

Hi all,

Thank you so much for this opportunity and for your time and attention. This is the first of a planned five-chapter book. Three of those chapters are drafted (at least two and two thirds anyway) and those two chapters that follow look at Melville's Pacific novels (Typee, Omoo, and Mardi) in the context of the legal theory of Pacific exploration, ethnography, Native sovereignty and colonization, and then at Moby-Dick in the context not only of the laws of whaling, but of perceptions and representations of whales and oceans as having constitutions of their own. A big part of the argument, in short, is that from an early part of his career Melville starts tracing a profound contradiction in the historical self-understanding of republican constitutionalism: that instead of eliminating authoritative forms of discretionary justice (the rule of law and not men, etc., etc.), the powers once in the hands of the Lord Chancellor and the Lord Chief Justice and the Crown itself intensified in concentrated forms across social space, down to the very lived experience of the individual, in their innermost selves. Melville traced the dislocation of the power to do justice, of the promise of equity, remedy, and mercy in an age of commerce and contract. If freedom in the early modern republican sense was a status, not subject to the arbitrary rule of another, Melville looked around and saw not only a whole bunch of arbitrary will and power, but purportedly free citizens wielding that power over each other, over others, and finding it wielded over them, and in ever more forceful and surprising ways.

My hope for the book is that it illuminates not only Melville's writings, but shows us something about the nature of judicial and police power in the United States, about anxieties concerning the judgments of others in so many different spheres of life, and perhaps most importantly, about the way we use law to think about justice, the way we posit an allegory of the court of law (the judgment of history and so forth) as a seemingly intractable part of how we talk about what justice may or may not demand and who if anyone is responsible for deciding, and if everybody is, then is anybody, really? If the writer Amitav Ghosh is right in his discussion of climate change, and I think he is, that today we have awoken to find ourselves "watched and judged by other eyes," then we might need to spend some time with Melville thinking about the judgments of others, human and otherwise.

Thanks again,

- Matt Crow

## The Constitutions of Herman Melville

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"You see your condition! You know where I've got you all, and you know what to expect!"  
- The Captain, in Richard Henry Dana, Jr., *Two Years Before the Mast*<sup>i</sup>

Early in the summer of 1839, a young Herman Melville, at the age of 20 years, shipped out for the first time. He was born in 1819 in New York City, in what is today lower Manhattan, the son of two prominent families. Through his mother, Maria Gansevoort, Melville was descended from his grandfather Peter, a hero of the Battle of Fort Stanwix during the American Revolution, and from the Dutch merchant class of what had once been the colony of New Amsterdam. Melville was born into an ongoing history of Atlantic empire and revolt, from annexation by the British Empire in 1664 and conflicts over the place of Dutch New Yorkers in the colony to Martin Van Buren and party politics in the antebellum United States. Personified in the figure of Andrew Jackson, whom Van Buren followed into the White House, an expansive and nationalist ideology of white democracy would play a critical role in the electoral power and political culture of Jacksonian politics. That politics promised economic security through westward expansion, and it projected an ideology of race and nation that could overcome inherited differences of European ethnicity, status, and class. This force of populist energy, of popular constitutionalism, white supremacy, and the violence of settler colonialism would capture, for a time, even Melville's imagination, as it did that of his brothers and cousins, and it would provide quite a bit of the material he used in working through his studies of law and politics in the young United States.<sup>ii</sup>

On his father Allan Melvill's side, too, Melville was descended from revolutionary heroism, through his grandfather Thomas. Allan Melvill's business connections in Boston would

help him find his wife, Maria, as they would for his son, who married Elizabeth Shaw, the daughter of Lemuel Shaw, a judge on the Massachusetts Superior Court. Melville aimed to take advantage of his name and the economic opportunities unleashed through independence and expansion by opening an import business in New York City. But the promises of the market revolution were kept incompletely at best, even for the white professional class of Northern cities. That business went bankrupt, and Allan died depressed and largely bankrupt himself just over a decade later. The experience of downward mobility greased the wheels of Democratic politics and provided its own constraints and opportunities. The rapid descent into economic hardship for the family, and a corresponding move to Albany, eventually sent young Herman looking for a work as a cabin-boy on the *St. Lawrence*, bound for Liverpool from New York. He would return in the fall of 1839, still confronting a broken family legacy. He did so with a harshly acquired and more carefully attuned sensibility to the cruelties unleashed by commerce and capital, by credit and debt, and in the ships, crews, and currents that carried these forces around the world.

His family background left a profound influence on Melville, and not just because it was the occasion of financial uncertainty that sent him to sea. It constituted his writing life, in Michael Rogin's words, as a series of experiments in "subversive genealogy."<sup>iiii</sup> His father's ruin and early death left him little by way of direct inheritance. He had his name, with an anglicizing extra vowel added by his mother. He had a keen awareness of inheritance as a fraught cultural idea in a new country that had revolted against its colonial past, unleashed commercial empire by further reforming the law of property as mobile, fostering financial speculation in landed and moneyed wealth, leaving families of widely varying status and means more exposed to emergent forces of market volatility. Melville certainly appreciated how important inheritance, paternity,

and genealogy would be in this country that had purported to move away from hereditary power and aristocracy, and that study would show up in *Israel Potter* and *Pierre*, among other works, in the 1850's. On a more directly political scale, Melville was hardly the only writer paying attention to the American Revolution and its aftermath as a crisis of paternal authority and identity.<sup>iv</sup> The thrust of Enlightenment social theory, Emma Rothschild has written, created a "fatherless world," a world of new promises and opportunities to be sure, but where customary guarantors of status, value, and identity had shipwrecked, and just so, new mechanisms for creating and policing power were emerging.<sup>v</sup> In the time of Tocqueville's American journey and more than half a century before Weber, Melville surveyed a commercial culture of anxious and uncertain watchfulness, of examination and judgment, of security and insecurity in and for the market. Tocqueville noted that in the wake of the abolition of entail and primogeniture "wealth circulates with inconceivable rapidity, and experience shows that it is rare to find two succeeding generations in the full enjoyment of it."<sup>vi</sup> Democratic and market revolutions, taken together, had unleashed popular energy and a private insecurity, a "ceaseless trepidation," and both on scales that staggered the mind of the theorist. Here, perhaps not surprisingly, "the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls... so that the whole people contracts the habits and the tastes of the magistrate."<sup>vii</sup> This new historical scene was indeed new, but it was also anchored in the persistence of powers that were crucial to its functioning. Chief among these powers was not only the juridical nature of labor control in plantations, ships, factories, and even families, but in a kind of seeping of the judiciary into the very fabric of society.

Melville would go on pay a lot of attention to that, too. It is reported by Melville descendants, with confidence, that Maria Gansevoort demanded that her eight children sit around

her bed and watch as she took her afternoon naps.<sup>viii</sup> Even before the death of Allen Melville, and given the inner strength and support of extended family that Maria would have had to draw on in the face of the future, there could hardly be a better representation of Melville's developing feeling that in the absence of the father, those on the receiving end of that inheritance would be more compelled to anxiously watch each other. In *Moby-Dick*, Ishmael's initial discomfort with Queequeg's embrace stems, in part, from a childhood memory of a phantom hand that would clasp his as he slept. He finds comfort and a partner in Queequeg, who had the strength on his own accord to disinherit himself from his father's chiefdom. Inheritance in Melville's work will serve as an allegory of antebellum law and politics. It was certainly not his only or even most important theme, but it was both biographically and philosophically central to his developing exploration of the redistribution of discretionary authority from the prerogative and interpretive powers of crowns and judges and into the people themselves.

It was his older and soon to be deceased brother Gansevoort who would set him up with his employment on the *St. Lawrence*. As the beginning of Melville's 1849 *Redburn* has it, it was "out of the goodness and simplicity of his heart" that "my elder brother" offered his shooting-jacket for warmth and a fowling piece or shotgun to sell, "since we are both short on money."<sup>ix</sup> The gun is to be delivered over to commerce, by necessity, but the jacket will surely be important to hold on to on a passage across the North Atlantic, even in summer. For the narrator, young Wellingborough, the jacket was more. It was a shield against the elements, to be sure, but it was also a marker of status and standing. He expects its quality along with his practiced conversation to identify himself to the captain as a peer, which will be the occasion in the novel for something of a teaching moment, a tutoring in proletarianization and in the shifting, crumbling distinctions of status and merit in a purportedly egalitarian polity.

Gender and dress, as many Melville scholars have appreciated, is a consistent theme, especially in the early works, and Melville felt the ascendancy of fashion in an age of commerce and its power to at once solidify social status as well as mask, subvert or sidestep it.<sup>x</sup> That is not to say that before this time fashion, like the theater in Rousseau's discourse on the arts and letters, was unimportant or any less of a way of signifying to others in the past. But Melville saw that an emergent commercial and urban modernity had to a certain extent freed—and forced—people with means to adapt and adjust the self they presented to the world, and indeed, a lot of modern commerce, including his father's failed business, quite literally banked on the perpetual capacity of sufficient numbers of consumers to do exactly that. When Melville returned to London a decade later to market his writing to London publishers, he enjoyed coming as an author, not a worker, and he took pains to make that clear. Still, as anyone can attest, dressing for the job is never a sure thing. Approaching the shores of the mitered isle for a second time, an eccentrically green coat has replaced hand-me-downs from his father and older brother, but the jacket, according his journal, only occasions a preempting "hint" from a fellow passenger.<sup>xi</sup>

Dude, you look ridiculous.

Melville would have been understandably preoccupied with making an impression. After returning from his first Atlantic voyage, in 1841 Melville set out on a whaling voyage on the *Acushnet* from Fairhaven, Massachusetts, just across what is now the Acushnet River from New Bedford, which would prove to be something of a character itself in *Moby-Dick*. His first novels, *Typee* and *Omoo*, loosely built on his own experience in the Pacific, and they established him as a singularly popular writer in the field of exoticizing romances. His third novel, *Mardi*, was much longer and more difficult, much more obviously and directly fictional, and in 1849 he was at pains in correspondence and meetings with publishers to reassure them that there was no

metaphysics in *Redburn*, that it was all "cakes & ale."<sup>xii</sup> He was also at pains to be recognized not only by publishers and readers, but by other writers, in particular Nathaniel Hawthorne and Richard Henry Dana, Jr., both fortunate sons of well-to-do families in Salem and Boston, respectively. Upon his return from England in 1850, Melville moved his family to Pittsfield, Massachusetts, in large part to cultivate his relationship with Hawthorne, and while the nature of that relationship looms larger in public memory and literary imagination, the conversation and correspondence with Dana that began with a meeting in 1847 is at least as significant. In point of fact, Dana gave Melville a letter of introduction to the British publisher of *Two Years Before the Mast*, and might well have been urging Melville to follow suit and produce a novel about his own experience in the Navy, which is how Melville would return to the Atlantic seaboard from Honolulu in 1844. Mutual friends, an experience of life at sea, and the ambition to literature all made Melville's relationship with Dana both personal and practical, but it was philosophical and political, too. Dana was along with James Fenimore Cooper and Melville, after *White-Jacket*, the leading literary interrogator of the conditions of life on board US ships and how that life squared with the professed ideals of an egalitarian country. He was a lawyer whose advocacy would go on to cover the rights of sailors and officers, and captains, as well as the relative powers of presidents and governments over ships and their cargo during the Civil War. Dana was Melville's colleague in the study and illumination of life before the mast and under command at sea.

While Melville was off in the Pacific, however, a family member of his was having some of his own in the Atlantic, also in the Navy. Melville's cousin, Guert Gansevoort, first officer on board the USS *Somers* sailing for home off the western coast of Africa in 1842, participated in a trial for alleged mutiny at sea that would lead to the execution of three men, to a scandal that would affect the highest seats of government and command, and would set the stage for

Melville's greatest and most direct mediation on discretionary justice at the end of his own life. Long before *Billy-Budd*, however, Melville was drawing on the events on the *Somers* and their aftermath, and a wider context of debates over law and rights in maritime and specifically military settings. That work is as present in his early writings as it is in his last. These and other instances and narratives of seemingly arbitrary and often cruel summary judgments, carried out at the barest limits of recognizable legal authority, fired the beginnings of Melville's allegorical study of life in and under Leviathan, that avowedly artificial personage of the distinctly modern state.

