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FROM SHYLOCK TO BILLY BUDD: THE LITERARY “HEADLINE TRIAL”

MICHAEL A. KAHN*

“This is a court of law, young man, not a court of justice.”¹

“Litigation, *n.* A machine which you go into as a pig and come out of as a sausage.”²

The same dramatic qualities that create the so-called “headline trial”—that courtroom clash of vivid personalities, compelling facts, and moral dilemmas—have inspired playwrights and novelists for centuries. Indeed, while novice fans of legal thrillers might date the origins of that genre to 1991, the publication year for John Grisham’s novel *The Firm*,³ fictional lawyers and courtrooms have played a significant role in English literature since at least Geoffrey Chaucer’s fourteenth century masterpiece, *The Canterbury Tales*, whose cast of pilgrims includes the Man of Law.⁴

Sometimes the fictional version of the headline trial is just that: a work of fiction in which the trial captivates the fictional town where it’s set. Examples are the murder trials in Maycomb in Harper Lee’s *The Kill a Mockingbird* (1960)⁵ and Kindle County in Scott Turow’s *Presumed Innocent* (1987).⁶ Other times the fictional version is a dramatization of a real headline trial, such as the 2000 motion picture *Erin Brockovich*, based on the facts giving rise to

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1. Attributed to Supreme Court Justice Oliver Wendell Holmes Jr. See, e.g., LAWYER’S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION, IN BRIEF 152 (Bruce Nash & Allan Zullo eds., 1995).

2. AMBROSE BIERCE, THE UNABRIDGED DEVIL’S DICTIONARY 152 (David E. Schultz & S. T. Joshi eds., Univ. of Georgia Press paperback ed. 2002) (1911).

3. JOHN GRISHAM, THE FIRM (1991).

4. GEOFFREY CHAUCER, THE CANTERBURY TALES 16 (A. Kent Heatt & Constance Heatt eds. & trans., Bantam Classic 1981) (1386).

5. HARPER LEE, TO KILL A MOCKINGBIRD 5 (Harper Perennial Classic 2002) (1960).

6. SCOTT TUROW, PRESUMED INNOCENT 19 (12th prtng. 1987).

the mass tort class action against a California power company,⁷ or *Inherit the Wind*, the Broadway version of the Scopes Monkey Trial.⁸

And sometimes the fictional trials reach headline status through sheer popularity of the works themselves. For example, one former attorney named Erle Stanley Gardner left a cultural footprint that dwarfs the combined output of all other twentieth century authors of legal thrillers. Beginning in 1933 with the publication of *The Case of the Velvet Claws*, Gardner wrote more than eighty novels and short stories featuring the most famous fictional attorney in American history, Perry Mason.⁹ Mason became the lead character in, among other things, several motion pictures, a daily radio show in the pre-television era, more than twenty made-for-TV movies, and one of the most successful television series of all time, *Perry Mason*, which was aired on CBS-TV from 1957 to 1966.¹⁰

But the focus of this essay is another type of fictional headline trial, namely, significant works of literature that use the courtroom as their dramatic engine. These works have achieved headline status through sheer artistic force and cultural impact. Specifically, I explore the confrontation between law and justice in William Shakespeare's play *The Merchant of Venice*,¹¹ Charles Dickens' novel *Bleak House*,¹² and Herman Melville's novella *Billy Budd*.¹³ The first two works involve civil lawsuits—one on a promissory note, the other over a disputed estate.¹⁴ The third is a murder trial.¹⁵ While the venues and the legal issues could not be more different, the lesson in all three works is a similarly grim one: A courtroom is no place to seek justice, redemption, or any satisfactory closure. In all three works, we watch from the courtroom gallery as the legal system grinds out injustice in the name of the law.

7. ERIN BROCKOVICH (Universal Studios 2000) (based on 1996 class action tort suit against Pacific Gas & Electric).

8. JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (1955) (based on the 1925 prosecution of John Scopes).

9. ALLEN J. HUBIN, *CRIME FICTION 1749–1980: A COMPREHENSIVE BIBLIOGRAPHY* 158 (1984).

10. DOROTHY B. HUGHES, *ERLE STANLEY GARDNER: THE CASE OF THE REAL PERRY MASON* 228–33, 242–51 (1978).

11. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (M.M. Mahood ed., New Cambridge Shakespeare Ser., updated ed. 2003) (1598).

