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BODY AND SOUL UNDER THE LAW, AND THE
RESPONSE FROM LAW AND LITERATURE IN
BARTLEBY, THE SCRIVENER AND BILLY BUDD,
SAILOR

*Thane Rosenbaum**

The values of the American legal system, and the annual *Sports Illustrated* swimsuit issue, have at least one thing in common: both are unquestionably, if not shamelessly, body conscious. Nothing triggers legal exposure with greater certainty than an injury to the human body. The body is the locus of the law's remedial obsessions. Unless the body is bruised, some scar is left, an essential piece of anatomy is altered, or some damage takes place in a material, external sense to objects that have definable, tangible characteristics, the law is without moral force or conviction.

Yet, when it comes to more internal, intangible forms of suffering, the legal system is largely silent. When faced with spiritual injuries—pounded into the soul with the hammer of indignity, humiliation, debasement, disrespect, or betrayal—the law functions as an innocent bystander at best, or an indifferent arbiter at worst. The body is overprotected, the recipient of all manner of civil and criminal remedy, covered by various causes of action, the subject of endless legal theory, the beneficiary of well-settled relief. The spirit, by notable admission and contrast, all the while remains unremedied and mysterious. In fact, the law doesn't acknowledge the way in which human beings are divided into both body and soul, and that the decision to judge the harms done to one while ignoring the consequences to the other is without any moral justification.

Put simply, while the law will display all of its vital signs of outrage on behalf of a wounded body, when it comes to the human soul, the best it can do is register a complacent flat line.

The soul receives no protection under the law because the legal system is obtuse to the spiritual sphere of human existence. If it considers it at all, the legal system regards the soul as hopelessly elliptical and abstract, incapable of being understood, beyond the vision

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of the human eye, and therefore, more consistent with the talents of mystics than magistrates. The soul, and its professed injuries, can never be documented or verified by accident reports, financial statements, eyewitness testimony, or for that matter, the statute of frauds.

After all, people can lie about their wounded spirits; unless we can see it, we can't trust their claims to having been damaged. Unlike a broken body, where the evidence is manifested in physical immobility or deformity, how can we tell when the spirit is actually broken if we can't see what it even looks like when it's perfectly healthy? Evidence is irrefutable when it is external, material, and quantifiable, but the possibly feigned injury to the human spirit is beyond the comprehension of finders of fact. It is better left in the more ethereal hands of clergy, psycho-therapists, or for that matter, psychics. Let them tolerate all this ambiguity while lawyers and judges manipulate the concrete certainties of the physical world and its relationship to law.

Of course, it is easy to forget that the body is not always so easy to read. It may be an anatomy chart, but it is not always a roadmap to truth. There are detours and fault lines to understanding what's wrong with the body—whether it is functioning well, whether it is capable of healing, whether it was ever actually injured at all. People visit lawyers every day seeking to file lawsuits based on manufactured injuries. They come into courtrooms indignant, righteously aided by wheelchairs and supported by neck braces, all the while lying about the extent of their pain. While sequestered from jurors at night, and in the privacy of their own homes, some of these plaintiffs have been known to be miraculously capable of playing tennis, or doing cartwheels, or engaging in vigorous, violent sex. But during the day, under oath and under penalty of perjury, they are somehow permanently disabled, lifeless vegetables, wheeled into courtrooms behind weeping relatives, all manner of life support being dragged along as Exhibit A of their suffering.

And to add to the confusion, there are always conflicting experts, people with medical degrees, brought into court to assist the jury in determining whether the damage is real, and if so, the extent of its severity. And with all this irrefutable science, medical judgment, and bedside manner behind them—the sum total of life experience and street sense, the ability to read medical charts and to detect the malingers among us—these doctors nonetheless still disagree. Their diagnoses can't be reconciled, and the jury doesn't know what or who to believe. One doctor testifies that the plaintiff will never walk again; the other professes that the plaintiff should be able to complete the New York Marathon in less than three hours. How can this be if the body doesn't lie?

