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## BILLY BUDD AND THE FEDERAL SENTENCING MANDATES

KEVIN W. SAUNDERS\*

*The author examines the picture of British naval justice in the era of the Napoleonic Wars, as presented in the motion picture Billy Budd. The film portrays a contrast between what justice demands of those enforcing the law and what the law itself demands of those officers. It is argued that the same contrast is present in what justice demands of federal judges and what mandatory sentencing requires of those judges and that society should learn a lesson from Melville's novel and the film that hard and fast rules, at the expense of justice, impose a cost it may not want to bear.*

*Billy Budd*,<sup>1</sup> the film version of Herman Melville's novel *Billy Budd, Foretopman*, opens with an encounter at sea between two square-rigged sailing ships. The era is that of the Napoleonic Wars and the pursuing ship is the British Royal Navy fighting ship *Avenger*. The pursued, however, is not a French warship, but is instead the British merchantman *Rights of Man*. The pursuit of one British ship by another is explained by the law of impressment. A British warship sailing shorthanded had the authority to take seamen off any other British ship and impress them into naval service. *Avenger* is shorthanded and forces the *Rights of Man* to heave to and receive a boarding party. The crew of the merchantman is called to muster for inspection by the boarding officer, but one seaman has been sent up the mast in hopes that he will not be seen. The officer spots Billy Budd in the rigging and finds him to be the only one fit for service in the Royal Navy.

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1. (Anglo-Allied 1962).

Billy says goodbye to the *Rights of Man*, both literally and figuratively, as he is taken to the *Avenger*. There he enters a world quite different from that which he has known. It is a world of harsh discipline with little in the way of procedural protection. The crew is regularly called upon to witness floggings, but there is never an explanation of the offenses involved. The crew lives in fear of the Master-at-Arms, Mr. Claggart, a man of great evil, who treats the crew cruelly and is hated by them. The officer corps, Captain Vere and Lieutenants Seymour, Ratcliffe and Wyatt, appear to be men of more compassion than Claggart, but do little to insulate the crew from Claggart's evildoing.

Budd and Claggart seem almost incapable of comprehending each other. Budd does not see the evil in Claggart, but instead seems to sense a loneliness. Claggart cannot take Budd as the embodiment of good that he is. Budd's goodness seems universally recognized by his shipmates on the *Rights of Man* and is soon recognized by his new shipmates and even his new officers, but Claggart does not know what to make of him. He cannot tell whether Budd's lack of hatred for him is due to naivete or if Budd is consciously serving as an ironic counterpoint to Claggart's evildoing. Once he recognizes the good in Budd, he determines to destroy him.

The precipitating event occurs when Claggart forces an ill seaman to go up the mast for a sail change. The seaman, Jenkins, falls from the spar to his death. The crew's fear of Claggart turns to hatred, and Kincaid, another seaman, curses Claggart from the rigging. When the crew comes down from the masts, Kincaid is placed under arrest. Budd backs up Kincaid's accusation that Claggart knew Jenkins was ill when he was sent aloft. Captain Vere, while taking no action against Claggart, clearly believes Budd. He sentences Kincaid to only ten lashes, rather than the one hundred suggested, almost demanded, by Claggart.

Claggart, either sensing the need for bold action to save his position or intent on going out in a blaze of evil, tells Captain Vere that he has learned that Billy Budd is leading a conspiracy to mutiny. The Captain, certain that Claggart is lying, calls for Budd and has Claggart repeat the charges to Budd's face. Budd is given the opportunity to deny the charges, but Budd has a

propensity to stammer when under strong emotion. He is unable to find his words, and as Claggart continues to harangue him, Budd strikes him a blow to the head, killing him. As Claggart lays on the floor of the Captain's cabin dying, there is a smirk on his face. He seems to take pleasure in the fact that, even though it has cost him his life, he has destroyed Budd.

The ship's officers meet in secret Court-Martial. They are torn between a sense of justice that would take account of Budd's good and the evil that Claggart tried to do and a commitment to the law that demands that Budd be condemned. Budd is found guilty and sentenced to be hanged. The crew assembles to witness punishment, and when they learn that Budd is to be executed, they almost mutiny. After last words of "God bless Captain Vere," Billy is hanged. At that moment a French warship appears from behind a point. The crew, still in a state of near mutiny, refuses for a time to respond to an order to battle stations. The delay gives the French an advantage, and the *Avenger* is sunk.