12. CHARLES DICKENS, *BLEAK HOUSE* (Nicola Bradbury ed., Penguin Classics 1996) (1853).

13. HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Simon & Schuster Paperback Ser. 2009) (1924).

14. SHAKESPEARE, *supra* note 11, act 1, sc. 3; DICKENS, *supra* note 12, at 15.

15. MELVILLE, *supra* note 13, at 89–94.

I. THE MERCHANT OF VENICE¹⁶

Newcomers to *The Merchant of Venice* may be surprised that the play is listed under Shakespeare's comedies. Just as surprising is that the Jewish moneylender Shylock—today portrayed as a tragic victim of anti-Semitism—was to Shakespeare's audiences a comic villain, an Elizabethan version of Captain Hook or Dr. Evil.¹⁷ Shylock has not been played as such for more than two centuries.¹⁸

The trial in Act IV has long been recognized as one of the most dramatic scenes in all of Shakespeare. Indeed, nearly 200 years ago, the great Shakespearean critic William Hazlitt wrote:

The whole of the trial-scene, both before and after the entrance of Portia, is a master[.]piece of dramatic skill. The legal acuteness, the passionate declamations, the sound maxims of jurisprudence, the wit and irony interspersed in it, the fluctuations of hope and fear in the different persons, and the completeness and suddenness of the catastrophe, cannot be surpassed.¹⁹

It takes place in the Court of the Duke of Venice, where Shylock comes seeking to enforce a promissory note signed by Antonio, the merchant of the play's title.²⁰ The note contains the infamous bond provision: If Antonio defaults, Shylock is entitled to the security pledged, namely, a pound of Antonio's flesh.²¹ While that bond may seem absurdly grotesque outside the context of the play, by the time Shylock arrives in court he is by far the most complex and compelling character in the play, and the enforcement he demands makes sense within the play's version of Venice.

We, the audience, witness the formation of that loan agreement in Act I.²² Antonio needs 3,000 ducats to cover his financial obligations pending the return of his merchant ships to Venice.²³ The arrogant merchant approaches Shylock, who angrily reminds Antonio of how he had treated him in the past:

Well then, it now appears you need my help.
Go to, then, you come to me, and you say,
"Shylock, we would have monies"—you say so,
You that did void your rheum upon my beard,

16. SHAKESPEARE, *supra* note 11.

17. J.M. BARRIE, *PETER PAN* 47 (Viking Penguin 1991) (1911) (Captain Hook is the villain in the Peter Pan play, musical, book, and movies, the original of which is the J.M. Barrie play); AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY (New Line Productions 1997) (Dr. Evil is, of course, the villain in the Austin Powers film series).

18. HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN* 172 (1998).

19. WILLIAM HAZLITT, *CHARACTERS OF SHAKESPEAR'S PLAYS* 321 (Everyman's Library 1969) (1817).

20. SHAKESPEARE, *supra* note 11, act 1, sc. 3, ll. 136–44.

21. *Id.*

22. *Id.* act 1.

23. *Id.* act 1, sc. 3, ll. 8–9.

And foot me as you spurn a stranger cur
 Over your threshold: monies is your suit.
 What should I say to you? Should I not say
 "Hath a dog money? Is it possible
 A cur can lend three thousand ducats?" Or
 Shall I bend low, and in a bondman's key,
 With bated breath and whisp'ring humbleness,
 Say this:
 "Fair sir, you spat on me on Wednesday last,
 You spurned me such a day, another time
 You called me dog: and for these courtesies
 I'll lend you thus much monies."²⁴

To which Antonio responds, "I am as like to call thee so again, [t]o spit on thee again, to spurn thee too."²⁵ Shylock offers the following terms:

Go with me to a notary, seal me there
 Your single bond, and, in a merry sport,
 If you repay me not on such a day,
 In such a place, such sum or sums as are
 Expressed in the condition, let the forfeit
 Be nominated for an equal pound
 Of your fair flesh, to be cut off and taken
 In what part of your body pleaseth me.²⁶

Despite his friend Bassanio's objections, Antonio tells Shylock: "I'll seal to such a bond."²⁷

Later, when it appears that Antonio may default, one of his friends asks Shylock why he would ever enforce such a bond.²⁸ What, he asks, is a pound of flesh good for?²⁹ Shylock's answer, one of the most famous passages in all of Shakespeare, lays the foundation for Shylock's later posture in the court case.³⁰ What is a pound of Antonio's flesh good for?:

To bait fish withal; if it will feed nothing else, it will feed my revenge. He hath disgraced me, and hindered me half a million, laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies—and what's his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the

24. *Id.* act 1, sc. 3, ll. 106–21.

25. SHAKESPEARE, *supra* note 11, act 1, sc. 3, ll. 122–23.

26. *Id.* act 1, sc. 3, ll. 137–44.

27. *Id.* act 1, sc. 3, l. 145.

28. *Id.* act 3, sc. 1, ll. 40–41.

