Judiciary Committee holds a hearing to question a Supreme Court Justice nominee, there is always extensive questioning on the principle of *stare decisis* and how that nominee intends to interpret the Constitution. This issue, if further explored, could reveal possible cultural traces of this particular area of the debate through the history of literature.

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# ACADEMIC VITA

Laura Beltz

200 Goldenrod Court, Perkasie PA 18944 / labeltz@gmail.com

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## Education

- Pennsylvania State University (*Anticipated Graduation: Spring 2013*)
  - Enrolled in the colleges of the Liberal Arts and the Schreyer Honors College
  - Major: English, Minor: Communication Arts and Sciences
  - Undergraduate Honors Thesis: "The Letter of the Law v. The Spirit of the Law: a study of the binary's representation in literature"

## Honors and Awards

- Academic Excellence Scholarship (*Fall 2009 – Spring 2013*)
- Penn State Dean's List (*2009-2012*)
- Outstanding Mock Trial Witness Award (*2009-2012*)
- The Phillips Scholarship in the Liberal Arts (*Spring 2012*)
- The President Sparks Award (*Spring 2010*)
- The President's Freshman Award (*Spring 2010*)

## Association Memberships/Activities

- Pearl S. Buck International, *Perkasie, Pennsylvania (2012-Present, 4 hours/week)*
- Penn State Mock Trial Association, *University Park, Pennsylvania (2009-Present, 10 hours/week)*

## Professional Experience

- Penn State Center for the Performing Arts, *University Park, Pennsylvania (2010-Present, 10-14 hours/week)*
- Working the position of Floor Manager: settling disputes among patrons, resolving the complaints and issues raised by patrons, and supervising a group of volunteers by delegating tasks.
- Editing Internship, *University Park, Pennsylvania (Fall of 2010, 4 hours/week)*
- Private cello instruction, *Perkasie, Pennsylvania (2007-Present, 6 hours/week)*

## Research Interests

I am interested in the intersection of law and literature, and how the study of literature can improve the personal practice of law.