#### THE LEGAL ISSUES OF THE FILM

There are various perspectives of *Billy Budd* that provide for interesting analysis. The script, in identifying Billy as completely good and Claggart as completely evil, makes the film an obvious vehicle for an examination of the struggle between good and evil in the world. The two seem unable to coexist. One, in destroying the other, also destroys itself. Billy can also be seen as a Christ figure. Only through an act that costs him his life is the crew saved from the evil in its world. There are also overtones of possible homosexuality on the part of Claggart. He at one point says to Billy that many things are permitted of a handsome seaman that are denied his fellows. Dansker, the old sailmaker, also explains the malice that Claggart felt toward Budd as being based on Billy having a grace that Claggart could not possess. Claggart could not admit any homosexuality and may have been unable to accept it in himself, leading him to have to destroy the source of his temptation and himself.

While all these perspectives make for interesting thought, the subject of this essay is the vision of the law seen in the film, and *Billy Budd* offers insights in this area as well. There

is, of course, the historical insight into the law of impressment and the rules under which the Royal Navy operated in the eighteenth century. While of historical interest, these insights provide little of interest in a look at the nature of law in the current era. Of far greater interest is the view of the role of the law and the relationship between law and justice expressed by the various characters in the film. These insights into what are timeless questions may provide a vehicle for an examination of the current role of law and present views on the relationship between law and justice.

Interestingly, the film's first view on law was spoken by Claggart. He discussed with Captain Vere the proper punishment for Kincaid for the curse directed toward him in front of the crew. Claggart thought one hundred lashes to be appropriate, under the law, for such an outburst. Captain Vere, guided more by a sense of justice and knowing that Claggart deserved the curse, believed ten lashes to be just. Claggart suggested that justice is not the issue but that the rule of law was uppermost. He said to Captain Vere: "We must serve the law, Sir, or give up the right and privilege of service. It is only within that law that we may use our discretions according to our rank." Nonetheless, Vere exercised the discretion belonging to a captain to set punishment and, whether within the law or not, imposed the ten lashes.

When Budd faced more serious charges, at his Court-Martial for striking and killing Claggart, Captain Vere's flexibility seemed to disappear. The court consisted of the First Lieutenant Seymore, Second Lieutenant Ratcliffe and Third Lieutenant Wyatt. They heard Vere's testimony and Budd's, and quickly reached a unanimous conclusion that Budd should be acquitted on the basis of self-defense. The suggestion that self-defense applied in a situation in which the actor responded not to force, but to accusation, appears to be a strained attempt to reach a just conclusion. Vere spoke up before the members of the court could sign the acquittal.

Since Vere had earlier told the court he was speaking as a witness and not a commanding officer, Seymour asked if he was continuing to speak as a witness or was now speaking as commanding officer. Vere responded: "As convening authority, Seymour. I summoned this court and I must review its findings

and approve them, before passing them on to the Admiralty." Seymour acceded: "Aye, Sir, that is your right." Vere responded: "No right. Which one of us here has rights? It's my duty and I must perform it."

Captain Vere had begun to separate his private self from the position he held and the duties that attended the rank. Again addressing the court, he said: "[Y]our verdict sets him free and so would I wish to do, but are we free to choose as we would if we were private citizens? The Admiralty has its code. Does it care who Budd is, who you and I are?" Seymour argued that the Code cannot be inflexible: "We don't forget that, Sir, but surely even within that code each crime is different. We can't ignore the facts." To this Vere responded that all that matters is the law, saying: "The facts. Come, you know the facts, which are the Mutiny Act's provisions."

Captain Vere seemed also to appeal to the fear that the crew would mutiny, whatever decision they made, but that at least they would have done their duty if they found him guilty. The debate then returned to what appeared to be the real issue, whether law or justice was to control. Ratcliffe, responding to Vere's earlier point on the law being the only facts that matter, said: "I concede that, Sir, but this case is exceptional, and pity, if we are men, must move us, Captain." Vere responds: "So am I moved, Ratcliffe, but we cannot have warm hearts betraying heads that should be cool." The law, it seems, is the law and it is the officers' duty to enforce its provisions without fail.