29. *Id.*

30. SHAKESPEARE, *supra* note 11, act 3, sc.1, ll. 42–57.

same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? 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? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian, what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge! The villainy you teach me I will execute and it shall go hard but I will better the instruction.³¹

When Antonio does default on the loan, Shylock takes him to court demanding the bond.³²

Act IV opens in court with the Duke of Venice encouraging Shylock to give up his demand for the pound of flesh and, instead, accept the repayment of the 3,000 ducats—a request Shylock rejects.³³ Bassiano, Antonio's friend, then offers to pay Shylock 6,000 ducats—double the amount owed.³⁴ When Shylock rejects that offer as well, the Duke asks, "How shalt thou hope for mercy, rendering none?"³⁵ Shylock's response—a closing argument many trial attorneys, including this one, would envy—exposes the hypocrisy of the question by pointing to the foundation of the Venetian economy:

What judgment shall I dread, doing no wrong?
 You have among you many a purchased slave,
 Which, like your asses and your dogs and mules,
 You use in abject and in slavish parts
 Because you bought them. Shall I say to you,
 "Let them be free! Marry them to your heirs!
 Why sweat they under burdens? Let their beds
 Be made as soft as yours, and let their palates
 Be seasoned with such viands"? You will answer,
 "The slaves are ours." So do I answer you.
 The pound of flesh which I demand of him
 Is dearly bought; 'tis mine, and I will have it.
 If you deny me, fie upon your law:
 There is no force in the decrees of Venice.
 I stand for judgment. Answer; shall I have it?³⁶

The trial is interrupted by the arrival of a young lawyer named Balthasar, purportedly sent to the court by Bellario, an elderly attorney who was too sick

31. *Id.*

32. *Id.* act 4, sc. 1, ll. 1–39.

33. *Id.* act 4, sc. 1, ll. 16–62.

34. *Id.* act 4, sc. 1, l. 84.

35. SHAKESPEARE, *supra* note 11, at act 4, sc. 1, ll. 85–88.

36. *Id.* act 4, sc. 1, ll. 89–103.

to appear.³⁷ The young lawyer is actually Portia, the play's female lead, dressed as a man.³⁸ She takes over the examination of the witnesses, first asking Antonio whether he confesses the bond, which he does, and then telling Shylock he must be merciful—a request Shylock rejects: "I crave the law, [t]he penalty and forfeit of my bond."³⁹

Bassanio pleads for his friend, urging Portia to bend the law to allow him to pay off the bond at three times its value.⁴⁰ In almost a parody of judicial deference to precedent, Portia rejects his request, explaining that if she created an exception to that rule of law, "'Twill be recorded for a precedent, [a]nd many an error by the same example [w]ill rush into the state: it cannot be."⁴¹ Shylock is overjoyed by her ruling: "O wise young judge, how I do honour thee!"⁴²

Portia asks for the legal document, examines it, and concludes that the "bond is forfeit, [a]nd lawfully by this the Jew may claim [a] pound of flesh, to be by him cut off [n]earest the merchant's heart."⁴³ She urges Shylock: "Be merciful: [t]ake thrice thy money; bid me tear the bond."⁴⁴ Shylock again rejects the plea for mercy, telling her that he will bid her to tear up the bond only "[w]hen it is paid, according to the tenour."⁴⁵

Portia listens to Antonio's final plea and Shylock's response, then she issues judgment: "A pound of that same merchant's flesh is thine, [t]he court awards it, and the law doth give it."⁴⁶ Shylock responds: "Most rightful judge!"⁴⁷ Portia continues: "And you must cut this flesh from off his breast; The law allows it, and the court awards it."⁴⁸

But then Portia unveils the fatal legal twist:

Tarry a little, there is something else.
This bond doth give thee here no jot of blood.
The words expressly are "a pound of flesh".
Take then thy bond, take thou thy pound of flesh,
But in the cutting it, if thou dost shed

37. *Id.* act 4, sc. 1, ll. 149–66.

38. *Id.* act 4, sc. 1, ll. 163–66.

39. *Id.* act 4, sc. 1, ll. 177–78, 202–03.

40. SHAKESPEARE, *supra* note 11, act 4, sc. 1, ll. 205–23.

41. *Id.* act 4, sc. 1, ll. 216–18.

42. *Id.* act 4, sc. 1, l. 220.

43. *Id.* act 4, sc. 1, ll. 226–29.

44. *Id.* act 4, sc. 1, ll. 229–30.

45. SHAKESPEARE, *supra* note 11, act 4, sc. 1, ll. 231–38.

46. *Id.* act 4, sc. 1, ll. 295–96.

47. *Id.* act 4, sc. 1, l. 297.

48. *Id.* act 4, sc. 1, ll. 298–99.

One drop of Christian blood, thy lands and goods
Are by the laws of Venice confiscate
Unto the state of Venice.⁴⁹

Stunned, Shylock realizes he has been defeated by this literal reading of the contract.⁵⁰ Struggling to overcome this setback, he agrees to accept the prior offer of three times the value of the bond, but Portia insists that Shylock must either have the pound of flesh or nothing.⁵¹ She then instructs him to prepare to cut off the flesh, but reminds him that if he should shed any blood or cut off any less or more than an exact pound, “Thou diest, and all thy goods are confiscate.”⁵²