And so, *Redburn* and *White-Jacket* were both reflections not only on Melville's own life and experience, but on the global legal history of his present. They are in some sense histories, or they contain histories and narratives of historical events, without a doubt, but they are also substantively and self-consciously historiographical, in that they consider the work that narratives and images of events do in law and politics, participating in a broader consideration in the history of thought of how societies think about their place and role in history. They are Melville's fourth and fifth books, respectively, but they get primary focus here in the first chapter of this book because out of all of Melville's work they are the most directly reflective on his first experience of going to sea.<sup>xiii</sup> Melville's experience and his subsequent theorization of what it meant to find oneself at the very limits of law, beyond law, and at the same time subject to its force in a way that was, to Melville, shocking, and he knew he was lucky to come home to write about it at all. He drew on the controversial legacy of events such as the *Bounty* mutiny and the naval battles and legal disputes of the late eighteenth and early nineteenth centuries, and he drew on Dana and other authors in their own narratives of this history. He drew on his own experience and that of his family, and he drew on the intellectual history of law and politics, on political

thought and the philosophical histories of law and society that characterized so much of Anglophone social theory in the preceding century of Enlightenment. As the intellectual historian Istvan Hont demonstrated, that project of writing philosophical histories of law and society in a hopeful age of commerce was beset by the realities of a recent history of early modern denominational and geopolitical warfare, of state rivalry and organized force and violence on a global scale.<sup>xiv</sup> Lurking in those realities and the awareness of them, from the most optimistic visions to the most radical and reactionary critiques, was an image of how power worked no matter what people chose to do or say about it. When Melville shipped for home as a common seaman from the Pacific, he enlisted on the USS *United States*. That journey is the subject of *White-Jacket*, but at the end of *Omoo*, where the narrative leaves off and the narrator enlists for passage home, the ship is a man-of-war, and not for nothing is that artificial man of a ship named the USS *Leviathan*.

#### Law and Judgment at Sea

Over the course of the narrative in *White-Jacket*, published in 1850, Melville frames his consideration of naval policy in the context of early modern law and empire. The book suggests, pretty directly, that its author and his fellows were more a part of this ongoing history than confident projections of the progress of rights and liberty would lead one to believe. In *White-Jacket*, Melville comes to an extensive consideration of the Articles of War that were passed by Congress in 1800 and which formed the legal basis for governance and discipline in the Army and Navy. The Articles, which grew out of earlier regulations of the Continental Army and the previous two centuries of British attempts to enforce discipline in the crews of its expanding fleets, allowed for corporal punishment and left a wide berth for discretion on the part of

commanding officers. "Whence came they," he asks, for "they cannot be the indigenous growth of those political institutions which are based upon that arch-democrat Thomas Jefferson's Declaration of Independence? No, they are an importation from abroad," from Britain and its empire, "whose laws we Americans threw off as tyrannical, and yet retained the most tyrannical of all."<sup>xv</sup> This is the paradox Melville will wrestle with over the course of his career: not only the continuities but the intensification and innovation in the arts of exercising power over the lives and bodies of selves and others.

The deep body of scholarship on maritime social and labor history has reconstructed an eighteenth-century Atlantic world where the very real threats of flight, mutiny, and revolt prompted Parliament and the Admiralty to back extraordinary measures to keep discipline across the fleet. A potentially transnational maritime proletariat was a pressing problem for the British Atlantic empire.<sup>xvi</sup> This was a fleet composed in large part of a vast array of mostly desperate men, many of them impressed sailors taken from other ships or states, and that included men who had either escaped or been transferred from slavery in the Americas. The American, French, and Haitian revolutions posed radical threats to the imposition of order, and at least in the case of the latter two, this was even more the case for the United States than it was for Britain. Policing the port cities of the southern United States, and the movement of bodies and ideas in and across those jurisdictions, was a central question of policy in the early republic.<sup>xvii</sup>

Melville's "genealogy of the Articles of War," or Chapter 71 of *White-Jacket*, is largely true to its name, situating naval policy in the history of disciplinary practices, and British fleet regulations and responses to mutinies. The following chapter takes as its title an epigraph, a quotation from the Consulate of the Sea, on "the good ordinances of the sea," and provides a selective survey of what might anachronistically be called the law of the sea in the ancient and

medieval Mediterranean and Atlantic worlds. That chapter deepens the inquiry, and shows Melville going beyond a genealogy and toward a broader, more radical consideration of how law has constructed the maritime environment. A consideration of the "unjust, despotic, and degrading laws under which the man-of-war-man lives" reveals a form of "judicial and administrative authority" that is "in most cases entirely discretionary," a "judicial severity unknown on the national soil."<sup>xviii</sup> For Melville, the stark contrast between the lawlessness of captains and officers and the ferocity with which they use the law against sailors, and so the question of "who put this great gulf between the American Captain and the American sailor" is not a matter of ancient tyrannies or insufficient progress. There is something *American* about that gulf and the need for it. "We moderns" Melville intones, may have civil rights that many in the past did not, but mariners in the distant past enjoyed a freedom unknown to the American sailor, that epitome of the empire of modern liberty. A comparison with the Roman laws of the sea in Justinian's Digest and other ancient sources, along with the customary laws gathered and published in the medieval world to facilitate growing trade and the safety of merchants across mixed and contested jurisdictional authorities, leaves the reviewer with only one conclusion. Relative to the present, "they were ocean democrats in those days," and a big part of Melville's work will be to ask why it is that at the moment of democracy's apparent ascendancy, "ocean democrats" had faded from the scene of modern law and politics.<sup>xix</sup>

Any evocation of the ancient world that holds it up as idealized space from which to judge the present is doing some polishing, no doubt, but what matters for Melville is the work that narratives of law and politics do in the present. A stark contrast arises between the freedom of the ancient North African sailor to seek work or even restitution in a port in the Greek Islands and the image of the American sailor, perhaps possessed of full citizenship in the white man's

republic of Thomas Jefferson's and Andrew Jackson's dreams, whipped for missing a bell, or even hung from the mast for little more than a lark. Even if these extreme cases were rare, they were reflective of a broader reality that troubled American democratic and racial ideology. With Freud, Melville might have said, somewhere a sailor is being beaten.

Melville's work, and in particular his invocation of ancient "ocean democrats," gestures to a history of maritime law, and along with the gesture itself, that history warrants appreciation. It was indeed the case that even while the Romans came to know the Mediterranean as *mare nostrum*, our sea, the Digest of Justinian, a frequent source of Melville's, recognized that same sea as a place of customary legal pluralism, not subject to the normal operation of territorial sovereignty or claims to possession, public or private. In Justinian's Institutes, "the things which are everyone's are the air, flowing water, the sea, and sea-shore," and so "nobody can be stopped from going onto the sea-shore," and indeed, "the right view is that ownership of these shores is vested in no one at all."<sup>xx</sup> The shore in this framework is the opening of civil law out onto a space governed by the maxims of the law of all peoples, and law there is customary, situational and negotiated. In response to a petition of one Eudaimon of Nicomedia to the Emperor Antonius that told of being robbed after shipwreck in the Cyclades Islands, the Emperor is quoted in the *Digest* to have responded that "I am, indeed, the Lord of the World, but the Law is the Lord of the sea, and this affair must be decided by the Rhodian law [an assemblage of customary maxims attributed by the Romans to earlier Greek maritime communities] adopted with reference to maritime questions, provided no enactment of ours is opposed to it."<sup>xxi</sup> The self-styled ultimate temporal power on earth was constructed by its leading theorists and defenders as an office that tiptoed to the water's edge. This was hardly the rumbling force of the *senatus populusque*.

From the perspective of the subsequent centuries of European law and empire, it is clear there was a catch that would pervade the intellectual (and literary) history of maritime law up to the modern day. Maritime matters were a question of praetorian jurisdiction, which meant that judgment was an extension of imperial prerogative and followed from general considerations of equity and natural justice, regional custom, and the facts of a specific case. The sea is open, but precisely because of its openness, legal disputes are not covered by the civil law of any single polity, and so what counted as law and justice in any case was largely situational and dependent on a broadly defined judicial power. Praetorian jurisdiction was first and foremost discretionary jurisdiction, and little of this would change by the period of early modern European oceanic empire that in turn forged the theoretical underpinnings of modern international law. Melville cites as examples the maxims of the Spanish Consulate of the Sea and the laws of the Hanse Towns in the late medieval and early modern periods as examples where the rights of all at sea were built into customary understandings of natural law.<sup>xxii</sup>

Indeed, a recognizable ancient natural law framework was still in play in Hugo Grotius' *Mare Liberum*, published in 1609, which defended the rights of free navigation and drew fierce critiques from English theorists such as John Selden and William Welwood. But even Grotius confronted a fundamental problem in identifying what powers, then, had jurisdiction over wrongs committed at sea. The praetorian provenance of his particular legal construction of oceanic space is clear. With the exception of God, the supreme judge of the universe, there were two tribunals to which one might appeal, Grotius asserted. "every man's own conscience and fame, and other men's estimation of them."<sup>xxiii</sup> This is one of the points on which Welwood questioned Grotius, arguing that the extension of the power to judge over a particular case was coterminous with sovereignty over the space, but Grotius insisted this was not necessarily the

case, that a stranger landing on a foreign shore and doing no harm, would be protected "by the office and authority of the praetor." Indeed, for Grotius, all questions relating to maritime matters and rights of persons at sea or seeking shelter were to be dealt with by a judge with recourse to the *ius gentium*. The idea of the praetor, of discretionary justice, proved inseparable from the idea of ensuring any kind of justice or reciprocity at sea, and Grotius did not hesitate to repeatedly insist that this was a question of Roman *aequitas*, of equity, legal relations that he suggested bound the consciences of all free Christian princes. As they ruled over their states, so God ruled over the sea. These sites of prerogative justice, these "seats of judgment stand always open to them to whom other tribunals are shut up," and it was to these "judgment places," Grotius wrote, that "we bring a new case."<sup>xxiv</sup> Grotius turned the world into a court of admiralty, and just so, any lasting peace in global affairs depended, for him, on telling the allegory of the law of the sea.

Needless to say, despite his enormous intellectual influence, the world of global maritime law and conflict hardly fits in the picture painted by Grotius. Early modern empire and the growing recognition of jurists that ships were extensions of state power made the legal authority of captains a fundamental question in imperial legal theory. For the Elizabethan theorists of English territorial claims in the Atlantic, the captains who carried a providential history of a protestant empire into the western hemisphere of nominal Spanish dominion were in the business, and it was a business, of creating new commonwealths.<sup>xxv</sup> They were, in effect, sovereigns themselves over their ships and crews even as they drew their authority from the natural extension of royal prerogative. Beyond the scope of regular communication with metropolitan officials, they exercised discretionary judgment about when to attack Spanish galleons, or where the open ocean ended and bays or rivers began. They were founders. Empire

and the global geopolitical rivalries of European states made captains extraordinarily important and powerful figures. This is the historical argument that Melville makes in Chapters 71 and 72, that the enormous discretionary legal power of captains over their crews and their and their officers' seeming lack of any reciprocal legal accountability, even in his time, was the product of an early modern history of the legal theory of empire.

One of the many factors that makes Thomas Hobbes' *Leviathan* so important for Melville is his critical stance on the history sketched above. Indeed, as Alexander Haskell has argued, Hobbes was concerned in *Leviathan* to refute the idea of early imperial theorists that the colonies were new commonwealths under a common sovereign, and he had no time for even a hint of the idea that a captain exercised prerogative powers of their own.<sup>xxvi</sup> Security and civil peace required nothing less than a constituted sovereign vested with the final authority to interpret law and equity. For Hobbes, sovereignty, to make any sense as a legal and political idea, had to be undivided, and its writ coterminous with its boundaries. Sovereignty in this sense was a specifically jurisdictional quality, and a large part of what made a sovereign a sovereign was the control over the meaning and interpretation of law, certainly not bound by law, and not sharing in its power to decide law and equity with the jurisdictions of common law courts. The distribution of goods either given by God or wrested by labor from "the two breasts of our common mother, land and sea" was a question of sovereign nomination. The introduction of customs and rules of commerce and conduct, of propriety, "is an effect of commonwealth."<sup>xxvii</sup> It is the judgment of the sovereign and of the judicial officers who represent that singular authority to define and judge "what is agreeable to equity and the common good." This is the work of sovereign power, and for Hobbes, empire is merely a spatial extension of that same power.