Despite all the assurance that the physical, external world is hiding nothing under the interrogative glare of daylight and the law's own illumination, the fact remains that so much about life in the "real world" remains presumptively unknown—even when it comes to the human body, and particularly given the incentive and resiliency of human beings to lie. The quantifiable actually can't be counted on to provide accurate answers; the measurable sometimes produces false numbers; the objective is riddled with subjectivity and emotion; the external is masquerading behind all manner of internal deception; and the material is surrounded by ghosts.

Yet, for some reason, we tolerate all of this ambiguity, hypocrisy, and deceit in the physical world. But when it comes to the spiritual world, and the harms left in the wake of human manipulation, we doubt our capacity to investigate the truth, and we tolerate no similar claims to uncertainty.¹ Suddenly the body becomes reliable while the soul is deemed pathological. When confronted by apparent injuries to the soul, we somehow always presume bad faith. We believe that the false claims of a wounded spirit will fool us every time. But show us a bashed-in body, and we'll show you a legitimate cause of action crying out for relief.

Yet, anyone who has read Shakespeare's "Othello" knows that while evil Iago commits neither a crime nor tort in his murderous manipulations of Othello (which lead to the death of three innocent people), there is little doubt that a jury, in hearing the testimony of Othello and Iago's other victims, would determine that what Othello experienced by way of Iago's deceptions, while it left no immediate bruise, was far more damaging, and ultimately visible, than anything Iago could have ever done to Othello's body. And if Othello were given the choice between a baseball bat to the head and the mind games that Iago was playing inside his head, there is little question that the Moor would have selected the body blow rather than the far more ruinous and painful spiritual madness that he endured and which ultimately led to the murder of three human beings.

The fact is, people know—in the deepest part of their consciousness—that the nursery rhyme, "Sticks and stones can break my bones but names can never hurt me," is actually untrue. Even children, to whom and for whom the rhyme is recited, know it, as well. But the law, paradoxically, deploys this deception as a shill, a lame excuse for not responding to spiritual injuries with legal relief. A central facet of humanity goes unrecognized and unremedied while the legal system blithely avoids these larger spiritual issues by trivializing the harm. But name-calling does indeed hurt, sometimes worse than

¹ It is not that all tort plaintiffs lie, it is just that spiritual damage is not necessarily feigned either.

broken bones. Ask Othello. Ask anyone. As one of my students once wisely said, "Not everyone has been in a car accident, but everyone, at some point in their lives, has been subject to some kind of humiliation." And yet we ask jurors to sift through the wreckage of traffic accidents all the time, knowing that they will have no idea what manner of unsafe driving took place, the condition of the road, which cars were screeching as the light blinked yellow on its way to red. Despite all this uncertainty and confusion, the legal system would never trust this same panel of people to figure out what happened to a wrecked spirit, even though this is an area where many of them might have a greater level of understanding and empathy, and might ultimately prove to be better fact finders.

Moreover, while it may be true that spirit and soul are words normally spoken by either clerics or kooks, that does not mean that spiritual damage is the province only of religious authorities, or those normally found howling at the moon. They, after all, are usually not empowered to render enforceable judgments. In the modern world, people do not come to them to express their grievances and resolve their conflicts with one another. They cannot compensate for spiritual loss, nor imprison those for causing spiritual injury. And unlike the confidential confines of the doctor-patient or therapist-patient relationship, which one enjoys while visiting a mental health care provider, those who have been betrayed require a public forum in which to proclaim their pain. They don't need confidentiality. What they require is acknowledgment—often times in public, with witnesses watching, and a court stenographer recording the testimony for posterity, and with the offending party present to hear the full story of damage that was done either through malice or neglect. For this you need a courtroom, and a judge, and a community—in essence, we need the legal system to repair not only harms to the body, but also to the soul.