Dejected, Shylock asks if he can have just the principal on the bond.⁵³ Again, Portia tells him the only remedy he is allowed by law is the pound of flesh.⁵⁴ Now in retreat, Shylock tries to dismiss his claim, but Portia informs him of another law of Venice: When an alien threatens the life of a citizen of Venice, as Shylock surely did when he demanded the right to cut a pound of flesh out of Antonio’s chest, the law requires that the offender be put to death and that half of his property go to the state and the other half to the offended party (here, Antonio).⁵⁵ Portia tells Shylock his best hope is to beg for the Duke’s mercy.⁵⁶ The Duke declares that he will spare Shylock’s life, but only if Shylock agrees to Antonio’s two conditions: convert to Christianity and bequeath half of his fortune to the man who ran off with his daughter.⁵⁷ Defeated and humiliated, Shylock accepts those terms.⁵⁸

At one level, Shylock’s defeat can be viewed as the risks of pursuing a harsh letter-of-the-law brand of justice. He demanded compliance with the exact language of the agreement, rejected calls for compassion, and is then undone by the exact language of the agreement. But the modern audience can’t help but conclude that the outcome of the lawsuit—namely, the utter humiliation and destruction of a human being—is unjust. Shylock has lost his daughter, his fortune, his profession, and his religion.⁵⁹ He has become a tragic figure in the middle of a comedy. The final words of this once strong and defiant victim of prejudice, spoken after Portia orders the clerk to draw up the deed transferring Shylock’s assets, continue to haunt us: “I pray you give

49. *Id.* act 4, sc. 1, ll. 301–08.

50. SHAKESPEARE, *supra* note 11, act 4, sc. 1, l. 310.

51. *Id.* act 4, sc. 1, ll. 314–18.

52. *Id.* act 4, sc. 1, ll. 320–28.

53. *Id.* act 4, sc. 1, l. 332.

54. *Id.* act 4, sc. 1, ll. 334–35, 339–40.

55. SHAKESPEARE, *supra* note 11, act 4, sc. 1, ll. 341–49.

56. *Id.* act 4, sc. 1, l. 351–59.

57. *Id.* act 4, sc. 1, ll. 364–68, 376–88.

58. *Id.* act 4, sc. 1, ll. 390.

59. *Id.* act 4, sc. 1, ll. 376–90.

me leave to go from hence; I am not well. Send the deed after me [a]nd I will sign it.”⁶⁰

“Get thee gone,” the Duke commands, “but do it.”⁶¹

II. BLEAK HOUSE⁶²

Bleak House is one of the greatest novels by one of the giants of English literature. It is also, in the words of one legal scholar, “the ultimate indictment of law, lawyers, and the legal system in the English language.”⁶³

The engine of this novel is a massive trusts-and-estates case that has been slogging through the Court of Chancery for decades.⁶⁴ In a novel filled with wonderfully evocative names—the money-grubbing attorney Vholes, the arrogant baronet Sir Dedlock, the sleazy loan shark Smallweed—it is fitting that the lawsuit’s name sounds more like a double dose of symptoms from a liver ailment: *Jarndyce and Jarndyce*.⁶⁵

The essence of what Dickens has to say about justice and the legal system is captured in the novel’s extraordinary first chapter, which begins with the literary equivalent of a Hollywood tracking shot through the streets of London on a November morning. The city is cold and muddy: “As much mud in the streets, as if the waters had but newly retired from the face of the earth, and it would not be wonderful to meet a Megalosaurus, forty feet long or so, waddling like an elephantine lizard up Holborn Hill.”⁶⁶ The sky is overcast, the city shrouded in fog, as we approach the Court of Chancery:

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln’s Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.⁶⁷

60. SHAKESPEARE, *supra* note 11, act 4, sc. 1, ll. 391–93.

61. *Id.* act 4, sc. 1, ll. 393.

62. DICKENS, *supra* note 12.

63. R.B. Bernstein, *Bleak House*, 18 LAW & POL. BOOK REV. 313, 314 (2008), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/dickens0408.htm>.

64. *Id.* at 314–15.

65. *Id.*; DICKENS, *supra* note 12, *passim*.

66. DICKENS, *supra* note 12, at 13 (footnotes omitted).

67. *Id.* at 14 (footnote omitted).

And with that prelude, Dickens introduces us to the proceedings underway. In one magical paragraph he captures litigation every bit as muddy and foggy and dangerous as London itself:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.⁶⁸

Dickens' dark view of the legal process comes through in that first chapter. Like a contagious disease, the case has infected all it has touched. No one—from the lawyers to the parties to the court clerks—has emerged untainted:

How many people out of the suit, Jarndyce and Jarndyce has stretched forth its unwholesome hand to spoil and corrupt, would be a very wide question. From the master, upon whose impaling files reams of dusty warrants in Jarndyce and Jarndyce have grimly writhed into many shapes; down to the copying clerk in the Six Clerks' Office, who has copied his tens of thousands of Chancery folio-pages under that eternal heading; no man's nature has been made the better by it. In trickery, evasion, procrastination, spoliation, botheration, under false pretences of all sorts, there are influences that can never come to good. The very solicitors' boys who have kept the wretched suitors at bay, by protesting time out of mind that Mr. Chizzle, Mizzle, or otherwise was particularly engaged and had appointments until dinner, may have got an extra moral twist and shuffle into themselves out of Jarndyce and Jarndyce. The receiver in the cause has acquired a goodly sum of money by it, but has acquired too a distrust of his own mother, and a contempt for his own kind. Chizzle, Mizzle, and otherwise, have lapsed into a habit of vaguely promising themselves that they will look into that outstanding little matter, and see what can be done for Drizzle—who was not well used—when Jarndyce and Jarndyce shall be got out of the office. Shirking and sharking, in all their

68. *Id.* at 16–17 (footnotes omitted).

many varieties, have been sown broadcast by the ill-fated cause; and even those who have contemplated its history from the outer-most circle of such evil, have been insensibly tempted into a loose way of letting bad things alone to take their own bad course, and a loose belief that if the world go wrong, it was, in some off-hand manner, never meant to go right.⁶⁹

As for specifics of the case, we learn only that many years ago a member of the Jarndyce family made a will—or perhaps more than one—dealing with a substantial and varied estate and many heirs.⁷⁰ In the course of the novel, we watch the painful demise of Richard Carstone, an innocent young heir caught up—as were so many other potential beneficiaries of that will—in the equivalent of litigation cancer, which eventually metastasizes into the victim’s mental, moral, and psychological worlds. In the end, the gentle Carstone, like others before him, dies of his litigation cancer—dejected and impoverished, with all of his moneys paid to his unscrupulous lawyer, Mr. Vholes.⁷¹

And the outcome of Jarndyce and Jarndyce? Esther Summerson, the cousin of Richard Carstone and the young narrator of the story, is in the hallway outside the Court of Chancery on the day the case concludes:

Our suspense was short; for a break up soon took place in the crowd, and the people came streaming out looking flushed and hot, and bringing a quantity of bad air with them. Still they were all exceedingly amused, and were more like people coming out from a Farce or a Juggler than from a court of Justice. We stood aside, watching for any countenance we knew; and presently great bundles of paper began to be carried out—bundles in bags, bundles too large to be got into any bags, immense masses of papers of all shapes and no shapes, which the bearers staggered under, and threw down for the time being, anyhow, on the Hall pavement, while they went back to bring out more. Even these clerks were laughing. We glanced at the papers, and seeing Jarndyce and Jarndyce everywhere, asked an official-looking person who was standing in the midst of them, whether the cause was over. “Yes,” he said; “it was all up with it at last!” and burst out laughing too.⁷²

69. *Id.* at 17–18 (footnotes omitted). The first chapter is filled with vivid comic scenes poking fun at lawyers, such as the following interruption by the Chancellor:

“Have you nearly concluded your argument?”

“Mlud, no—variety of points—feel it my duty tsubmit—ludship,” is the reply that slides out of Mr. Tangle.

“Several members of the bar are still to be heard, I believe?” says the Chancellor, with a slight smile.

Eighteen of Mr. Tangle’s learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a piano-forte, make eighteen bows, and drop into their eighteen places of obscurity.

Id. at 18.

70. *Id.* at 16–17.

71. DICKENS, *supra* note 12, at 975–79.

72. *Id.* at 973–74.

As for the winners and losers of this massive case, the entire Jarndyce estate has been consumed by legal fees.⁷³ There is, quite literally, nothing left to distribute to the heirs.⁷⁴ The lawyers are anything but apologetic. One of them announces to Esther ““that this has been a great cause, that this has been a protracted cause, that this has been a complex cause. Jarndyce and Jarndyce has been termed, not inaptly, a Monument of Chancery practice.””⁷⁵ Additionally, he emphasizes, “If the public have the benefit, and if the country have the adornment, of this great Grasp, it must be paid for, in money or money’s worth, sir.”⁷⁶ It is, in short, a bleak view of the legal profession and an even bleaker view of the legal process.

III. BILLY BUDD⁷⁷

Hard as it is to believe, the author of *Moby Dick* toiled in obscurity and died penniless after spending his final two decades working as a customs inspector in New York City.⁷⁸ Melville’s executors found among his papers a manuscript entitled “*Billy Budd: Foretopman*.”⁷⁹ The novella was first published in 1924, more than thirty years after his death.⁸⁰

The novella’s plot is fairly straightforward: It is the summer of 1797.⁸¹ Earlier that year, the British Navy had been rocked by two significant mutinies, at Spithead and Nore.⁸² Billy Budd, a guileless young seaman aboard a merchant ship called the Rights-of-Man, is impressed into duty by the HMS *Bellipotent*, a warship in need of sailors as the Royal Navy struggles to confront Napoleon’s navy.⁸³ The cheerful, innocent Billy, an orphan, is soon the favorite of the crew on his new ship.⁸⁴ His only flaw: He stutters severely when under distress.⁸⁵

The malevolent master-at-arms, John Claggert, develops a deep hatred of young Billy, perhaps based on jealousy, and eventually accuses him of conspiring to mutiny—a profoundly serious charge in the aftermath of the

73. *Id.* at 975.