Hobbes is taken by many to be an unapologetic and even monstrous theorist of absolute power and the fearful subject, but one of the implications of his thinking, and another part of what made him so resonant for Melville, was not just his suggestive choice of metaphor to think about state power in an age of oceanic empire, but his insistence that private wrongs and injustice implicated the state.<sup>xxviii</sup> Of controversies, Hobbes argued, there were two sorts, those of fact and those of law, and while in both cases there might arise a point of dispute between a party and the judge themselves, equity demanded that both "be judged by men agreed on by consent of both," and as "the sovereign is already agreed on for judge of both," he is "therefore either to hear the cause, and determine it himself, or appoint a judge such as they shall both agree on."<sup>xxix</sup> Hobbes was more continuous with Grotius than is generally appreciated, in the sense that their attention to the specifically juridical nature of sovereignty and its promise of protection through the mechanism of judicature, of discretionary justice, illuminates an alternative history of law and politics where the distinction between public and private law gets purposefully, even performatively, thrown into question. This was a history that Melville picked up on and put to work. For Hobbes, and for Melville, a captain acting unjustly and beyond the limits of law was either committing a crime or acting with what might as well be taken to be the express permission of his commander in chief. The sovereign must still concern themselves with natural jurisprudence, even if rarely, and minimally. "All punishments of innocent subjects, be they great or little, are against the law of nature; for punishment is only for transgression of the law, and therefore there can be no punishment of the innocent," Hobbes wrote, for such punishment would invite just revenge against the sovereign, a contradiction, would abrogate that body of law which every consenting and obedient subject should "be protected thereby," and finally, would violate "the law that commandeth equity; that is to say, an equal distribution of justice; which in

punishing the innocent is not observed."<sup>xxx</sup> There is no grey area here: private wrongs, inequities, are questions of the highest constitutional importance.

This strategic implication, of the private in the public, of equity in sovereignty, of a flogging in a democratic country's constitution, was a key methodological and critical principle of Melville's developing study of law, or more accurately perhaps, of his legal and juridical reading of history and politics, and indeed of the world. That principle is apparent in the multiple ways in which Melville tended to the presence and problems of discretionary authority, problems which struck at the very heart of the ideas of the rule of law and the possession of rights.<sup>xxxi</sup> Jurisdictional conflict, after all, was a fundamental part of the crisis of British Atlantic empire that would lead to the founding of the United States. In the Declaration, Jefferson and his fellows indicted the king "for refusing his assent to laws for establishing judiciary powers," for making judges "dependent on his will alone for the tenure of their offices," and for "combining with others to subject us to a jurisdiction foreign to our constitutions and unacknowledged by our laws." The location of judicial powers in the legal edifice of the empire was a primary driver of constitutional conflict across the early modern British Atlantic world, and the theory of Parliamentary sovereignty and supremacy outlined by William Blackstone in his *Commentaries on the Laws of England* and announced explicitly in Parliament's issuance of the Declaratory Act in 1766 had made the diminutive nature of colonial jurisdictional authorities pretty clear to colonial legal minds and political activists. Jefferson went even further in his draft of the Declaration, blaming the continuity of the slave trade at the feet of the crown, and in particular, at the royal prerogative. In alleging that the legitimacy of the prerogative had been compromised by the corrupting influence of the Royal African Company, Jefferson was exaggerating and covering over his own and many of his compatriots' culpability quite a bit, but one of the perhaps

ironically important elements of the accusation was that it located the central issues of the constitutional conflict in the institution of slavery, and in the powers of institutions of the royal prerogative over questions of defining legal status of persons in the empire. Particularly among theorists of an expansive white and settler colonial democracy, the power of judges to make and unmake legal personhood on an individual and a collective scale set up a profound ambivalence in American constitutional politics, an ambivalence that was at the center of both Thomas Jefferson and Andrew Jackson's contempt for Chief Justice John Marshall on the United States Supreme Court.<sup>xxxii</sup> That ambivalence was about the role of discretionary powers of judgment, and of the conciliar jurisdictions where those powers had been traditionally located, in the infamous Star Chamber and the once incredibly powerful office of the Lord Chancellor, and more generally and lastingly, in chancery and admiralty.

This, too, was part of the context that Melville produces to think with about law and rights on the ship. Of the court-martial at sea, Melville writes that here "is a Council of Ten and a Star Chamber, indeed! While it was a maxim of all "civilized jurisprudence" that man should be tried by a jury of his peers, here a sailor found himself before a tribunal of a small number of his "social superiors," and with no recourse for appeal.<sup>xxxiii</sup> Melville is zeroing in here on a study of the power that judges have over rights, to create and redefine them and to take them away, to deny even the standing of a person or a people to claim them in the first place. In time, Melville will come to explore that power at depth, as it were, but in his early works he is not quite there yet. In his early works, he had to come to terms with his own experience and to think about how that experience fit into the history in which he found himself moving. He had to examine, like Kafka, what it meant to be before the law.<sup>xxxiv</sup> As an American, and as a sailor, as a writer with equally healthy doses of democratic national pride and Anglophilic historical imagination, he did

not have to look far to find examples of a developing idea, that modern life had been imagined largely as an escape from the uncertainties of discretion, and in his study of that life he found discretion and anxieties about its use and staying power everywhere he looked.

#### From Before the Mast to Before the Law

The maritime environments of early modern European and American history made interrelated questions of prerogative, jurisdiction, and personhood the driving issues of constitutional politics. In the United States, that history continued well into the antebellum period, if not beyond, but it did so in ways that were transformed by Enlightenment legal and historical thought, by the opportunities and problems posed by the commercial revolution to democratic politics, by slavery and the solidifying if fecund ideology of white supremacy, and by the expansion of American empire across the North American continent, around the South American continent, and into the Pacific. Amidst the ascendancy of a white working man's purportedly democratic vision of the nation, Melville encountered a "motley retinue" of sailors from an astounding variety of backgrounds.<sup>xxxv</sup> Most of what they had in common could be summarized in the paradox of being in some sense the embodiment of liberty, the congenial face of the freedom to move and seek out, all while being subject to a discipline, and a jurisdiction, for which properly legitimating legal theory was hard to come by, and this in an age when there was a lot of legitimating theory going around.<sup>xxxvi</sup>

This was the broader context of states and empires in which Melville situated his consideration of the ship and the captain, but he was hardly lacking in more immediately maritime sources and examples with which to flesh out his study. The mutinous events on the HMS Bounty would certainly shape his and many others' sense of the risks and imagined

rewards of sailing in the Pacific and about the limits of law and command, but it was much more the subsequent inquiry and court-martial, and the legal history of the mutiny and its aftermath, that gave meaning to the event as a case study in discretion and its discontents. Secondly, the writings of Richard Henry Dana, Jr. brought attention to law and oppressive violence on American ships, opening space for Melville's own ambitions as a writer and shaping the contours of his study. Finally, most pressingly and directly, the events on board the USS Somers in 1842 made clear and explicit what was at stake in thinking about judgment at sea, and about the implication of the central tenets of American law and democracy in the power over life being exercised beyond the limits of the land.

The harshness of naval life and the felt remoteness of the Pacific that emerged from narratives of the events of the Bounty mutiny were hardly lost on Melville, who recommended a perusal of the "Narratives of Byron and Bligh," to any erstwhile young man thinking of becoming an officer in the Navy.<sup>xxxvii</sup> John Byron, Lord Byron's grandfather, in his *Narrative of the Loss of the Wager* recounted the story of officers on board a British ship wrecked on the Chilean coast in 1740 while attempting to round the Horn, and the mutiny and desperation that followed. William Bligh's *A Narrative of the Mutiny on Board His Majesty's Ship Bounty*, published in 1790, was an attempt on the part of the captain to get ahead of the developing story of his abusiveness and incompetence before the courts of official inquiries and public opinion. These narratives raised questions of duty and the terrors of nature to be sure, but they also raised issues of the intersections of cultivated sensibility, masculinity, and class.

Introducing the readers of his own narrative in *White-Jacket* to two "junior lieutenants, lords and noblemen, members of the House of Peers," Melville identifies them as usefully representative of the two extremes of officer types: the genteel man who takes to the sea as a

professional, in search of advancement more than adventure, and the sailor's sailor, the scarred and tested man whose body has seen and drunk it all. The latter is known as Mad Jack, and the former as Selvagee, so named by the crew after a thin rope that ties the weight of the anchor's chain to the capstan holding the stronger messenger rope on board, "the exact type and symbol of a tall, genteel, limber, spiralizing exquisite."<sup>xxxviii</sup> Selvagee, whom Melville's narrator mocks as having looked at Hermit Island off Cape Horn through opera glasses, and suggesting to the captain that the sails be touched up with lavender so as to not acquire too much of a musty smell, is a bit closer to home for Melville than the initial portrayal allows. He was "one of those officers for whom the sight of a trim-fitting naval coat had captivated in the days of his youth. He fancied, that if a sea-officer dressed well, and conversed genteelly, he would abundantly uphold the honour of his flag, and immortalize the tailor that made him. On that rock," Melville assures us, "many young gentlemen split."<sup>xxxix</sup> Selvagee is reflective of his own awareness of the blood, sweat, and tears that underwrite the honour of the flag at sea, the forced openness to the judgments of others that an imagined world of professional merit, self-fashioning, and the intimacies of a ship entailed, and the anxieties of sons in the absence of their fathers and the insecurities of performed manhood to which Melville will always be found paying careful attention. The officer played at the appearance of self-mastery and control, especially when the captain was on deck, but when the storm came, Melville intones, all of the crew will be grateful when the ranking officer supersedes "with his paternal authority," for as everyone knew, "Selvagee, you are no Neptune," and alas, "there was no getting the lavender out of you."<sup>xl</sup> These judgments may be harsh, but they are meant to be, or to appear to be. They stage the fraught proving grounds of masculinity and esteem, and more than that, the feeling of judging and being

judged, of penetrative perception, and the resulting generalized state of critical watchfulness that such an economy of souls produces.

Of the *Bounty* mutiny and its aftermath, the anthropologist Greg Dening writes that "blurred genres of behaviour — being somewhere between personal and institutional, between entrepreneurial and naval — can make the trivial momentous," and breach the private space of "institutional men."<sup>xli</sup> The mutiny led by Fletcher Christian in 1789 against William Bligh's command of the HMS *Bounty*, off Tahiti, provided a lot of material for a study in discretion and its place at the boundaries of legal legitimacy. Bligh had served as a ranking officer on the *Discovery*, on Cook's third and final fateful expedition in 1779, and as Dening points out, the event of Cook's death robbed Bligh of the structure of advancement, fellowship, and personal connections in which he had successfully charted his career.<sup>xlii</sup> After a decade of relative setbacks, he was given command of the *Bounty* on the recommendation of Sir Joseph Banks, who had also served under Cook as a botanist, on an experimental mission to the Pacific to grow and transport breadfruit for the purposes of supplying cheap, reliable food to the enslaved labor force in the British West Indies, cut off from trade with the thirteen mainland American colonies and all the more important to the British Empire since the signing of the Treaty of Paris in 1783. Bligh lacked the political capital in the officer corps to pick his own officers, many of whom were the sons of better-connected families, and he sailed on a relatively unheralded voyage to the remote Pacific in search of food for the enslaved. What would have been his cabin was used as a storehouse for plant specimens, and he shared cramped quarters with the other officers. His observations of indigenous culture on the island of Otaheite take place in a mirror, always reflecting back on his own history: "I know not if any action, however meritorious, can elevate a

man above the class in which he was born, unless he were to acquire sufficient power to confer dignity on himself."<sup>xliii</sup>

Bligh had reason to find his sense of his status and own private world punctured by social and institutional realities. He was, by all accounts, a violent, physically and verbally abusive captain. He was intimately if imperfectly aware of the performative and theatrical aspects of command and punishment, and his inability to master the politics of the ship became apparent even as he tried to master the politics of the court waiting at home. The world, for him, was a courtroom.<sup>xliv</sup> As he was "conscious of my integrity," he recalls, "I began to conceive of hopes, notwithstanding so heavy a calamity, that I should one day be able to account to my King and country for the misfortune."<sup>xlv</sup> The narrative, which he started preparing almost immediately after being cast off with others from the *Bounty* in one of the ship's boats, depicts the mutiny as a mystery, a quiet conspiracy of vain and ambitious, luxuriating men taken up by the availability of sex with native women and the extended liberty promised by what they were able to experience of early settler life in Tahiti. Few observers at home were convinced that the events were as truly opaque to legal and historical explanation. Few observers, however, questioned the need of the law and command to provide that explanation, locate responsibility, and pass judgment accordingly.

