Billy Budd, Joseph Story, and Racial Liberals
Frying Fish--A Polemical Essay

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Robert M. Cover was a fabled law student who as a teacher at Columbia and Yale became a path-finder to a generation and then died young.¹ Besides his other contributions, Cover was one of the founders of the law and literature movement. He began *Justice Accused*, his great book on anti-slavery judges who had to enforce the fugitive slave laws, with an introduction entitled *Creon's Minions*.² In the essay Cover put forth an intriguing theory, based on Herman Melville's short novel, *Billy Budd*.³ Cover pointed out that Melville was the son-in-law of the great Massachusetts Chief Justice Lemuel Shaw, one of the anti-slavery judges he was writing about, and speculated that Melville had used Shaw as the model for Captain Vere, who is forced by naval law to condemn Billy Budd to death despite his moral innocence.⁴ Without disputing either Cover's reading of *Billy Budd* or the brilliance of his intuition about the connection to Lemuel Shaw, I read *Billy Budd* and Captain Vere differently and use my reading to look at Justice Joseph Story, another opponent of slavery, who has for more than 165 years left observers wondering why he wrote the Supreme Court's opinion strongly defending and applying the fugitive slave laws in the critically important 1842 case of *Prigg v. Pennsylvania*.⁵ From my musings about Story, I have some thoughts about genuinely progressive whites, their attitude toward race, and what it means for the future of our country.
Billy Budd and Captain Vere

Billy Budd is set on board a British warship in 1797, during the wars with revolutionary France. Melville begins with a short preface telling how 1797 was part of “a crisis for Christendom” brought on by the French Revolution. He concludes it by discussing the Great Mutiny, earlier that year:

Now, as elsewhere hinted, it was something caught from the Revolutionary Spirit that at Spithead emboldened the man-of-war's men to rise against real abuses, long-standing ones, and afterwards at the Nore to make inordinate and aggressive demands – successful resistance to which was confirmed only when the ringleaders were hung for an admonitory spectacle to the anchored fleet. Yet, in a way analogous to the Revolution at large, the Great Mutiny, though, by Englishmen naturally deemed monstrous at the time, doubtless gave the first latent prompting to most important reforms in the British navy.  

He then begins his story. Billy Budd is one of many sailors who have been “impressed” into service, that is kidnaped from civilian life by press gangs from the Navy, or as in Billy's case, taken involuntarily from a merchant ship just before it returned to England. Billy, called the Handsome Sailor, is almost angelic but inarticulate. He is respected and loved by his shipmates and officers, but is falsely accused by the jealous Master-at-Arms, Claggart, of fomenting mutiny. The ship's captain, Edward Fairfax Vere, who is skeptical of Claggart's charge, calls in Billy and makes Claggart accuse him to his face. The Captain tells Billy to speak and defend himself, but Billy cannot and is so frustrated by what Melville calls his “convulsed tongue-tie” that he hits Claggart, killing him with one blow. Under the Mutiny Act there is no defense to striking a superior, and Captain Vere convenes a drumhead court-martial that condemns Billy to death even though Captain Vere and the members of the court sympathize with Billy and understand him to be morally innocent.
Cover pointed out that Shaw, the great Chief Justice of Massachusetts, was strongly anti-slavery but opened himself to severe attack by abolitionists when in the notorious 1851 Sims’s Case he upheld the constitutionality of the harsh federal Fugitive Slave Act of 1850 and sent Thomas Sims back to slavery. Without making any doctrinaire claims about Melville’s intentions, Cover suggested that Captain Vere may have been based on Shaw, who felt obliged by his office to follow the positive federal law rather than his strong moral view or any kind of overriding natural law, “a man caught in the horrible conflict between duty and conscience, between role and morality, between nature and positive law.”

Cover reads Captain Vere’s character with subtlety. He sees him as “[a] man . . . who is disposed to approach life institutionally, to avoid the personal realm even where it perhaps ought to hold sway, to be inflexibly honest, righteous and duty bound.” Though Vere showed the agony of his righteousness, “there is no indication that [he] suffered the agony of doubt about his course.” Cover finds these qualities similar to those of Lemuel Shaw and other nineteenth century positivist judges, who unflinchingly enforced the law against fugitive slaves though they detested slavery. “Make no mistake. The judges we shall examine really squirmed; were intensely uncomfortable in hanging Billy Budd. But they did the job. Like Vere, they were Creon's faithful minions.”

As much as I respect Cover and his analysis, I read Captain Vere differently, and I find that this different reading gives me a different insight, not into Lemuel Shaw, but into the most prominent of anti-slavery judges, Justice Joseph Story, a distinguished and respected member of the United States Supreme Court for more than thirty years. From Story we can look more generally at the anti-slavery North in the days before the Civil War, and even more, to all of this
nation in this twenty-first century.

Captain Vere is not, in my reading, the victim of circumstances. He is not forced by the Mutiny Act to pass judgment on Billy Budd. Vere considers making Billy a close prisoner until the ship rejoins the squadron and the matter can be submitted to the admiral, but decides against it.\(^\text{17}\) He insists on an immediate trial and punishment\(^\text{18}\) and "of his own motion communicate[s] the finding of the court to the prisoner."\(^\text{19}\) Unlike the tormented character in Benjamin Britten's opera or in Peter Ustinov's movie version, who has no choice against the positive law of the sea,\(^\text{20}\) the Captain Vere in Melville's novel has choices, but feels obliged to use the incident as an opportunity to show his crew that he will enforce the rules against them—by hanging a man that they love and he cares for and all know is morally innocent.