Ratcliffe then turned to the issue of whether officers should, in their official capacity, be forbidden to act according to conscience. "Officers are only men in uniform. We have our standards, ethics, scruples." Vere would have none of this and responded: "When we first put this [uniform] on, we resigned our freedom. The gold we wear shows that we serve the King, the law. For the term of my active life, I am bound by an oath . . . ." Coming around to Vere's position on duty and the law, Ratcliffe suggested that at least the penalty be mitigated, but Vere would not grant even this, noting that the penalty was prescribed. While it is clear that Vere's feelings were with Budd, he simply would not be swayed by those feelings. "Our consciences are private matters, Ratcliffe, but we are public

men. Dare we give our consciences precedence over the code that made us officers and which called this case to trial? Dare we?"

The last holdout on the court was the young Third Lieutenant Wyatt. He objected to the position the court was reaching, saying he could not hang an innocent person, and asked to be excused. At this point it was clear that Seymour had accepted the Captain's view. He said: "Wyatt, we do not deal with justice here but with the law." Wyatt was unwilling to give up the ideal of justice and asked: "Was not the one conceived to serve the other?" The question was left hanging, as Vere instead responded to the request to be excused. Vere said: "Wyatt, can't you see that you must first strip off the uniform you wear and then your flesh, before you can escape the case at issue here." Vere then asked Wyatt to show them a way to save the boy consistent with their duty, saying "Save him, Wyatt, and you save us all." Wyatt could not. Vere expressed his feelings of "revulsion, shame, outrage" but did his duty and ordered the execution.

While Vere and the other officers were torn between what is right or just and what is required by law, they eventually concluded that it is the law that must control. Even when the law leads away from the path of justice, those who hold the position as a result of the legal system owe their allegiance to the system and not to justice. The code is all important, and only private men and women can act according to conscience.

*Billy Budd* expresses an unappealing view of the law. It seems odd to suggest that sentences that are unjust must be imposed because, though unjust, they are demanded by the law. That may have been the way things worked in the Royal Navy of the eighteenth century, where one would be unlikely to look for a model legal system. Surely, however, in the modern era in a United States that asserts a commitment to justice, things must be different. One would think that our judges must not be forced into imposing unjust sentences, yet federal judges today are facing the same struggles with conscience that so troubled Captain Vere and his three Lieutenants. *Billy Budd* is not just a window on some misbegotten era in legal history—it serves also as a mirror on our own times.

## FEDERAL SENTENCING: REVIVING CAPTAIN VERE'S VERDICT

The problem facing today's federal judge arises in a congressional program to limit or remove judicial discretion in sentencing. The first major step in that process was the passage of the Sentencing Reform Act of 1984.<sup>2</sup> Congress was intent on reducing disparity in sentencing for federal crimes, and the way to do that seemed to be the reduction of judicial discretion in sentencing. The act established the United States Sentencing Commission charged with producing a set of Sentencing Guidelines. The Guidelines provide a system for the analysis of the important factors that make for a just sentence. The seriousness of the crime charged, the involvement and criminal history of the defendant, and the status or vulnerability of the victim are all quantified into a formula that results in a narrow sentencing range. The guidelines do allow for a consideration of the character of the defendant and victim, a luxury that Billy Budd's judges lacked. Furthermore, the Guidelines allow the sentencing judge to depart from the sentence suggested by the Guideline. The departure has to be explained by an opinion and is subject to appeal.

It was the second step in this process that contributed more to renew the problems presented by *Billy Budd*. In the six years following the Sentencing Reform Act, Congress adopted a get-tough policy toward crime. The result was a series of statutes providing mandatory minimum sentences for a variety of crimes of violence and a great number of drug crimes. In all, the United States Code now contains over one hundred mandatory sentencing provisions found in sixty different statutes.<sup>3</sup> Unlike the Sentencing Guidelines, the mandatory minimums do not take into account the characteristics of the defendant. Defendants of quite different character, who commit the same crime, receive the same sentence. This was the problem facing Billy's judges. Anyone killing a superior, without regard to the character or motivation of the defendant, was subject to execution. With no discretion, the court had to impose a sentence

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2. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

3. See Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993).

that in the abstract might have seemed reasonable, but in light of the situation was unjust. The situation is similar with federal mandatory minimums.<sup>4</sup>

Another difficulty with the mandatory minimums is that defendants who commit *almost* the same crime may receive vastly different sentences. Not only is injustice done by failing to recognize distinctions between defendants, injustice also results from unreasonable distinctions between crimes. For example, if one defendant is convicted of possession of 4.99 grams of crack cocaine and another is convicted of possession of 5.01 grams of crack cocaine, the two would seem equally culpable. Under the minimum sentencing requirements, however, the first would face a maximum sentence of one year, while the second would face a mandatory minimum of five years.