74. *Id.*

75. *Id.*

76. DICKENS, *supra* note 12, at 975.

77. MELVILLE, *supra* note 13, at 1.

78. Kathleen Helal, *Chronology of Herman Melville’s Life and Work*, in MELVILLE, *supra* note 13, at xv, xvi–xvii.

79. *Id.* at xvii.

80. *Id.*

81. Kathleen Helal, *Introduction to MELVILLE*, *supra* note 13, at vii, vii.

82. Kathleen Helal, *Historical Context of Billy Budd, Sailor*, in MELVILLE, *supra* note 13, at xix, xix–xx.

83. MELVILLE, *supra* note 13, at 5.

84. *Id.* at 8–9.

85. *Id.* at 16.

other two mutinies.⁸⁶ The ship's decent and honorable captain, Edward Fairfax Vere, summons both men to his cabin, where he has Claggert repeat his false charge.⁸⁷ Billy is literally rendered speechless—so upset that he is unable to respond to the accusation.⁸⁸ The Captain, knowing the charge is false, tries to soothe Billy so that he can deny the charge:

Going close up to the young sailor, and laying a soothing hand on his shoulder, he said, "There is no hurry, my boy. Take your time, take your time." Contrary to the effect intended, these words so fatherly in tone, doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance—efforts soon ending for the time in confirming the paralysis, and bringing to his face an expression which was as a crucifixion to behold. The next instant, quick as the flame from a discharged cannon at night, his right arm shot out, and Claggert dropped to the deck. . . . A gasp or two, and he lay motionless.

"Fated boy," breathed Captain Vere in tone so low as to be almost a whisper, "what have you done!"⁸⁹

The ship's surgeon is called in, but soon pronounces Claggert dead.⁹⁰ Captain Vere, standing off to the side, exclaims: "Struck dead by an angel of God. Yet the angel must hang!"⁹¹

Believing he has no choice in light of the law and the concern over the prior mutinies, Captain Vere convenes a drumhead court, i.e., a court martial held aboard a ship at sea.⁹² The three officers comprising the court arrive, Billy Budd is called before them, and Captain Vere—serving as both prosecutor and the main witness—testifies to what happened.⁹³ Then, the court examines Billy:

The first lieutenant, taking judicial primacy and turning toward the prisoner, said, "Captain Vere has spoken. Is it or is it not as Captain Vere says?"

In response came syllables not so much impeded in the utterance as might have been anticipated. They were these: "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."

"I believe you, my man," said [Captain Vere], his voice indicating a suppressed emotion not otherwise betrayed.

86. *Id.* at 42, 72–75.

87. *Id.* at 80.

88. MELVILLE, *supra* note 13, at 78–81.

89. *Id.* at 82.

90. *Id.* at 83–84.

91. *Id.* at 84.

92. *Id.* at 84–85.

93. MELVILLE, *supra* note 13, at 89–91.

“God will bless you for that, your honor!” not without stammering said Billy, and all but broke down. But immediately he was recalled to self-control by another question, to which with the same emotional difficulty of utterance he said, “No, there was no malice between us. I never bore malice against the master-at-arms. I am sorry that he is dead. I did not mean to kill him. Could I have used my tongue I would not have struck him. But he foully lied to my face and in presence of my captain, and I had to say something, and I could only say it with a blow, God help me!”

In the impulsive aboveboard manner of the frank one the court saw confirmed all that was implied in words that just previously had perplexed them, coming as they did from the testifier to the tragedy and promptly following Billy’s impassioned disclaimer of mutinous intent—Captain Vere’s words, “I believe you, my man.”⁹⁴

The testimony soon ends, Billy is sent away, and the three officers begin to deliberate.⁹⁵ It is clear they are uncomfortable with the prospect of convicting Billy of murder. And here we come to the central moral issue of the work: what is justice? Specifically, what is the just and moral response to Billy’s actions, and is the just and moral response the same as the proper legal response?

Captain Vere concedes to the court that he, too, is moved by Billy’s plight but warns, “let not warm hearts betray heads that should be cool.”⁹⁶ Noting that the court members are still unconvinced, he tries another tack:

“To steady us a bit, let us recur to the facts.—In wartime at sea a man-of-war’s man strikes his superior in grade, and the blow kills. Apart from its effect the blow itself is, according to the Articles of War, a capital crime. Furthermore—”

“Ay, Sir,” emotionally broke in the officer of marines, “in one sense it was. But surely Budd purposed neither mutiny nor homicide.”

“Surely not, my good man. And before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit. But how here? We proceed under the law of the Mutiny Act. . . . Budd’s intent or nonintent is nothing to the purpose.”⁹⁷

The officers are still conflicted, unwilling to do what they believe they are required to do. ““Can we not convict and yet mitigate the penalty?” asked the sailing master, here speaking, and falteringly, for the first.”⁹⁸ That question triggers Captain Vere’s closing argument, in which he refers to the infamous

94. *Id.* at 91–92.