Such disparity in treatment between body and soul and the absurdity of this neglect offers an opportunity to revisit the novels and stories of Herman Melville. While known as a novelist and land-locked seaman, he was also someone who, through his fiction, understood the way in which the legal system closes itself off from the spiritual world, and in doing so, brings about both moral and legal injustice. Reading Melville, especially for lawyers, is a tutorial on how much the law lacks, what it fails to comprehend, and why it ends up missing so much.

Indeed, for all of Melville's greatness, one overlooked dimension of his literary legacy is the significance he attached to the spiritual world. Perhaps more so than any other American fiction writer, Melville appreciated that humanity exists in both a physical and a spiritual sense—and that lawyers, and the law they serve, act with

disregard to the damage done to the spirit, and the complexity of that spirit. The external body is one thing, but the interior life of human beings is quite another entirely.

In fact, the spiritual life of humanity is where all the mysteries are lodged, and where the greatest complexity resides. For Melville, the spirit was not only present in life, but was perhaps the only way to understand life. Short of the spirit, all that remain are obvious external signs, the overtly explicit, and the un-nuanced simplicity of unmasked intentions. This kind of human behavior can be described without the aid and magic of a novelist. Even a lawyer can do it. But human motivation stripped of emotional complexity and interior scrutiny is an empty exercise, much like painting by numbers and ending up with an empty canvas. For this reason, the value of having lawyers read literature is to remind them that the external, physical, material components of what it means to be human is exceeded in mystery by its internal, spiritual, and moral counterparts.

There are many examples in Melville's fiction of cautionary tales for lawyers and those who require their services. Bartleby, the scrivener, the subject of so much curiosity in "Bartleby," pays the price for working within the law, breathing its suffocating air, and staring out each day onto its narrow pathways and near-sighted walls. While it is true that his tenure at the government's Dead Letter Office may have already contributed to his lifelessness, the fact remains that it is at the law firm, and his discharge from it, where he ultimately succumbs to his spiritual death. He is described throughout the novel as "palidly neat," "incurably forlorn," and "mildly cadaverous."² And the narrator says, "the scrivener was the victim of innate and incurable disorder. I might give alms to his body; but his body did not pain him; it was his soul that suffered, and his soul I could not reach."³ But when Bartleby does speak, rarely as that is, we find within his declarations of "I prefer not to" the divine spark of spiritual resistance against the tyrannies of a bureaucratic, soulless world.

After all, the lawyer who narrates the story is intellectually and emotionally honest enough to acknowledge that the work of the scrivener, and the environment in which that work is performed, is unsuitable to sustaining a healthy inner existence. The office is described as "deficient in what landscape painters call 'life.'"⁴ The windows look out onto brick walls no more than ten feet away, "black by age and everlasting shade."⁵ And the work of the copyist—the drudgery of repetitive, unoriginal, mindless tasks, the kind of job that

² HERMAN MEVILLE, *BILLY BUDD AND OTHER STORIES* 11, 26 (Penguin Classics 1986)

³ *Id.* at 25.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

lacks imagination and thwarts initiative (not unlike what most modern-day associates at law firms are called upon to do, by the way), only hastens one's spiritual demise. The lawyer describes Bartleby's day as follows: "It is a very dull, wearisome, lethargic affair. I can readily imagine that, to some sanguine temperaments, it would be altogether intolerable."⁶ He goes on to wonder whether the poet Byron would have ever been able to tolerate partnering up with Bartleby to check on the accuracy of a five hundred page legal document.

It is somewhat ironic, if not telling, that Melville would choose to have a lawyer narrate Bartleby's story. After all, wouldn't a lawyer—Bartleby's employer, no less—be the last person who could be relied upon to tell this tale of how the business of the law resulted in Bartleby's discharge, and then death? How could a lawyer, already presumably desensitized by his profession to Bartleby's spiritual condition, tolerate Bartleby's idiosyncrasies and insubordination? What's more, how could such a lawyer possess the language to narrate the emotional complexity of Bartleby's final days? The only answer, perhaps, is that Melville has this narrator introduce himself in the first few pages of the story as someone who is admittedly an aberrational member of the bar.