If the task of Bligh's *Narrative* and memory was to stitch and cover the wounds in self and naval order opened up by the mutiny, the job of the court-martial was to dig in and find other wounds so that someone at least would be punished, for something. Indeed, as Denning again demonstrates, a large part of the goal of the court-martial, Bligh's *Narrative*, and the testimonies of the ten men who were dragged before it was to make histories.<sup>xlvi</sup> Having survived shipwreck under arms after being captured in Tahiti, the ten men came before a court-martial presided over

by Vice-Admiral Lord Hood, working under the jurisdiction of the Admiralty on board the HMS *Duke* in Portsmouth Harbour. The setting of the ship allowed for a direct line of inquiry without the possibility of claiming common law rights of jury and cross-examination of witnesses. In admiralty, Lord Hood exercised a conciliar jurisdiction of immense discretionary power, directly tied to the royal prerogative, as long as he was on water. Of the ten men, four were acquitted on testimony from Bligh, three were eventually found guilty to varying degrees but pardoned by the crown, and three men, Thomas Burkitt, John Millward, and Thomas Ellison were hung from the yard arm of the *Duke*. The nature of the discretionary power wielded by Hood was inquisitorial, and the procedure of the trial consisted of his direct questioning of the accused and any other witness. In these settings, as in other conciliar jurisdictions, including other admiralty and chancery proceedings on land, the judicial office was empowered to find facts, establish motives and mitigating circumstances, to question and examine conscience, and to come to a judgment based on their own conscience and a balanced consideration of what law, justice, and ordered command of forces at sea required. The only appeal from Hood was to the King's Mercy, to the prerogative itself and perhaps its ultimate manifestation in law, the pardon power, and in this case that power intervened to save the lives of four men. As modern scholars of the *Bounty* affair have noted, deciding who received the benefit of that power and who did not was largely a question of access to legal counsel or family connections. Discretionary justice is always exactly that.

There is a lot going on here that would in time come to shape the legal cultures of ships in the British and American navies of the nineteenth centuries. Certainly, Melville picked up on few strands of the contorted history of discretionary justice, and of the discourses of conscience and casuistry that had developed over the course of early modern history as a way of answering

one's judges, from the private art of Christian self-examination to the judicial proceedings of the highest courts. For one, the feeling of being exposed to judgment, of being before the law, is something Melville will come to again and again as a kind of exposed nerve of modern law and history. Peter Heywood, an officer who one of the accused and pardoned, wrote to his family that there was no need for lawyers, as naval officers would not trust or respect them. More importantly, in a jurisdiction like the one he found himself under, it was his ability to account for himself directly in answering probing questions from the judge that would decide his fate. "It is not the same as a trial on shore," for lawyers would do no good, and he could rely only on fighting his own battle, on "truth undisguised."<sup>xlvii</sup> The language of natural communication and "undisguised" speech was of course an ideal of enlightened sociability, but that ideal and the desire of unmediated expression and experience carried with it a host of problems, not the least of which was a healthy skepticism that human language could ever be so fully and authentically unvarnished.

Even more glaringly, the nakedness to the watchful eyes of others entailed in such an ideal was also associated widely with the savage, and the animal, with nature understood as that which does not clothe itself or appear decorated by customs, fashions, and rhetoric. This idea of bare life, the creaturely, has been at the center of arguments in modern critical theory about sovereignty over bodies and the legal personhood, or lack thereof, of prisoners, refugees, and the enslaved.<sup>xlviii</sup> "Who ain't a slave," Ishmael asks, "tell me that."<sup>xlix</sup> The sailor matters here, for Melville, not because they are purportedly stripped of civic identity in the same ways (they were not, as he was very aware), but because even the free sailor experiences the intensification of examination and judgment, of being before decision and command to be sure but also in close contact with one's peers, of being unable to hide and always being watched, not by God or even

by the Captain per se but by themselves and each other as much as by officers and mates. This policing is something that Melville's work documents with growing acuity over the course of his career as a widespread experience of modern life.

With the titular use of an everyday maritime phrase, Richard Henry Dana, Jr., would give radical voice to that experience, of being before the mast. After meeting in 1847, Melville kept up efforts at a correspondence with Dana, who encouraged him in the writing and publication of *White-Jacket* and *Moby-Dick*, and it was to Dana that Melville first gave some inkling of the nature of his book on a whaling voyage, "a strange sort of book," Melville wrote, "& to cook the thing up, one must needs throw in a little fancy, which from the nature of the thing, must be ungainly as the gambols of the whales themselves. Yet I mean to give the truth of the thing, spite of this."<sup>i</sup> That *Moby-Dick* would among other things be a mediation on what it meant to report the truth, on testimony, to make history, is beyond doubt, but that is no less the case for his other works. "The man-of-war book, My Dear Sr, is in some parts rather man-of-warish in style," Melville wrote Dana, "aggressive." But, he continued, "you, like myself, have experienced in person the usages to which a sailor is subjected," and so will not wonder at the book. If the book "is taken hold of in an unfair and ignorant way," Melville hoped Dana would say a supportive word about the truth of its harsh portrayal of life at sea. "Accept my thanks for your kindness," he concluded, "and believe me fraternally yours," a "sea-brother."<sup>ii</sup> *Redburn*, which had just been published, Melville assured Dana, was not the book to which he was referring. Melville had written *White-Jacket* as a deeply political and potentially radical, dangerous book.

A year later, Melville would write Dana again, thanking him for kind words on *Redburn* and *White-Jacket*, and repeating his love of Dana's *Two Years Before the Mast*. "Strange, congenial feelings" accompanied his own first reading of the book, Melville wrote, after his first

voyage that was the subject of *Redburn*, and he felt tied to Dana, "welded to you by a sort of Siamese link of affectionate sympathy." That such feelings had reciprocated, "called out by any White Jackets or Redburns of mine," was, Melville wrote, nothing short of delightful.<sup>lii</sup> *Two Years Before the Mast*, published in 1840, was a memoir of Dana's time as a merchant seaman on a voyage around Cape Horn to the California coast. He was born to an upper-class Boston family, his father and namesake was also a writer and lawyer, and after being suspended from Harvard and contracting an illness, he enlisted as a sailor and joined a crew, living "before the mast." The voyage had a lasting impact on Dana, as much as any of Melville's had on his work, and he returned home to Boston to write, to study and practice law, and he went on to represent accused sailors and officers, and fugitive slaves in freedom suits. He also represented the Lincoln administration in its effort to use and assert the discretionary powers of the presidency in its seizure of merchant vessel cargo, its blockade, and the specifically maritime aspects of the Union's prosecution of the Civil War. He would later represent the United States in resolving legal and diplomatic disputes over fishing rights and damages in marine borderlands with Canada. He was an abolitionist and a reformer, and his portrayal of the voyage he took himself from 1834 to 1836 is among other things a study in life before the mast as a distinct but telling crystallization of what it meant to be before the law.<sup>liii</sup>

The embodied experience of being-subject-to is Dana's central focus, and it took on particular resonance in the antebellum context of growing disputes over slavery, the slave power, and the inseparability of these disputes from those over rights and privileges of common white men in the age of Jackson. Dana was certainly attentive enough to the blurring of the private and the institutional on a ship. He too observed officers who were there more by way of connection and the quest for advancement than competence and experience at sea, and the layered unwritten

rules that governed status and conduct in such spaces. Like Melville's narrator Wellingborough in *Redburn*, he too will see a man lost to the sea, and wonder at the seeming arbitrariness of who gets to survive these voyages and who does not, and the emotional lives of intimate comradery. When a "dozen men are shut up in a bark, upon the wide, wide sea, and for months and months," they get to know each other, and the sudden absence of one is a loss none of the others easily forget. When he and a friend have their request granted to move their bunks from the steerage to the forecabin, they are elated, because in the steerage one is but a "mongrel," and at all times "immediately under the eye of the officers."<sup>liv</sup> In the forecabin, you are one of the crew, a collective recognized even by the watchful officers as having something of an independence to it, and you learn the ways of experienced sailors, and the customs of a ship. You are given a new identity and participate in a new culture. Rather than being naked and exposed as a landed newcomer, you are clothed, or allowed to cloth yourself with others, in a new light.

Still, that could change in an instant. For Dana the most disquieting thing about the voyage was its omnipresent uncertainty, from the dangers of the sea and the apparent confused and haphazard trading relationships to the uncertain duration of the stay and voyage, and more than anything else the threat of punishment that lurked at all times on board. He and a fellow sailor witness the captain, first restraining and then yelling at a sailor for purportedly asking questions. "You see your condition! You see your condition," he repeatedly yells. "I'll make a spread eagle of you," he threatens. When the sailor protests that he is no "negro slave," the captain is quick to reply "then I'll make you one... I'll teach you all who is master aboard!" The man is cuffed and laid out for flogging, and as Dana suggests, legally there is nothing to be done by way of assisting the man or resisting the captain. If you aid or resist, it is mutiny, and if the mutiny is at all successful, even for an instant, it is piracy. As the man is flogged, the captain

revels in his power, dancing and telling the rest of the crew he flogs because it suits him and really for no other reason. When the man calls out for Jesus Christ, the captain responds "*he can't help you.*" And he goes on: "You've got a driver over you! Yes, a *slave-driver—a negro-driver!*"<sup>lv</sup> 'You see your condition' is the captain's most repeated phrase, and in Dana's hands the extremity of that situation and its implications for law and legality do not escape notice. The purpose of flogging is as much illustrative as destructive: it brings into visibility the condition of being directly and nearly nakedly subject to discretionary power. Interestingly, however, for Dana this was not just a question of the evils of such discretion. Recalling the flogging incident and his experience in witnessing it, his own seeing of his condition, he knows that the experience of going to sea is one where the "fine drapery" of the ocean's appeal falls off. You are under sail and under orders and judgments.

But, Dana suggests, "I have no fancies about equality on board ship," as the emergencies a ship itself and its captain can be subject to themselves require the directionality of decision. "He has great cares and responsibilities; is answerable for everything; and subject to emergencies which perhaps no other man exercising authority among civilized people is subject to," Dana writes of the figure of the captain, and it is an extraordinary and deeply learned statement, even if it reveals the mind of its establishment author tactfully tiptoeing away from any radically democratic or revolutionary implications of his portrayal, and even if we allow for a certain self-covering to be not all that surprising in the last chapter of an aspiring member of the legal and literary elite's first book. Captains of merchant vessels are subject to the common law, after all, as anyone else is, Dana writes, and so the matter at hand is less a question of writing new laws than of holding the responsible *responsible*, of "the administration of the laws" which had been, he admitted, "of no little embarrassment."<sup>lvi</sup> Merchant sailors brought before courts faced a

number of disadvantages, among them the fact that they are almost always treated better when there are passengers aboard, so direct but purportedly impartial witnesses to extreme cruelties were hard to come by. Even just considering the soft power of status and rank, "the sailor comes in court under very different circumstances from the master. He is thrown among landlords, and sharks of all descriptions." But precisely because of these inequities, where the sailor faces "a cloud of suspicion as to his character and veracity" while the captain is backed by "owners and insurers," discretionary justice is not only still present but necessarily so. Dana goes on to argue that for sailors "positive legislation would be of no manner of use. There can be no rule of law regulating the weight to be given to the seamen's evidence. It must rest in the mind of the judge and jury," and here Dana is probing a problem in legal thought that will occupy Melville in far broader if less obvious contexts. No law written by people will ever sufficiently proscribe the interpretive use of law. Discretion is inexorable, and for Dana, for the sailor's best hope is the intervention of a conscience other than the "hackneyed conscience" of many captains, of the feelings and conscience and wider consideration of context from a judge, of good old fashioned arbitrary, subjective, discretionary justice. It was a mistaken and developing theme of many well-intentioned reformers, Dana concludes, that law and policy had the power "to set all right at once," but such illusions usually work to obscure the more difficult project of transformation.<sup>lvii</sup> This is not just a conservative or moralist and gradualist argument. For a legal mind in particular, it is a startlingly forthright acknowledgment of an intractable reality, that discretion, even it when runs silent, runs deep.

It would be impossible to overstate the centrality of prerogative, judicial power and discretionary justice to a great deal of modern law and politics, and that is part of the legal history gestured at in the work of legally attentive writers like Dana or Melville. Discretionary

justice amounts to something like a repressed trauma in the history of modern political thought, but for Melville, this question of justice and its demands, and who is responsible for those demands, for judging law and equity, is not simply one for formal court proceedings or jurisdictional controversies. Rather, for Melville, the conjoined forces of democratic and commercial transformation made the responsibilities and opportunities for exercising judgment, and being subject to judgment, ubiquitous. As Denning observed of the ship, the normal boundaries of the private and psychological had bled into the institutional, and vice versa, and in time Melville will take his study of those boundaries into an astounding variety of contexts: Ahab will speak of being bled into by his first encounter with the whale.