95. *Id.* at 94–99.

96. *Id.* at 97.

97. *Id.* at 97–98 (footnotes omitted).

98. MELVILLE, *supra* note 13, at 98.

Nore mutiny in urging the court to uphold the law over their notions of justice and mercy:

“Gentlemen, were that clearly lawful for us under the circumstances, consider the consequences of such clemency. The people” (meaning the ship’s company) “have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids—they, long molded by arbitrary discipline have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman’s deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. *Why?* they will ruminare. You know what sailors are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm—the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive. But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid.”⁹⁹

And thus the court convicts Billy and sentences him to death by hanging the following dawn.¹⁰⁰ At 4 a.m. that morning, the ship’s crew gathers on deck.¹⁰¹ Billy seems at peace. His final words are “God bless Captain Vere!”¹⁰²

[Those final words,] delivered in the clear melody of a singing bird on the point of launching from the twig—had a phenomenal effect, not unenhanced by the rare personal beauty of the young sailor, spiritualized now through late experiences so poignantly profound.

Without volition, as it were, as if indeed the ship’s populace were but the vehicles of some vocal current electric, with one voice from aloft and aloft came a resonant sympathetic echo: “God bless Captain Vere!” And yet at that instant Billy alone must have been in their hearts, even as he was in their eyes.

At the pronounced words and the spontaneous echo that voluminously rebounded them, Captain Vere, either through stoic self-control or a sort of momentary paralysis induced by emotional shock, stood erectly rigid as a musket in the ship-armorer’s rack.¹⁰³

99. *Id.* at 99.

100. *Id.* at 101.

101. *Id.* at 113.

102. *Id.* at 114.

103. MELVILLE, *supra* note 13, at 114–15.

The closing chapters function as four separate epilogues, each with another take on the clash of law and justice in the court martial of Billy Budd. In the first “epilogue,” which hints at some divine intervention at the moment of death, the ship’s purser and surgeon discuss the peculiar stillness of Billy’s body.¹⁰⁴ Ordinarily, there would be violent spasms—literally, death throes—as the convict succumbed, but Billy’s body swayed from the execution rope with absolute tranquility.¹⁰⁵ The purser wonders if that serenity was a supernatural phenomenon, perhaps a sign that God blessed Billy.¹⁰⁶ The surgeon, a determined man of science, dismisses the purser’s speculation but, unable to offer a rational explanation himself, abruptly departs with the excuse that “there is a case in the sick bay that I do not care to leave to my assistants.”¹⁰⁷

The second epilogue, Chapter 28, takes place a few weeks later on the same voyage. Captain Vere, the unbending instrument of law in the prosecution of Billy Budd, is mortally wounded in battle.¹⁰⁸ Taken ashore, he lingers for a few days.¹⁰⁹

Not long before death, while lying under the influence of that magical drug which, soothing the physical frame, mysteriously operates on the subtler element in man, he was heard to murmur words inexplicable to his attendant: “Billy Budd, Billy Budd.”¹¹⁰

Chapter 29, the third epilogue, quotes from the navy newspaper’s account of Billy Budd’s execution.¹¹¹ Here we have Melville’s cynical view of the “headline trial,” as reported by the press. The account is classic government propaganda, with Billy cast in the role of a mutinous, savage, knife-wielding murderer while Claggert is portrayed as the decent, diligent officer.¹¹² The article details how the heroic Claggert discovered a nefarious plot in which “the ringleader was one William Budd.”¹¹³ While “in the act of arraigning the man before the Captain, [Claggert] was vindictively stabbed to the heart by the suddenly drawn sheath knife of Budd.”¹¹⁴ The newspaper story stresses that the “enormity of the crime and the extreme depravity of the criminal appear the greater in view of the character of the victim, a middle-aged man respectable

104. *Id.* at 116–17.

105. *Id.* at 116.

106. *Id.* at 117.

107. *Id.*

108. MELVILLE, *supra* note 13, at 122, 123.

109. *Id.*

110. *Id.*

111. *Id.* at 124.

112. *Id.* at 124–25.

113. MELVILLE *supra* note 13, at 124.

114. *Id.*

and discreet”¹¹⁵ Melville concludes the chapter: “The above, appearing in a publication now long ago superannuated and forgotten, is all that hitherto has stood in human record to attest what manner of men respectively were John Claggert and Billy Budd.”¹¹⁶ Thus, the newspaper’s account of the “headline trial,” the first draft of history, vindicates the legal system that killed Billy Budd.