Faced with what seem to be unjust results, some federal judges have taken up Captain Vere's challenge to find a way to save the defendant. In a 1991 trial in federal court in Washington, D.C., Judge Stanley Sporkin found a way around what he seemed to believe to be an unjust sentence.<sup>5</sup> The defendant was not a character as sympathetic as Billy Budd. He had a prior drug conviction and had been found in possession of crack cocaine, a .357 Magnum, and a sawed-off shotgun. Because of those aggravating factors, he faced fifteen years imprisonment if he had possessed five grams of crack. If there had been less than five grams of crack, the penalty would be two to three years, with an additional five years for the firearm charge. The prosecution submitted evidence from a government laboratory that the crack weighed 5.309 grams. The judge asked that the government have the crack reweighed, and the prosecution declined to do so, until threatened with contempt. On reweighing, the crack came in at 4.91 grams. The prosecution asked to be allowed to submit evidence on dehydration of the sample

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4. It is, in fact, possible for a defendant of worse character to receive a lesser sentence. An exception allows a shorter sentence for a defendant who testifies against others or provides law enforcement authorities with information useful in their investigation. It has been suggested that this exception, available only to those with valuable information, grants a benefit to ringleaders that is not available to those involved to a lesser degree. *See id.* at 211-12.

5. *See* Tracy Thompson, *Drug Case Adds Meaning To Court's Scales of Justice*, WASH. POST, Sept. 27, 1991, at C1.

and the possible loss of weight as the result of chemical analysis. The judge refused the offer. While the defendant was sentenced to eight years and one month in prison, it was seven years less than the sentence would have been if the drugs had weighed one-tenth of a gram more.

Other judges have taken up Lieutenant Wyatt's approach by stripping off the robe and quitting the federal bench. Perhaps the most vocal in expressing the role of sentencing in his decision to leave the bench is United States District Judge J. Lawrence Irving of San Diego. Judge Irving, an appointee of President Reagan, said in announcing his resignation:

I can't continue to do it—I can't continue to give out sentences that I feel in some instances are unconscionable . . . . Every week, I get these cases of "mules"—most of them Hispanic—who drive drugs across the border. Ninety percent of the time they don't even know how much they're carrying—they met somebody in a bar who paid them \$500. If it's a couple of kilos, you hit these mandatory minimums and it's unbelievable . . . . You're talking 10, 15, 20 years in prison.<sup>6</sup>

Most judges, however, have followed the route laid down by Captain Vere. They have continued to do their duty, however distasteful they may find that duty. The anguish expressed by Captain Vere is matched by that recently expressed by United States District Judge J. Spencer Letts, also a Reagan appointee. While imposing a mandated ten-year sentence on a first-time drug offender, he attacked the law that required the sentence:

Since the days when amputation of the offending hand was routinely used as the punishment for stealing a loaf of bread, one of the most basic precepts of criminal justice has been that the punishment fit the crime. . . . This is a principle which, as a matter of law, I must violate in this case. . . . I am no longer willing to apply this law without protest.<sup>7</sup>

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6. Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs; Draconian Sentences Hurt Small Offenders More Than Kingpins*, WASH. POST, Nov. 4, 1990, at C1.

7. Jim Newton, *Judge Denounces Mandatory Sentencing Law Courts: Jurist*

He said the case presented the "most difficult choice I have yet faced—between my judicial oath of office, which requires me to uphold the law as I understand it, and my conscience, which requires that I avoid intentional injustice." Of the Sentencing Guidelines, he said the system "is worse than uncivilized, it is barbaric."<sup>8</sup>

Judge Letts' view is widely shared in the judiciary. In a recent poll of federal and state judges, ninety percent of the federal judges responding expressed a belief that mandatory minimum sentencing provisions in federal drug law are a bad idea.<sup>9</sup> Two senior federal judges stated that they would refuse to impose drug sentences to avoid the Guidelines and mandatory minimums, and about twenty percent of the federal judges surveyed said they had considered some action to protest the policies.<sup>10</sup> Even Chief Justice Rehnquist has recognized the problems caused by the mandatory minimums, calling them "perhaps a good example of the law of unintended consequences."<sup>11</sup> The American Judicature Society has called mandatory minimums "a meat-ax approach to a task that demands fairness and precision . . . ."<sup>12</sup>

Despite this angst, federal judges, by and large, continue to side with the law over justice. They do so even though some seem to consider what they are doing to be morally wrong. "One federal judge . . . wondered, only half jokingly, whether in years to come he and his fellow jurists will have to assert the Nuremberg Defense—'I was only following orders'—to justify the number of people they are sending to prison for decades."<sup>13</sup> The dilemma faced by Captain Vere and his Lieutenants was not simply a product of the eighteenth century. Their problem was one that clearly has continued to trouble the law.