In *White-Jacket's* consideration of the Articles of War and the wider nature of discretionary authority at sea, Melville understatedly cites an example that no doubt shaped the writing of this work and would form the basis of *Billy-Budd*. The example, Melville wrote, "at any moment may be repeated. Three men, in a time of peace, were then hung at the yard-arm, merely because, the Captain's judgment, it became necessary to hang them. To this day, " he concludes, "the question of their complete guilt is socially discussed."<sup>lviii</sup> Melville's story has its origins in the experience of Melville's cousin, Guert Gansevoort, who in 1842 found himself an officer on board the training vessel USS Somers, sailing for home off the Atlantic coast of Africa when rumors of mutiny started to swirl. Gansevoort reported three sailors, Philip Spencer, the purported ringleader, Samuel Cromwell, and Elisha Small, to the captain on November 29th. Spencer was put in the brig first, and Cromwell and Small the following day. A trial, not a formal court-martial, was held by Captain Alexander Slidell McKenzie, advised by his officers, and on December 1st all three sailors were executed, hung from the yard arm of the main mast, and after a brief funeral, their bodies, in the brief words of the ship's log, were committed to the

deep. The case achieved particular notoriety because Spencer was the son the of the sitting Secretary of War, John Spencer. McKenzie faced a board of inquiry, followed by a court-martial, in which he was found not guilty, but the event and the public reaction to it put energy behind growing calls for reform of the treatment of sailors in the Navy. Widely considered a gross miscarriage of justice by close observers such as James Fenimore Cooper and Thurlow Weed, McKenzie's decision found its defenders, too, notably Richard Henry Dana Jr., and this within just over a year of the publication of *Two Years Before the Mast*.<sup>lix</sup>

Rumors of the events spread throughout the nation's news media, and newspaper accounts blamed the dangerous ideas that purportedly seized the minds of the rebels, in seafaring novels like Cooper's *Red Rover* or a book that Spencer owned, the *Pirates' Own Book*, a collection by Charles Ellms of piratical romance, published in 1837. The allegations against Spencer and his two comrades were that they aimed to take over the ship and use it to go pirating, that all who resisted would be killed, it being rumored that he had been heard to suggest "dead men tell no tales" as the operating principle for their revolt. According to the recollection recounted by Guert Gansevoort to his own younger brother, also a naval officer, as the three men were marched to their deaths it was Elisha Small who asked Gansevoort to say goodbye to him, Gansevoort who told Small this execution was the duty of the captain and the officers to the safety of the ship and the honor of the flag, and it was Small whose final words he remembered as "God Bless the American Flag." Billy Budd boards the *Bellipotent* by yelling "goodbye to you too, old Rights of Man," and meets his own death with "God Bless Captain Vere."<sup>lx</sup> Of course, neither Melville nor anyone else fully knew the truth of Spencer's intentions, to say nothing of those of Small and Cromwell. What we know is that they found themselves standing before the law of command and decision at sea, and that the three men paid for whatever might have been

their sins with their lives. For Melville, it was an event that bled into his extended family's troubled life, and that struck at the heart of emergent narratives of rights, law, and democracy. The event was an historic case-study in discretionary justice, in the attempt to bring discretion to heal with what could only ever amount to more discretion, from public opinion and literary portrayals to political trials and the continued uncertainty in law and legal theory, to which Dana gave testimony, about how law's promise of justice could survive the acknowledgment that no law, policy, or procedure could work the necessary contingencies of judgment out of cases or constitutions.

Dana, along with Charles Sumner and Francis Lieber, were outspoken defenders of the legality of McKenzie's order. The intertwined allegiances of Boston gentry and the political ascendancy of Jacksonian anti-elitism were at war, and indeed, Cooper would record in his own review of the case, noting the close ties of the captain and officers, that the ship had had "too much of the character of a family yacht."<sup>lxi</sup> But the accusations of partial justice cut both ways, and so did the discomfort with the indeterminacy of judgment and the centrality of powerful juridical offices to the functioning of American law. Sumner would go on to write that the ship had been in something like a "state of war," and in the face of "the sounds of arms the ordinary municipal law, which might before have controlled the duties and responsibilities of officers, became silent." Not unlike a dictator, it was McKenzie's duty to "*see that the ship received no detriment*. The law, that laid on his shoulders the burden of these transcendent powers," demanded their execution.<sup>lxii</sup> A person with judicial authority, Sumner concluded, had to be protected by the law in their judgments, and that protection was the foundation not only of the common law but of "universal law," of "natural equity." During the inquiry, Dana recorded in his diary that he boarded the Somers in port, and took note of how small it was, how cramped, and

how intimately dangerous any hint of mutiny would feel to a responsible officer on board. Like Bligh, McKenzie found himself commanding a smaller vessel on a less important mission than he would have liked, joined by officers and even a member of the crew, in McKenzie's case, who were sons of privilege. Like Bligh, his own written report of the events only intensified the uncertainty, and was widely taken as evidence that the point of action in the story was the felt insecurity of the captain rather than any real threat of rebellion.

When McKenzie's report on the events to the board of inquiry was published, even supporters of his like the diarist Philip Hone gulped, for in it they read a man admitting that he had made up his mind on the necessity of the execution even before consulting his officers, and openly conscious of the fact that the young man at the center of it all was the son of the Secretary of War, under whom McKenzie himself served. McKenzie reported that in his judicial examination of Philip Spencer, he had told the young man, who said he worried that this might hurt his father, that the ship could not return home for precisely that reason, that "it was not in nature that his father should have interfered to save him," that his father would have been bound by duty to abstain from intervention, if that was even possible for a father to do in the case of his son. McKenzie actually implies to Spencer that in holding the trial at sea he is taking the terrible burden of judicial power onto himself, to spare Spencer's father the scandal of confirming public cynicism about political connections and corruption, and in a note to his own report, admits that this might have been "an extreme and erroneous opinion, which I do not attempt to justify; I am only faithfully recording what passed on the occasion."<sup>lxiii</sup> Now, it might be that Philip Spencer mentioned his father as a kind of not too veiled threat, and it could be that McKenzie accurately or inaccurately reported that as part of the trial at sea as a way to bring the elephant in the room into light. An anonymous report from the federal government, published in the newspapers in

response to McKenzie's, widely taken to be authored by John Spencer, picked apart the account as nothing less than an extraordinary admission of uncertainty and therefore of guilt. Newspapers in support of McKenzie talked about the necessity of command and respect for order under sail, while others proclaimed the unanimous verdict of the public voice against the captain. Like Bligh, McKenzie felt himself under judgment from government and public opinion alike, and that anxiety was transparent to even the most sympathetic reader, and indeed was probably at the root of what sympathy he received, particularly from astute observers of the use of prerogative powers like Dana. It was the testimony of the officers, and of Gansevoort in particular, that went a long way in turning the tide of the court-martial, held in order to prevent the case from heading to a civil court where the judgment of public opinion might shape the judgment of the legal process, and where McKenzie's chances would have been much more slim. The anxiety of judgment, of wielding it and being subject to it, reverberated up and down the events and their aftermath. Evert Duychinck, Melville's publisher, scoffed at the "judicious sense" with which the proceedings went forward, the magisterial formality of those transcendent powers Sumner celebrated. But what of those powers? What place do they have in democratic constitutionalism, if any? Melville will return to the case in the writing of *Billy Budd* at the end of his life, and so that is what we will do at the end of this book. Michael Rogin appreciated the affair and its impact on Melville as a crisis in social standing and in cultures of sympathetic identification among men, and it was certainly that, but it was also an unsettling event in the history of the relationship between law and politics, of the place of judgment in a democratic polity.<sup>lxiv</sup>

Inheriting Discretion

In *Redburn*, Wellingborough takes stock of his dead father's things, including a chest of books, and he gets ready to depart for his voyage filled with visions of voyages to New Zealand and returning home dressed in "rich fabric and princely make."<sup>lxv</sup> Voyaging, for Melville, will always be a question of journeying through histories as much as across space. In previous decades, a nation had come into being by leveling the common man with the crown, and that event of the American Revolution itself had grown out of an Atlantic intellectual history of rethinking law, philosophy, and politics from a critical and historical perspective. Crucial to that project had been understanding the stages of human history in a developmental schema that linked the progress of the human mind toward maturity and enlightenment to the progress of institutions away from the tyranny of arbitrary power and toward the regularity of written law and known, inviolable rights. In the chest of books left behind from his father, the young narrator finds D'Alembert in French, which only his father could have read. On the voyage, he is lent a copy of Adam Smith's *The Wealth of Nations*, and the paradox of reading there of the "improvement in the productive power of labor" while not being paid for the hardest work he had ever done was not lost on him.<sup>lxvi</sup> Melville inherits revolution and enlightenment, but in ruins. The confident project of writing a philosophical history of law and legal institutions that Smith's work had grown out of still powerfully shaped historical consciousness and the conjecture of contemporary social theory, and Melville was hardly alone in noticing a slippage in that project's grip on reality.

Even on or near the ship, there are always other histories to be encountered. Larry the whaleman had "a sentimental distaste for civilized society," and "dealt in some illiberal insinuations against civilization."<sup>lxvii</sup> Whalers, who were held to be the lowest form of labor at sea, were also some of the most widely travelled and easily romanticized. They had a "familiarity

with the life of nature," and their encounters with other forms of life left them with the critical perspective on their own societies that the philosophers had constructed in theories of the state of nature, natural man, and the savage. This dichotomy of savagery and civilization becomes a trope Melville would play on too, and not just about other peoples. The horses of the docks, he writes, are "Roman citizens" no one would dare flog. "There are unknown worlds of knowledge in brutes," and in the "deep-seated eye" of a dog or a horse one could encounter an "Aristotle or a Kant, tranquilly speculating upon the mysteries in man." Of the majestic truck-horses of the docks in Liverpool, "I would as soon think of striking a judge on the bench, as to lay violent hands upon their holy hides."<sup>lxviii</sup> Even their human companions wear robes, "like the Judiciary in England."<sup>lxix</sup> The themes of corporal punishment and the appearance of the judiciary in surprising places plays with the distinction between human and animal, and more radically, begins to trace the fragmentation of the power to judge across populations and other boundaries. Discretionary judgment, from this perspective, is never the absolute or self-contained event that it is often represented to be. It is reciprocal, even dialectical. It bounces back, in new forms, when you least expect it. Melville will come to see judicial imagery and power scattered across the world of his own voyages, encounters, and writings.

What Melville's writing delivers, then, is not just an image of law's unchecked power, or of an escape beyond law and history into freedom and nature, but instead a survey of a kind of jurisdictional density. These are scenes where judging and judgments abound from all angles, and that encounter with other laws and histories casts a new light on one's own sense of historical reality. Redburn follows his father's footsteps, imagining what "trials and troubles he encountered; how he had been shaken by many storms of adversity; and at last died a bankrupt. I looked at my own sorry garb, and had much ado to keep from tears."<sup>lxx</sup> He realizes the guidebook

that his father had used was fifty years out of date, behind the rapid economic transformation that a city where "the African slave-trade once constituted the principal commerce." What theories of commerce and labor could make sense of the inextricable historical entwinement of Liverpool with slavery in Virginia and the Carolinas? As the storm of that transformation and the progress of commercial historical development went on, Redburn is constantly pushed back into a past that is only silent in the present. The "thing that had guided the father, could not guide the son."<sup>lxxi</sup> The names and memories of naval heroes who "did so much to protect the commerce of Britain," of whom none looms larger than Nelson, do not adorn the docks, but with the listless legacy of his father in mind, Redburn wants "stirring monuments" that link memory to "the living interests" of the race, and in "connection with the commerce they defended."<sup>lxxii</sup>

Melville saw the United States, in turn, as constituted by a unique relationship to the past. Any European who "scoffs at an American, calls his own brother *Raca*, and stands in danger of the judgment."<sup>lxxiii</sup> Echoing Matthew 5:22, where Jesus warns that a Greek insult, basically, 'stupid,' reveals hate that can lead to far worse than harsh words, and that so it is not just actions but what is one's intentions also that are subject to divine judgment, the searching of the heart and examination of the mind that biblical language gifts to the legal imagination, particularly the inquisitorial powers of judges sitting over conciliar courts. Again, the being-subject to judgment, and the freedom and responsibility to judge in turn, is a constant reference in Melville, and that constancy illuminates the fractured inheritance of these powers among a nominally egalitarian people. The "contemplation of the mode in which America has settled" combats national prejudice while adding luster to an emergent American nationalism, a nation "settled by the people of all nations," and indeed "not a nation, so much as a world; for unless we may claim all the world for our sire, like Melchisedec, we are without father or mother."<sup>lxxiv</sup> In this image, the