And finally, in the last chapter, we learn that Billy Budd has become the stuff of legend to the sailors, who have kept track of the spar from which he was hung: “Their knowledges followed it from ship to dockyard and again from dockyard to ship, still pursuing it even when at last reduced to a mere dockyard boom. To them a chip of it was as a piece of the Cross.”¹¹⁷

As his legend spreads, another sailor composes a ballad in his memory, “Billy in the Darbies,” which is soon printed and widely distributed.¹¹⁸ The ballad describes Billy’s last hours as he waits for dawn to arrive.¹¹⁹ The final poignant lines are also the final lines of the book:

Fathoms down, fathoms down, how I’ll dream fast asleep.
I feel it stealing now. Sentry, are you there?
Just ease this darbies at the wrist,
And roll me over fair!
I am sleepy, and the oozy weeds about me twist.¹²⁰

We are, by end of these four epilogues, left with the conclusion that the very legal system upon which we depend has not only failed to fairly resolve Billy’s crime and Claggert’s wrongdoings but has committed a profound injustice in the eyes of man and God. As one critic writes:

Billy Budd is about the tragic possibilities inherent in society’s invocation of its ultimate power over life and death when faced with an external threat to its existence. If the story concerned an evil society that did not deserve to exist, or a naval officer who acted in a perverse manner, then the whole point would be lost.¹²¹

IV. CONCLUSION

That each of the three works is grounded in a harsh view of the legal system should come as no surprise. Literary works are not created in a vacuum. That real courtrooms are no place to seek closure or truth has been a lesson taught by headline trials through the years, including the espionage trial

115. *Id.* at 125.

116. *Id.*

117. *Id.* at 126.

118. MELVILLE, *supra* note 13, at 127–28. “Darbies” is slang for handcuffs.

119. *Id.*

120. *Id.* at 128.

121. PETER SHAW, RECOVERING AMERICAN LITERATURE 91 (1994).

and execution of Julius and Ethel Rosenberg in the 1950s in the United States and the espionage trial and imprisonment of Alfred Dreyfus in the 1890s in France.¹²² That real courtrooms are no place to seek justice or mercy has been a lesson taught by headline trials since at least the prosecution and execution of Socrates in Ancient Greece and more recently by the work of the Innocence Project, which has, at last count, exonerated 261 people, including 17 on death row.¹²³ “These people,” according to the Innocence Project, “served an average of 13 years in prison before exoneration and release.”¹²⁴ The law cannot restore those years lost behind bars.

No doubt actual headline trials played a role in the creation of our three authors’ fictional ones.¹²⁵ And each of those fictional courtrooms has its own lesson. In the courtroom of the Duke of Venice, Shylock rejects repeated calls for mercy in favor of strict enforcement of the letter of the law—and is ultimately undone by that strict enforcement. The teaching of that courtroom is in Portia’s warning to Shylock at the outset of the trial:

Therefore, Jew,
Though justice be thy plea, consider this:
That in the course of justice, none of us
Should see salvation. We do pray for mercy¹²⁶

The maxim of *Bleak House* comes in the chambers of Mr. Wholes, summing up Dickens’ dark view of lawyers and the law:

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it.¹²⁷

But the most poignant of the three lessons comes at the end of *Billy Budd*—indeed, in the very last line of the sailor’s ballad, “Billy in the

122. Both cases continue to generate debate over their outcomes. See, for example, the latest two reexaminations of the Rosenberg trial published this year: ALLEN M. HORNBLUM, *THE INVISIBLE HARRY GOLD: THE MAN WHO GAVE THE SOVIETS THE ATOM BOMB* (2010); WALTER SCHNEIR, *FINAL VERDICT WHAT REALLY HAPPENED IN THE ROSENBERG CASE* (2010). As for the Dreyfus case, see, for example, LOUIS BEGLEY, *WHY THE DREYFUS AFFAIR MATTERS* (2009).

123. *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Apr. 14, 2011).

124. *Id.*

125. Melville actually cites a real drumhead trial in Chapter 21, namely the 1842 trial aboard the USS *Somers* in which three sailors were convicted of mutiny and executed. MELVILLE, *supra* note 13, at 100. The novella has many parallels with that case, including Billy’s last words: one of the sailors convicted in the *Somers* affair cried out at his hanging, “God bless the flag!” EDWARD H. ROSENBERRY, *MELVILLE* 111–12 (1979).

126. SHAKESPEARE, *supra* note 11, act 4, sc. 1, ll. 193–96.

127. DICKENS, *supra* note 12, at 621.

Darbies.”¹²⁸ As dawn approaches, Billy imagines his burial at sea.¹²⁹ He comes to rest on the bottom of ocean and calls for the sentry to ease the darbies from his wrist and roll him over gently.¹³⁰ His haunting last words: “I am sleepy, and the oozy weeds about me twist.”¹³¹

Those final words could also have been spoken by Shylock upon reaching home after court or by young Richard Carstone upon his deathbed, for at the end of all three court proceedings our victims can only watch helpless as the oozy weeds of the law about them twist.

128. MELVILLE, *supra* note 13, at 127.

129. *Id.*

130. *Id.* at 128.

131. *Id.*