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*Gives First-Time Drug Offender a 10-Year Term but Calls System that Imposes the Federal Guidelines "Barbaric,"* L.A. TIMES, Dec. 19, 1992, at B1.

8. *Id.*

9. *See The Verdict Is In: Throw Out Mandatory Minimum Sentences, Judges Tell A.B.A. Journal Poll*, A.B.A. J., Oct. 1993, at 78.

10. *See id.*

11. *Editorial: The Problem with Mandatory Minimum Sentencing*, 77 JUDICATURE 124 (1993).

12. *Id.* at 125.

13. Isikoff & Thompson, *supra* note 6.

When a feature of the law had been recognized as a problem for as long as the competition between law and justice in sentencing has been, it is useful to look deeper into the law to find its source. On this point, the scholars of the Critical Legal Studies movement (the Crits) have offered an explanation. According to the Crits, the law, not just sentencing but all of the law, is deeply conflicted. The conflict in each area is along the same lines as were present in the concerns expressed in sentencing Billy Budd and the modern drug offenders. On the one hand, there is a desire for hard, clear rules that inform the individual exactly what he may or may not do and what penalty will be imposed for violation of the rules. Such rules provide the individual with a sense of autonomy in the freedom to act within the confines of the rules and a sense of certainty, both for the individual in knowing the penalty for violation, and for society in assurance that the law will be enforced against those that transgress. On the other hand, there is a desire for justice—a sense that the punishment should fit the actual crime as committed by the defendant and not just the crime as defined by the law.

Some of the Crits suggest that even this conflict is only reflective of an even deeper conflict in the psychology of each individual. They see a conflict between the desire for individualism and the desire to belong to a community. Mark Kelman suggests that hard rules are based on a stereotypical individualism and that flexible standards—the appeal to justice—are based on the spirit of altruism and community.<sup>14</sup> Rules are associated with a commitment to theory, while standards are allied with facts, intuition and a relationship of trust and care.<sup>15</sup> This dichotomy explains the victory of the rules approach in Congress and in the *Billy Budd* era Admiralty. The theorists attempt to develop a series of rules that they expect to be applied in all situations. After all, a theory should predict or provide for all outcomes. It also explains the concerns expressed by those who must actually pass sentence. Judges see

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14. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 59 (1987).

15. See *id.* at 60.

the facts. They have intuitions with regard to a just sentence. They see the individual situations unjustly grouped together by meat-ax rules.

*Billy Budd* shows the unacceptability of resolving the conflict between rules and standards by resting solely on a system of rules. Captain Vere did not have the discretion to impose a just sentence and was forced to have Billy hanged. Federal judges find themselves in the same predicament in some drug cases. The "War on Drugs" has led Congress to impose harsh and inflexible rules. Congress has determined to do battle with what is a serious problem, but it should be remembered that as Captain Vere said: "Battle makes a mockery of justice."

What *Billy Budd* teaches us is that rules must be tempered by the requirements of justice in individual cases. Billy Budd's execution is, unfortunately, a lesson that mandatory minimum sentencing shows we have yet to learn. The result of that failure is a sense, even on the part of those who pronounce sentence, that the law and justice have parted way. On a more concrete level it has led to a situation in which the federal prison population has doubled since 1980, with more drug prisoners incarcerated now than the entire prison population in 1980.<sup>16</sup> The mandatory sentences attending drug convictions, in both federal and state systems, have led to prison overcrowding and sometimes the release of violent criminals to make room for those serving mandatory drug sentences. Inflexibility is causing the system to founder, and if the problems of withholding all discretion from judges are not recognized, the system of justice and corrections may well face the same fate as the *Avenger*.

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16. See Dan Baum, *Tunnel Vision: The War on Drugs, 12 Years Later*, A.B.A. J., Mar. 1993, at 70, 71.