United States is the place where the experiment of enlightened modernity, of maturity and collective life in the "fatherless world" will be tested out. "Our ancestry is lost in the universal paternity," he reflects, watching the German and Irish immigrants who are passengers on the voyage back to New York. "We are the heirs of all time, and with all nations we divide our inheritance. On this Western Hemisphere all tribes and people are forming into one federated whole,"<sup>lxxv</sup> but of course it is not so simple. Harry, Redburn's friend he meets in England, joins the crew on the return voyage, where he experiences "a cold and unsympathizing civility," from the rest of the crew, those "ocean barbarians," a direct contrast with the with those whom the narrator of *White-Jacket* hailed as the "ocean democrats" of the ancient world. Harry's "girlish youth" is the object not just of contempt, but fear and desire: "they hunted you, Harry, my zebra," cursed to be among "those unimpressible, uncivilized sailors of ours."<sup>lxxvi</sup>

All of the passengers, too he acknowledges, are under "a sort of martial-law" and the "despotic ordinances of the captain." Of starving and sick immigrants in the hold, Redburn contemplates their lives from the relative comforts of his poor place among the crew. The law, he admits, was the chief reason it did not fully occur to him or anyone else to kill themselves, "for die they must very soon." Indeed, the very thought summons further thoughts on the law: "I well knew that the law, which would let them perish of themselves without giving them one cup of water, would spend a thousand pounds, if necessary, in convicting him who should so much as offer to relieve them from their miserable existence."<sup>lxxvii</sup> The cold passage stages the scene of judgment and splits it across contexts, from often implicit, perhaps barely cognizant judgments of the worth of other people's lives, or of our responsibilities to or for them, to the anxious self-regard and to the judgment that comes to judge the judgments one makes, examining your heart and mind, your conscience. A world where such offices could no longer be safely assigned to the

symbolic investiture of royal prerogative and its constitutional armature was a world where both the grand injustices of slavery and desperate or forced migration and the smaller cruelties of human life, the deeply felt occlusions and injuries that piled up in a mind like Bligh's, or Redburn's, are detached from the architecture of legal fiction that assigned responsibility for these experiences to the nature of the universe, to gods, fates, and states. In some sense, a voyage, even a voyage to another land and other people, can leave one, as it does Redburn, with a sense that it's just us. Melville's work is rightly regarded, and has been for some time, as rigorously modernist for just such reasons. His art is a question of what to do after the inherited forms of authority have fractured.

That is not to say that the world of Melville's historical experience and writing is a merely disenchanted one, far from it. He was as attuned to how powerful enchantments could be in an age when the enchantments of the past were purportedly just that, past. In *Redburn*, the aptly named Jackson, a member of the crew, is a bully who exercises a power over his shipmates that goes beyond fear of force. Jackson "froze my blood" Redburn admits. He exercised a dominion over the other men that was hard to describe, a kind of democratic and petty despotism. His power could be both insidious, as when he circulated insults and false rumors, or coldly managerial and effective, as when he distributes tobacco evenly. Only when he falls ill and dies on the return voyage does the crew seem to appreciate the hold he had on their minds, an "extraordinary dominion" over healthy tars the riddle of which needed "to be left to the philosophers."<sup>lxxviii</sup> Even as he lay dying, he remained a "misanthrope," not giving over "his blasphemies, but endeavored to drag down with him to his own perdition, all who came within the evil spell of his power." This is willful pride, a prerogative, that Melville will more famously draw on again in the character of Ahab, and still "even though he was a nameless vagabond

without an epitaph," Redburn records, "yet do I account this Yankee Jackson full as dignified a personage" as Tiberius, the cruel and corrupt Caesar, and "as well meriting his lofty gallows in history," for "hell is a democracy of devils, where all are equals."<sup>lxxix</sup> This consistent staging of a confrontation between democracy and its other, between democratic dignity and discretionary power, is, again, a persistent theme of Melville's work. This was the core his developing study of some of the blind spots in modern legal and political thought, in historical and fictional narratives of democratic self-understanding, and his own experience, as reworked in *Redburn* and *White-Jacket*, was the beginning of that study.

The narrative in *White-Jacket* is persistently framed by allusions to the early modern history of the rise of the modern state.<sup>lxxx</sup> The regulations of a man-of-war are what make a crew something other than mob, a Gordon riots crowd "tearing down the lofty house of Lord Mansfield," the Chief Justice of King's Bench. Captain Claret is "Henry the Eighth afloat," no "limited monarchy, where the Commons have a right to petition, and snarl if they please," but a "despotism, like the Grand Turk's." But in Melville's depiction, Montesquieu's oriental despotism is alive in well on an occidental ship: "the captain's word is law; he never speaks but in the imperative mood."<sup>lxxxii</sup> In language that matches what William Blackstone wrote about parliamentary supremacy, even what the jurist called parliamentary omnipotence, of the captain's power Melville writes that "only the moon and stars are beyond his jurisdiction," for he is "lord and master of the sun." There was nothing surprising in this, for Melville, for "a ship is a bit of terra firma cut off from the main; it is a state in itself; and the captain is the king." While the officers "all associate on a footing of perfect social equality," order and hierarchy are baked into the ship's constitution.<sup>lxxxiii</sup> Jack Chase, the captain of the main top to which *White-Jacket* is assigned, is a bit of a despot himself, although a learned and largely humane one. He had

deserted to help fight for Peruvian independence, was pardoned, and was a "stickler for the Rights of Man," at least on shore. Chase casually cites the natural law theorist Vattel on the law of nations. His presence, too, was fit material for a study in the use of discretionary authority. He seems able, remarkably, to inherit discretion and keep it real, sociable, and just.<sup>lxxxiii</sup>

Melville is at his most obviously political and constitutional when he employs the deeply historical language of common law legal theory, another persistent reference. His attention to "usages" and customs, to unwritten laws as much as to statutes and orders, is recursive, and it works to frame his stories as studies in jurisprudence and constitutionalism where you might least expect to find them. There were, of course, exceptions. Mad Jack issues an order directly contradicting the captain as the ship is scudding before the blasts of the passage around Cape Horn, and his orders are obeyed. He saved the ship, and the scandal of his momentary seizing of command is never mentioned, or punished. "To show how little real sway at times have the severest restrictive laws, and how spontaneous is the instinct of discretion in some minds," one need only consider that example.<sup>lxxxiv</sup> In Chapter 33, he witnesses a flogging, which is performed before the entire crew, on four men who had reportedly under the influence while on duty, and a great deal of the rest of the chapters will be a reflection, in one form or another, on the moral and political implications of violence inflicted for events "not essentially criminal, but only made so by arbitrary laws."<sup>lxxxv</sup> Laws were arbitrary, because discretion was constant, and it was a world of discretionary and sudden judgment that the sailor was compelled to confront. Crimes not specified in the Articles, Melville quotes, are to be punished "according to the laws and customs of such cases at sea."<sup>lxxxvi</sup> This, he writes, is what puts the scourge in the hands of captains. Laws and customs, the ancient language of inherited rights and constitutional belonging, are here simply providing for discretion in the only office tasked with interpreting them. Customs and

"sea-usages," then, are customarily and legally restricted to the captain, throwing a critical light on the language of a good deal of the revolutionary thought and action in the previous centuries of Anglophone constitutional politics.

As the discourse of democratic rights and equality spread, so apparently did the urgency of reinforcing force with force. Officers complain about having to conform to the laws fixing captains as solely responsible for inflicting corporal punishment. Melville reports understandings of American sailors that British officers are generally more well-liked by their crews, possibly, he wonders, because of their greater familiarity with a culture of deference, and among the Americans, Southern officers are generally more admired than their Northern counterparts. That whiteness and its distinctive boundaries might play a role here is obvious, and he quotes the patrician theorist John Randolph of Roanoke that on a voyage to Russia he had seen more flogging than on his plantation in a decade.<sup>lxxxvii</sup> The intellectual tradition, long and distinguished, of evoking slavery to think about white labor politics and its condition is something to be considered in later chapters, but it mattered for Melville to note that the more nominally egalitarian the origin of the officer, the more committed they might be to flogging, to making sure there was some other way to distinguish classes and orders.

The history Melville recounts in large parts of the novel is true and accurate enough, as is the moral clarity with which he addresses the lives and treatment of sailors on U.S. naval vessels. At the same time, Melville frames his history in the context of early modern legal and political thought and the origins of the American Revolution and Founding. "If there are," he calmly suggests, "three things opposed to the genius of the American Constitution, then they are: irresponsibility in a judge, unlimited discretionary authority in the executive, and the union of an irresponsible judge and an unlimited executive in one person."<sup>lxxxviii</sup> The American captain is

precisely such a union, and not because he exists in some zone of lawlessness, but because the law made him that way when it made the union. And, for Melville, it is the captain's interpretive freedom, his singular responsibility for announcing what law and custom dictate in any particular case, that make his office such a powerful one, and so amenable to being discussed in a framework borrowed largely from Hobbes. The captain is an "absolute ruler, making and unmaking the law as he pleases." The code, Melville dares suggest, "should conform to the spirit of the political institutions of the country that ordains it."<sup>lxxxix</sup> He plays in national self-image, but we know from his later work that he was fully aware of how ingrained aspects of what he saw at sea were in the paradoxes characteristic of his society. If discussions of national and international law in previous centuries had been driven by attention to natural law, the authority to identify and define it was a powerful one indeed. A substantively universal law would have to at least begin with holding the judge who expounds law's operation accountable to the law. If the great English legal theorist William Blackstone, author of the *Commentaries on the Laws of England*, had broken the law, so the implication goes, he would have been brought before a court and perhaps had his commentaries read back to him, before the law. Judgment, in this light, to be anything close to safe, had to be judged, and shared.

That is hardly, of course, the end of the matter. Sailors, Melville complains, are subject to a level of opulent display and repetitive ritual for the sake of the vanity of the officers that rivals any court of absolutist Europe. The ship's surgeon, called on to perform dramatic and dangerous surgery on a man while the ship is anchored in Rio, exercises a "discretionary authority" over the life and body. From the power wielded by Prospero over the sea and the people on or near it in *The Tempest* to Locke on government, White-Jacket's reading traces a dialectic moving from the realities of sharp judgments and discretion and the resentments and feelings that govern their use,

on the one hand, and the theories of rights and the rational restraints on arbitrary power promised in modern thought on the other. Encounters with the Commodore, the head of the fleet, and a barge rowed by enslaved people in Rio de Janeiro's harbor, carrying the Brazilian Emperor Don Pedro II, affords further grounds for thinking about prerogative, about how royal and commanding authority gets made differently across time and space. "Republicans are often more courteous to royalty than royalists themselves," he observes, but "doubtless this springs from a noble magnanimity."<sup>xc</sup> The salute offered to the emperor and the display of authority is as certainly unrepublican as it gets, but in the context of the rituals and dress of naval custom, and the violent power lurking behind it, to say nothing of the empire of slavery and conquest that underwrites that power, the scene doubles back on the American audience, and Melville takes due note of the irony. And this is the primary importance of Melville for politics: not that he was some closet monarchist or skeptic of democracy, far from it. His work raises the specter of republican historical self-understanding, as having left absolute and discretionary, masterly power over free people behind, as a myth, a very powerful myth, and so his writing wrests open the question of what to do with the feeling of finding one's self inhabiting a temporal disjuncture, an earlier set of problems all over again but in a new light. In the wake of the spectacle of rule put on display in Rio, Jack Chase reminds White-Jacket that "we all wear crowns."<sup>xc1</sup> For Melville, this was a profoundly loaded statement. Prerogative has not been restrained to the foppery of ritual. It had been democratized, along with a good deal of foppery and ritual to boot. If uneasy lies the head that wears the crown, Melville was beginning to document a society where everyone felt a little uneasy.

When White-Jacket is himself arraigned for not being at his post, even though it had changed without his knowing of it, he understands the terrain between him and the captain as a

confrontation of discretions. "I felt my man's manhood so bottomless within me," and he resolves to do what he must to not let the degradation go forward: "I meant to drag Captain Claret from this earthly tribunal to that of Jehovah, and let Him decide between us." The power of dying, and taking the life of another with you, he writes, is "inborn and inalienable," although it has often been abused. "These are the last resources of an insulted and unendurable existence," and so again, for Melville, discretion is the critical object of study. One of the sailors, Colbrook, followed by Jack Chase, step up to defend him at the last minute, and he credits their intervention with saving his life (and that, he boasts, of the captain's).<sup>xcii</sup> Man's manhood indeed, but again, for Melville, if discretionary judgment comes from every angle, by its very definition, it can go in any direction. Judgment, at some point, comes for all. In the last words of the book, as he leaves the world in a man-of-war for the man-of-war world, he has only the certainty that "Our Lord High Admiral will yet interpose; and though long ages elapse, and leave our wrongs unredressed," it should always be remembered, "Life is a voyage that's homeward-bound!"<sup>xciii</sup> And at this point in his life, that is precisely what Melville was. He received a letter from his brother informing him of cousin Guert's trouble in the Navy, and he sat down, with the encouragement of family, to write about his experiences at sea.