He is a man who admits to his readers that, at least for him, "the easiest way of life is the best."⁷ He belongs to a "profession proverbially energetic and nervous, even to turbulence, at times, yet nothing of that sort have I ever suffered to invade my peace. I am one of those unambitious lawyers . . ."⁸ Only such an attorney "who never address[es] a jury, or in any way draw[s] down public applause," is capable of supplying a sympathetic, narrative voice that can be trusted to understand what happened to Bartleby, and how this happened.⁹ The man who fires Bartleby is the same one who, despite being a lawyer himself, may have the kind of inner depth and curiosity to delve into the mysteries of Bartleby's soul, and the law's contribution to how it came to be extinguished. But again, this isn't the kind of lawyer, by his own admission, who would have made partner at Skadden, Arps.

While today many have observed the way in which bureaucratic organizations bring about spiritual decline, Melville did it in the mid-nineteenth century, and made his observations within the context of a law firm and what it can do to its employees. The legal system itself rarely undergoes such critical self-examination of its own practices. Nor does the legal system encourage or tolerate the kind of rallying cry on behalf of the soul that would have its associates turn back work by

⁶ *Id.* at 12.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.*

simply expressing a preference not to toil away in such mindless endeavors.

Billy Budd, Sailor, which takes place on a British naval war ship, and not at a Wall Street law firm, nonetheless tells us much about the American legal system, and specifically, the way in which the disregard of the spiritual world has a way of foiling the discovery of the truth. Poor Billy Budd is so handsome and yet so obtuse to the inner life of his nemesis, the ship's master-at-arms, Claggart. Claggart hates Billy for all sorts of reasons—mostly, because Billy was the Brad Pitt of his day, and Claggart was either jealous that his glance into a mirror did not produce an equally pleasant sight, or, as the noted literary critic Leslie Fiedler once observed, perhaps Claggart possessed unrequited homoerotic feelings for Billy, and could not stand the rejection. Regardless, because no harsh words were exchanged between them, Billy—as well as the drumhead court that was assembled to punish him for Claggart's murder—can't figure out why Claggart would have lied in accusing Billy of having plotted a mutiny on the ship.

It is here that Melville reminds lawyers and laymen that the legal system, in failing to appreciate the spiritual dimension of human behavior, utterly misses the emotional complexity of why some idiosyncratic characters choose to act in the way that they do. The lawyer's world is increasingly narrowed, standardized, cut off from the subjective and mistrusting of the aberrational. Yet, how can the law understand the internal motives of Claggart's actions when his external conduct conceals what he is really thinking and feeling? In this case, justice is wholly unblind, because the putative judge in the case, Captain Vere, is the only person in the courtroom who understands that Billy did not intend to commit a capital crime. Billy was driven to strike Claggart in retaliation for Claggart's slanderous statement against him. Captain Vere, however, perhaps suffering from an early onset of insanity due to the pressures that come with commanding a naval vessel filled with ex-convicts during a time of rampant mutinies on the high seas, won't part with the truth. Everyone else, relying on the logic of the law, can't account for Claggart's lie, and so all that's left to do is determine the punishment for Billy's crime.

Yet Melville is relentless in pointing out what the law, in its neglect of the spirit, lacks. An honest scholar is described as having speculated:

I am not certain whether to know the world and to know human nature be not two distinct branches of knowledge, which while they may coexist in the same heart, yet either may exist with little or nothing of the other. Nay, in an average man of the world, his constant rubbing with it blunts the finer *spiritual insight* indispensable to the understanding of the essential in certain exceptional characters, whether evil ones or good. In a matter of

some importance I have seen a girl wind an old lawyer about her little finger. Nor was it the dotage of senile love. Nothing of the sort. But he knew law better than he knew the girl's heart. Coke and Blackstone hardly shed so much light into *obscure spiritual places* as the Hebrew prophets. And who were they? Mostly recluses.¹⁰

Lawyers know law, but they don't necessarily know life. They can be fooled and manipulated by furtive agendas largely because they have read far too many hornbooks and perhaps not enough novels. They associate too much with other members of the bar, and unfortunately not enough with those who have only a passing knowledge of law but an abundance of experience with a world without predictability and precedents.