A few years later, Dana wrote Melville after reading *White-Jacket* and wondered about the actual white, make-shift jacket Melville had been stuck with on the voyage home, in the difficult passage around the Patagonian coast. Alas, Melville assured Dana, the coat was real, but he had discarded it, and it was probably at the bottom of the Charles River. Melville's perhaps apocryphal pollution of waterways notwithstanding, the exchanges with Dana, even on something as apparently trivial as a coat no longer needed, was not without meaning. He had begun his narrative reworkings of his first voyage, in *Redburn*, with a self-awareness of how

others would judge him in the jacket he was wearing, and he never appears to have fully let that go. That awareness of judging and being judged, of looking through people and being looked through, of being figured out, decided upon, would certainly not go away in his writing, and as a critical insight into the economic culture of American capitalism, his attention to it would reach its apex in his last full novel, *The Confidence Man: His Masquerade*. But none of these were the first books he sat down to write. Captains and fellow sailors, he had come to know, were not the only people making judgments and history, and were not even the only people to have laid a skeptical and judicious eye on him.

Looking forward to the next chapter, this one on the Atlantic world concludes by noting Melville was not fully prepared for the depth of history he had encountered in the Pacific, and its reverberations never fully left him. For an amateur historiographer of Anglophone prerogative powers and discretionary justice, the divine kingships of Oceania were something else, or were they? For a globalizing world of commerce, heralded as leaving Leviathan's sovereignty behind, the power and persistence of native governance was a stumbling block in the sea, a significant problem, perhaps the largest challenge for modern social theory to explain, and thus, among other things, a central piece of global legal and intellectual history. As modern historical scholarship, still wrestling with its own origins in the intellectual life of empire, has only just begun to appreciate, these islands, among others, and the people that lived on them would play fundamental roles in the making of oceanic history, indeed in the very idea of oceanic history, and in the imperial transformations of American legal history, too. And, as Melville had only just begun to perceive, it mattered a great deal to this history that the indigenous peoples of Pacific islands were making distinctive legal and oceanic histories of their own, and had been for quite some time.

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<sup>i</sup> Richard Henry Dana, Jr., *Two Years Before the Mast & Other Voyages*, Thomas L. Philbrick, ed. (New York: Library of America, 2005), p. 99.

<sup>ii</sup> When Herman Melville returned from the Pacific in 1844, his brother Gansevoort Melville was a committed Democrat and expansionist, and before his early death he helped secure British publication of Melville's first novel, *Typee*, and introduced Herman to Evert Duyckinck, who would publish the American edition, bringing Melville into the literary wing of the Young America movement that argued for a cohesive national literature, declaring cultural independence from the British and colonial past, see Andrew Delbanco, *Melville: His World and Work* (New York: Knopf, 2005). On Jacksonian democracy, see Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: Hill and Wang, 2006); Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2007); J.M. Opal, *Avenging the People: Andrew Jackson, the Rule of Law, and the American Nation* (Oxford: Oxford University Press, 2017); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018).

<sup>iii</sup> Michael Paul Rogin, *Subversive Genealogy: The Politics and Art of Herman Melville* (Berkeley and Los Angeles: University of California Press, 1985); see also Neal L. Tolchin, *Mourning, Gender, and Creativity in the Art of Herman Melville* (New Haven: Yale University Press, 1988); Andrew Delbanco, *Melville: His World and Work* (New York: Knopf, 2005); Ellen Weinauer, "Women, Ownership, and Gothic Manhood in *Pierre*," in Elizabeth A. Schultz and Haskell S. Springer, eds., *Melville and Women* (Kent: Kent State University Press, 2006), pp. 141-62.

<sup>iv</sup> See Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution Against Patriarchal Authority* (Cambridge: Cambridge University Press, 1982); Melvin Yazawa, *From Colonies to Commonwealth: Familial Ideology and the Beginnings of the American Republic* (Baltimore: Johns Hopkins University Press, 1985); Steven Watts, *The Republic Reborn: War and the Making of Liberal America* (Baltimore: Johns Hopkins University Press, 1987); Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (Oxford: Oxford University Press, 1992); Ruth Bloch, *Gender and Morality in Anglo-American Culture, 1650-1800* (Berkeley and California: University of California Press, 2003).

<sup>v</sup> Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (Cambridge, MA: Harvard University Press, 2001).

<sup>vi</sup> Alexis de Tocqueville, *Democracy in America, Volume 1*, Henry Reeve, trans. (New York: Schocken, 1972), p. 43.

<sup>vii</sup> Tocqueville, *Democracy in America, Volume 2*, Henry Reeve, trans. (New York: Schocken, 1972), p. 162; Tocqueville, *Volume 1*, p. 330, and as Tocqueville elaborates, in properly maritime fashion, the "surface of American society is... covered with a layer of democracy, from beneath which the old aristocratic colours sometimes peep," and in such a society, "it is certain that every member of the community will always find out several points about him which command his own position, and we may foresee that his looks will be doggedly fixed in that direction. When inequality of conditions is the common law of society, the most marked inequalities do not strike the eye: when everything is nearly on the same level, the slightest are marked enough to hurt it," *Volume 1*, p. 36, *Volume 2*, p. 164. The observation is more dialectical than it might first appear, for Tocqueville here has in mind a condition where the spirit of equality before the law runs up against libidinal investment in making and marking inequality that adheres in a market society. Eric Santner, reading Walter Benjamin, has described this "excess of animation" as the "norm in the culture of modern capitalism," and a prompting to the production of allegory's attention to natural history, Santner, *On Creaturely Life: Rilke, Benjamin, Sebald* (Chicago: University of Chicago Press, 2006), p. 80.

<sup>viii</sup> Rich Moody, "Introduction" to Paul Metcalf, *Genoa: A Telling of Wonders* (New York: Coffee House Press, 2015). Appropriately enough, Metcalf was a direct descendant of Melville and the book is a kind of creative memoir that tries to work through the burden of that inheritance by way of an extractive and associative reading.

<sup>ix</sup> Herman Melville, *Redburn*, Harold Beaver, ed., (London: Penguin English Library, 1977), 44.

<sup>x</sup> See Rogin, *ibid*; Linda Costanzo Cahir, *Solitude and Society in the Works of Herman Melville and Edith Wharton*, (Westport: Greenwood Press, 1999); Stephen Matterson, *Melville: Fashioning in Modernity* (London: Bloomsbury, 2014).

<sup>xi</sup> Melville, *Journals*, Harrison Hayford and Lynn Forth, eds., *The Writings of Herman Melville* (Evanston and Chicago: Northwestern University Press and The Newberry Library, 1989), p. 12.

<sup>xii</sup> Melville to Richard Bentley, 5 June 1849, *Correspondence*, Lynn Horth, ed., *The Writings of Herman Melville* (Evanston: Northwestern University Press and The Newberry Library, 1993), p. 132.

- <sup>xiii</sup> Howard P. Vincent, *The Tailoring of Melville's White-Jacket* (Evanston: Northwestern University Press, 1970); James Duban, *Melville's Major Fiction: Politics, Theology, and Imagination* (Dekalb: Northern Illinois University Press, 1983), Ch. 3.
- <sup>xiv</sup> See Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, MA: Harvard University Press, 2010); *Politics in a Commercial Society: Jean-Jacques Rousseau and Adam Smith* (Cambridge, MA: Harvard University Press, 2015).
- <sup>xv</sup> Melville, *White-Jacket* (Evanston: Northwestern University Press, 2000), p. 297; the Articles of War were first passed by Congress in 1775, codified by the US Congress in 1789, then again in 1800 (which is what Melville refers to in his text), and then again in 1806, but they stood largely unchanged until 1848; see John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012).
- <sup>xvi</sup> Peter Linebaugh and Markus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (New York: Beacon, 2000); Denver Brunsman, *The Evil Necessity: British Naval Impressment in the Eighteenth-Century Atlantic World* (Charlottesville University Press, 2013); Paul A. Gilje, *To Swear Like a Sailor: Maritime Culture in America, 1750-1850* (Cambridge: Cambridge University Press, 2016); Christopher P. Magra, *Poseidon's Curse: British Naval Impressment and Atlantic Origins of the American Revolution* (Cambridge: Cambridge University Press, 2016); Sarah Kinkel, *Disciplining the Empire: Politics, Governance, and the Rise of the British Navy* (Cambridge, MA: Harvard University Press, 2018).
- <sup>xvii</sup> Gerald Horne, *The Counter-Revolution of 1776: Slave Resistance and the Origins of the United States* (New York: New York University Press, 2014); Trevor Burnard, *Planters, Merchants, and Slaves: Plantation Societies in British America, 1650-1820* (Chicago: University of Chicago Press, 2015); Malick W. Ghachem, *The Old Regime and the Haitian Revolution* (Cambridge: Cambridge University Press, 2012); Ada Ferrer, *Freedom's Mirror: Cuba and Haiti in the Age of Revolution* (Cambridge: Cambridge University Press, 2014); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018), Ch. 3; Julius S. Scott, *The Common Wind: Afro-American Currents in the Age of the Haitian Revolution* (London: Verso, 2018); Tiffany Lethabo King, *The Black Shoals: Offshore Formations of Black and Native Studies* (Durham: Duke University Press, 2019), Ch. 2-3; Michael A. Schoeppner, *Moral Contagion: Black Atlantic Sailors, Citizenship, and Diplomacy in Antebellum America* (Cambridge: Cambridge University Press, 2019); Alejandro de la Fuente and Ariela J. Gross, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (Cambridge: Cambridge University Press, 2020).
- <sup>xviii</sup> Melville, *White-Jacket*, p. 301.
- <sup>xix</sup> Melville, *ibid*, p. 304.
- <sup>xx</sup> *Justinian's Institutes*, Peter Birks and Grant McLeod, ed., trans., (Ithaca: Cornell University Press, 1987), p. 55; see Percy Thomas Fenn, "Justinian and the Freedom of the Sea," *The American Journal of International Law*, Vol. 19, No. 4 (Oct., 1925), pp. 716-727; on the range of Roman law in early modern natural law theory and international relations, see Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015); see Matthew Crow, "Littoral Leviathan: Histories of Oceans, Laws, and Empires," *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity*, Edward Cavanagh, ed. (Brill Studies in the History of International Law, 2020), pp. 362-387.
- <sup>xxi</sup> *The Digest of Justinian Volume I*, Alan Watson, ed., trans. (Philadelphia: University of Pennsylvania Press, 2009), p. 421.
- <sup>xxii</sup> See Jennifer L. Green, "The Development of Medieval Maritime Law in Medieval Spain: The Case of Castile and the *Siete Partidas*," *The Historian*, Vol. 58, No. 3 (Spring, 1996), pp. 575-87; see also Lionel H. Laing, "Historic Origins of Admiralty Jurisdiction in England," *Michigan Law Review*, Vol. 45, No. 2 (Dec., 1946), 163-82; Timothy J. Ryan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England," *The American Journal of Legal History*, Vol. 19, No. 2 (Apr., 1975), pp. 95-111; see also George F. Steckley, "Merchants and the Admiralty Court during the English Revolution," *The American Journal of Legal History*, Vol. 22, No. 2 (Apr., 1978), pp. 137-75; see Richard Zouche, *The Jurisdiction of the admiralty of England asserted against Sr. Edward Coke's Articuli admiralitatis in the XXII chapter of his jurisdiction of courts* (London: Francis Tyon and Thomas Dring, 1663).
- <sup>xxiii</sup> Hugo Grotius, *The Free Sea*, Richard Hakluyt, trans., David Armitage, ed., (Indianapolis: Liberty Fund, 2004), p. 7; see Laren Benton, *A Search for Sovereignty: Geography and European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), Ch. 3; Benton, "Legalities of the Sea in Gentili's *Hispanica Advocatio*," in Benedict Kingsbury and Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011), pp. 269-82; Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014), pp. 126-82.
- <sup>xxiv</sup> Grotius, *ibid*.

- <sup>xxv</sup> Richard Koebner, *Empire* (Cambridge: Cambridge University Press, 1961); David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); Ken Macmillan, *Sovereignty and Possession in the English New World, 1576-1640: The Legal Foundations of Empire* (Cambridge: Cambridge University Press, 2006); see also John R. Gillis, *The Human Shore: Seashore in History* (Chicago: University of Chicago Press, 2012); Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014).
- <sup>xxvi</sup> Alexander Haskell, *For God, King, and People: Forging Commonwealth Bonds in Renaissance Virginia* (Chapel Hill: University of North Carolina Press, 2017); see also Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1982); Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011).
- <sup>xxvii</sup> Thomas Hobbes, *Leviathan*, Christopher Brooke, ed., (London: Penguin Classics, 2017), p. 201, pp. 202-203.
- <sup>xxviii</sup> See Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, Javonovich, 1973), pp. 139-157; Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004), pp. 31-50.
- <sup>xxix</sup> Hobbes (Oxford), p. 158, p. 184.
- <sup>xxx</sup> Hobbes (Oxford), p. 207.
- <sup>xxxi</sup> See Thomas Poole, *Reason of State: Law, Prerogative, and Empire* (Cambridge: Cambridge University Press, 2015).
- <sup>xxxii</sup> See Barbara A. Black, "The Constitution of Empire: The Case for the Colonists," *University of Pennsylvania Law Review*, Vol. 124 (1976), pp. 1158-1211; David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009); Aziz Rana, *The Two Faces of American Freedom* (Cambridge, MA: Harvard University Press, 2010); Andrew Delbanco, *The War Before the War: Fugitive Slaves and the Struggle for America's Soul before the Civil War* (New York: Penguin, 2018); see Matthew Crow, *Thomas Jefferson, Legal History, and the Art of Recollection* (Cambridge: Cambridge University Press, 2017); J.M. Opal, *Avenging the People: Andrew Jackson, The Rule of Law, and the American Nation* (Oxford: Oxford University Press, 2017).
- <sup>xxxiii</sup> Melville, *White-Jacket*, p. 302.
- <sup>xxxiv</sup> Franz Kafka, *The Trial*, Breon Mitchell, trans. (New York: Schocken Books, 1998).
- <sup>xxxv</sup> See C.L.R. James, *Mariners, Renegades and Castaways: The Story of Herman Melville and the World We Live In* (Hanover: Dartmouth College Press, 2001).
- <sup>xxxvi</sup> As Matthew Taylor Rafferty suggests, strengthening federal maritime and admiralty jurisdictions and defending the legitimacy of relevant legislation were critical components of the project of constitutional nationalism pursued by judges in the nineteenth century United States, particularly in the careers of Samuel Betts (1786-1868), a federal judge on the US District Court for the Southern District of New York, Peleg Sprague (1793-1880), a judge on the US District Court for the District of Massachusetts, and for Joseph Story (1779-1845), who served on the US Supreme Court, and whose *Commentaries on the Constitution of the United States* described broad federal judiciary powers to hear cases of admiralty and maritime matters that originated at sea and even on the internal aquatic environments of lakes and rivers; see Joseph Story, *Commentaries on the Constitution of the United States* (Cambridge, MA: Brown, Shattuck, and Co., 1833), Vol. III, Ch. 20; an 1835 Amendment to the Crimes Act of 1790 provided for direct access to federal courts for remedy on behalf of officers and sailors, see Rafferty, *The Republic Afloat: Law, Honor, and Citizenship in Maritime America* (Chicago: University of Chicago Press, 2013), pp. 33-50; see also Steven L. Snell, *Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction* (Durham: Carolina Academic Press, 2007).
- <sup>xxxvii</sup> Melville, *White-Jacket*, 32.
- <sup>xxxviii</sup> Melville, *ibid*.
- <sup>xxxix</sup> Melville, *ibid*, 32-3.
- <sup>xl</sup> Melville, *ibid*, 33; on constructions of masculinity in Melville and *White-Jacket*, see Wai Chee Dimock, *Empire for Liberty: Empire and the Poetics of Individualism* (Princeton: Princeton University Press, 1989); Marvin Fisher, "Melville's *White-Jacket* and the War Within," *The Centennial Review* 37:3 (Fall, 1993); 593-604; Juniper Ellis, "Engendering Melville," *Journal of Narrative Theory* 29:1 (Winter, 1999), 61-84.
- <sup>xli</sup> Greg Denning, *Mr Bligh's Bad Language: Passion, Power, and Theater on the Bounty* (Cambridge: Cambridge University Press, 1992), p. 28.
- <sup>xlii</sup> That he saw himself sailing in Cook's wake and was trying to position himself as Coke's successor, is apparent throughout Bligh's narrative: on Otaheite, he encounters native memories of Cook's voyages, and instructs his officers to keep the manner of Cook's death to themselves at all costs; a portrait of Cook is even taken on board, and it serves as a kind of medium for channeling communication between historical legacy and the present and between the captain and indigenous leaders, see William Bligh, *The Mutiny On Board the HMS Bounty* (New York: New American Library, 1964), p. 62, p. 89.

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<sup>xliii</sup> Bligh, *ibid*, p. 77.

<sup>xliv</sup> This feeling of the world as a kind of vertically layered set of juridical authorities constantly surfaces in the text. On the occasion of repeated "petty thefts," allegedly on the part of natives, Bligh decides it would be good to demonstrate some the implications of such behavior, and orders a dozen lashes for the sailor stationed to lookout for the boats on shore, a punishment delivered in front of Tinah and other chiefs and leaders, who "interceded very earnestly to get it mitigated" and "the women showed great sympathy." The episode is one of several events that allow for a display of the dialectic of law and equity at work. From punishments and chiefs to the Dutch and British colonial officials who receive Bligh and the other men who survive in the boat, from islands on all sides of the world to the sea itself, he was deeply conscious of passing through and between various spheres of jurisdictional intensity that he appears to feel at the very core of his being, see Bligh, p. 79, pp. 198-204.

<sup>xlv</sup> Bligh, p. 139.

<sup>xlvi</sup> See R.D. Madison, ed., *The Bounty Mutiny* (New York: Penguin Classics, 2001); Vanessa Smith and Nicholas Thomas, eds., *Mutiny and Its Aftermath: James Morrison's Account of the Mutiny on the Boundy and the Island of Tahiti* (Manoa: University of Hawaii Press, 2013); see also Caroline Alexander, *The Bounty: The True Story of The Mutiny on the Bounty* (New York: Viking, 2003).

<sup>xlvii</sup> John Barrow, (1831) *The Mutiny and Piratical Seizure of HMS Bounty* (Cambridge: Cambridge University Press, 2011).

<sup>xlviii</sup> See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Roazen, trans. (Stanford: Stanford University Press, 1998); *The Open: Man and Animal*, Kevin Attell, trans. (Stanford: Stanford University Press, 2004), pp. 12-16, pp. 91-92; Eric Santner, *On Creaturely Life: Rilke, Benjamin, Sebald* (Chicago: University of Chicago Press, 2006).

<sup>xlix</sup> Melville, *Moby-Dick or, The Whale* (New York: Penguin, 1992), p. 6.

<sup>l</sup> Melville to Dana, 1 May 1850, Lynn Forth, ed., *Correspondence*, Northwestern-Newberry Edition of the Writings of Herman Melville (Evanston: Northwestern University Press, 1993), p. 162.

<sup>li</sup> Melville to Dana, 6 October 1849, *ibid*.

<sup>lii</sup> Melville to Dana, 1 May 1850, *ibid*.

<sup>liii</sup> Jeffrey L. Amestoy, *Slavish Shore: The Odyssey of Richard Henry Dana, Jr.* (Cambridge, MA: Harvard University Press, 2015); see also J.D. Hart, "Melville and Dana," *American Literature* Vol. 9, No. 1 (March 1937), pp. 49-55; Bryce Conrad, "Richard Henry Dana, Jr. and Two Years Before the Mast: Objectifying the Subjective Self," *Criticism* 29:3 (Summer, 1987), 291-311.

<sup>liv</sup> Richard Henry Dana, Jr., Thomas L. Philbrick, ed., *Two Years Before the Mast & Other Voyages* (New York: Library of America, 2005), p. 36.

<sup>lv</sup> Dana, *ibid*, pp. 98-100; abolitionist Senator John T. Hale from New Hampshire successfully added a provision banning flogging from the United States in Navy in 1850, with support built up around the sentiments conveyed to the public in accounts like Dana's here and in Melville's *White-Jacket*, published that same year, see Rafferty, *The Republic Afloat*, p. 47.

<sup>lvi</sup> Dana, *ibid*, pp. 348-9.

<sup>lvii</sup> Dana, *ibid*, pp. 350-351; Melville will go on to use sharks as an image of the constancy of violence in *Moby-Dick*: "we are all killers, on land and sea; Bonapartes and Sharks included," Melville, *Moby-Dick*, p. 155.

<sup>lviii</sup> Melville, *White-Jacket*, p. 303.

<sup>lix</sup> The networks lined up around McKenzie were nothing short of extraordinary. Philip Hone's son, John Hone, married Jane Hazard Perry, a daughter of Matthew C. Perry, who married Captain McKenzie's sister, Jane Slidell Perry. Their son, the younger Oliver Hazard Perry, was the serving commander's clerk and midshipman on the *Somers*, the nephew of both McKenzie and the older Oliver Hazard Perry who commanded American naval action at the Battle of Lake Erie in the War of 1812, and whose career was the subject of disputes in naval history between McKenzie and Cooper before, during, and after the events of inquiry and trial, see Harrison Hayford, ed., *The Somers Mutiny Affair* (Englewood Cliffs, NJ: Prentice-Hall, 1959), pp. 1-19.

<sup>lx</sup> See Harrison Hayford, ed., *ibid*; James Fenimore Cooper, *The Cruise of the Somers, Illustrative of the Despotism of the Quarter-Deck and of the Unmanly Conduct of Commander Mackenzie* (New York: J. Winchester, 1844).

<sup>lxi</sup> Cooper, quoted in Hayford, ed., see pp. 185-95. Cooper's son Paul had been at the College of Geneva, now Hobart and William Smith Colleges, at the same time as Philip Spencer, see pp. 76-8.

<sup>lxii</sup> Charles Sumner, "The Mutiny on the Somers," published in *North American Review* in July 1843, quoted in Hayford, ed., pp. 171-2.

<sup>lxiii</sup> Alexander Slidell McKenzie, testimony to the Court of Inquiry, quoted in Hayford, ed., p. 45.

<sup>lxiv</sup> See Rogin, *Subversive Genealogy*, Ch. 9.

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- lxv Melville, *Redburn*, 46; see James Schroeder, "Redburn and the Failures of Mythic Criticism," *American Literature* Vol. 39, No. 3 (Nov., 1967), pp. 279-97; Sacvan Bercovitch, "Melville's Search for a National Identity: Father and Son in Redburn, Pierre, and Billy-Budd," *CLA Journal* Vol. 10, No. 3 (March, 1967), pp. 217-28; Janet Giltrow, "Speaking Out: Travel and Structure in Herman Melville's Early Narratives," *American Literature* Vol. 52, No. 1 (March 1980), pp. 18-32; Timothy Marr, "Melville's Ethnic Conscriptations," *Leviathan: A Journal of Melville Studies* Vol. 3, No. 1 (March 2001), pp. 5-29.
- lxvi Melville, *Redburn*, p. 143.
- lxvii Melville, *ibid*, pp. 156-8.
- lxviii Melville, *ibid*, p. 272.
- lxix Melville, *ibid*.
- lxx Melville, *ibid*, p. 221
- lxxi Melville, *ibid*, p. 224.
- lxxii Melville, *ibid*, p. 230.
- lxxiii Melville, *ibid*, p. 238.
- lxxiv Melville, *ibid*, p. 239.
- lxxv Melville, *ibid*, p. 239.
- lxxvi Melville, *ibid*, p. 336.
- lxxvii Melville, *ibid*, p. 256.
- lxxviii Melville, *ibid*, p. 360.
- lxxix Melville, *ibid*, p. 362.
- lxxx Joyce Adler, *War in Melville's Imagination* (New York: New York University Press, 1981); John Samson, *White Lies: Melville's Narratives of Facts* (Ithaca: Cornell University Press, 1989).
- lxxxi Melville, *White-Jacket*, p. 23.
- lxxxii Melville, *ibid*, pp. 24-28.
- lxxxiii Melville, *ibid*, p. 17.
- lxxxiv Melville, *ibid*, p. 111.
- lxxxv Melville, *ibid*, p. 138.
- lxxxvi Melville, *ibid*, p. 143.
- lxxxvii Melville, *ibid*, p. 141.
- lxxxviii Melville, *ibid*, p. 143; this is a direct refutation of Charles Sumner on the importance of war powers contained in the judiciary and executive authority of naval captains at sea in case of McKenzie and the Somers, see above.
- lxxxix Melville, *ibid*, p. 144.
- xc Melville, *ibid*, p. 233
- xc1 Melville, *ibid*, p. 237.
- xcii Melville, *ibid*, p. 281.
- xciii Melville, *ibid*, p. 400.