We are reminded in *Billy Budd, Sailor*, that the most dangerous among us are not those who are explicitly evil, but rather those whose malice is more self-contained and controlled. The external is easy to see, but its visibility is often obscured by internal smoke screens. Therefore, what seems obvious may not tell us very much. What lies within requires a greater task of excavation. But without curiosity into the workings of the human soul, the law shouldn't feel so smug about its alleged findings of fact. Human beings are too complex to judge simply on the basis of their external actions or what they might say on a particular day on the witness stand. They may come across as perfectly credible and sane, yet their testimony may be tainted and untrue or the product of unrevealed spiritual malice, or their minds may be influenced by hidden insanity.

"Who in the rainbow can draw the line where the violet tint ends and the orange tint begins?" the narrator of *Billy Budd, Sailor* reminds us.¹¹

This is the true testament of human complexity. The interior world of the spirit is stitched together by such blindingly intricate and intersecting lines. Often times we can't know for sure what is going on. But it is particularly worrisome when the law believes that the full truth can be known simply by subjecting witnesses to direct and cross-examination. People lie even if their outward appearance suggests great sincerity. But how would the law know the truth if it continues to rely too insistently on external, physical, and objective evidence, while missing the deeper truths that are located only by internal, spiritual and subjective investigations?

Billy Budd finds himself in this predicament. The law won't come to his rescue even though it is capable of a broader, more complex and thereby fuller inquiry. And since Billy has a physical deformity (he is a stutterer), and his stunning face is matched by a simple mind, he is

¹⁰ *Id.* at 324-25 (emphasis added).

¹¹ *Id.* at 353

unable to assist the court in speculating further into Claggart's motivations. When one of the jurists asks him why Claggart would have lied given that no outward animus existed between them, the narrator observes, "At that question, unintentionally touching on a *spiritual sphere wholly obscure to Billy's thoughts*, he was nonplussed, evincing a confusion indeed that some observers, such as can readily be imagined, would have construed into involuntary evidence of hidden guilt."¹²

Unfortunately, in this regard, Billy is no worse than most judges and lawyers. The spiritual sphere does not generate much legal thought. Lawyers and judges are equally obtuse to the obscurity of the spirit. It is not taught in law school, nor is it the subject of legal treatises. And for practicing lawyers, such spiritual concerns do not receive priority in trial preparation. The mysteries of the spirit remain mysterious, all to the detriment of legal resolution and judgment.

But artists, like Melville, are always mindful of these moral and spiritual concerns and the way in which the legal system fails to account for them. The law should stand for more than the simplicity of what anyone can see. This is why law and literature, as an art form, spends so little time explaining legal rules. It is the nuances of life that are far more important. Indeed, for a writer like Melville, the body is truly beside the point.

Lawyers are rarely conflicted by the same insight. Anyone can examine a physical bruise and determine how likely it is to heal. But damaged souls, like Bartleby's, or spiritual manipulators, like Claggart, are not central to the law's investigations. Because their bodies are unharmed and the harm that they commit is not externally obvious, the law doesn't know what to make of these characters. And so only in art are we treated to the spiritual half of humanity that receives a neglectful pass under the law.

Despite all the restatements, reporters, hornbooks, treatises, and legal encyclopedias that exist to research the law—the massive accumulation of words on paper that swell inside law libraries—when it comes to understanding the law's responsibility to the human spirit, it's best to pick up the annual *Sports Illustrated* swimsuit issue and simply ogle the pictures. It is there that we find all that the law needs to know—the body beautiful that the law leeringly guards while the soul hovers pleadingly behind the desks of lawyers at work.

¹² *Id.* at 358 (emphasis added).