This is not to say that Captain Vere is insensitive: The first to encounter Captain Vere [after he told Billy that he was to hang] was the senior lieutenant. The face he beheld, for the moment one expressive of the agony of the strong, was to that officer, though a man of fifty, a startling revelation. That the condemned one suffered less than he who mainly had effected the condemnation was apparently indicated by the former's exclamation in the scene soon perforce to be touched upon. [Just as Billy's last words were "God bless Captain Vere!", Captain Vere's dying words were "Billy Budd, Billy Budd."\(^\text{21}\)]

But Captain Vere not only insisted on the immediate drumhead court-martial, he was the only witness at the trial and directed the court of his subordinates that Claggart's motives in falsely accusing Billy were irrelevant; the only issue was that Billy had killed a superior. In fact, Vere bullied the officers on the court to convict Billy and give him the death sentence.\(^\text{22}\)

Why did Vere do all this? Not because he was forced to by the law, but because he feared rebellion by the other men on the ship. This explains Melville's preface about revolution
and mutiny, and his reference to the Great Mutiny, at Spithead and the Nore. Melville says that Vere's reason for not waiting to turn Billy over to the admiral was that delay “would tend to awaken any slumbering embers of the Nore among the crew,” and when the junior lieutenant falteringly asked “Can we not convict and yet mitigate the penalty?,” Vere, in the tone of a superior, said that even if they had the power under the law, mitigation would be taken by the crew as a sign of weakness and would encourage mutiny: “Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them . . . .” Vere is no monster, but he clearly decides that the best course for the ship is to hang the innocent Billy as a warning to the rest of the crew, so many of whom were, like Billy, pressed into service against their will.

This reminds me of Story in *Prigg v. Pennsylvania*.

**Joseph Story and the Slave Trade**

Story was a strong opponent of slavery, and presided over trials involving alleged slaving ships as the Circuit Justice in New England, where abolitionist feeling was rampant. In 1822 he wrote the Circuit Court's opinion in *United States v. La Jeune Eugénie*, a case involving the slave trade, which had been outlawed in the United States in 1809, the earliest date allowed by the Constitution. In that case, the “public armed schooner” *Alligator*, patrolling the coast of Africa to enforce the various American anti-slave trade statutes, had seized the schooner *La Jeune Eugénie* off the West African coast as a suspected slave ship. The *Eugénie* flew a French flag, had French papers and was registered as owned by two residents of Guadeloupe, a French possession, but had been built in the United States. Although she had not taken on any
slaves when captured, there was a great deal of circumstantial evidence that the *Eugénie* was fitted out for the slave trade. Against this, all the seamen of the *Eugénie* who were examined said that they had no reason to suppose that she was engaged in the slave trade.

The United States filed a libel, an admiralty action seeking forfeiture, against the schooner with two counts: first that she was a vessel of the United States engaged in the slave trade and thus subject to forfeiture, and second that she had been captured as prize and when seized was “concerned and employed in the slave trade.” The second count did not allege to what nation she belonged. A claim was made for the schooner by the French consul on behalf of the owners of record, and a protest was made by the French Government.

Story marshaled the circumstantial evidence and said that “[i]f there are any persons, who entertain doubts as to the real destination and employment of this vessel, I profess myself not willing to be included in that number.” He dealt with the ownership question almost as summarily. He said that American slave traders would have to use a foreign flag on their slaving vessels, and although documents of title normally created a presumption of ownership, where the slave trade was concerned, “an American court will have its suspicions alive.” Because of this, he put the burden of proving bona fide ownership on the claimants, and declared that “standing, then, as this cause does, I am not satisfied that the property is owned as claimed.”

But there remained the claim of the French consul. After some “preliminary considerations” he turned to “the great points in controversy,” particularly whether the slave trade violated the law of nations. Story conceded that slavery might have a lawful existence “or may form a part of the domestic policy of a nation,” but continued that “this concession carries us
a very short distance towards the decision of this cause." He then began a long denunciation of the slave trade:

It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other. It begins in corruption, and plunder and kidnapping. It creates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. . . .39

The paragraph continues for nearly another page, detailing the impact of the slave trade on Africa and the Africans in some of the nineteenth century's most purple prose ("brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted," etc.). He then concluded:

It is not by breaking up the elements of the case into fragments, and detaching them one from another, that we are to be asked of each separately, if the law of nations prohibits it. We are not to be told, that war is lawful, and slavery lawful, and plunder lawful, and the taking away of life is lawful, and the selling of human beings is lawful. Assuming that they are so under circumstances, it establishes nothing. It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations.40

Story argued that the law of nations could develop incrementally, like the common law, and without either unanimity of conduct or a formal treaty.41 As to the African slave trade, condemned individually by most but not all "civilized communities," it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of society. When any trade can be truly said to have these ingredients, it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation.42
From this Story concluded that "the slave trade is a trade prohibited by the universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected."\(^{43}\)

Story's aggressive attitude, natural law/morality argument and overwrought language provoked mild disapproval from his friend and close ally on the Supreme Court, John Marshall, himself anti-slavery. In *The Antelope*,\(^{44}\) a slave trade case decided shortly after *La Jeune Eugénie*, Marshall expressed in not terribly subtle terms his disapproval of Story's moralizing in *La Jeune Eugénie*: "Indeed, we ought not to be surprised, if, in this novel series of cases, even courts of justice should, in some instances, have carried the principle of suppression further than a more deliberate consideration of the subject would justify."\(^{45}\) Marshall's criticism seems not to have been lost on Story, who toned down his rhetoric in later opinions, but nonetheless wrote opinions freeing slaves in *The Plattsburgh*\(^{46}\) and in the famous *Amistad* case.\(^{47}\)

**Story and Prigg v. Pennsylvania**

The fugitive slave cases were much more controversial and gut-wrenching than the slave trade cases. Unlike the slave trade, which almost everyone opposed\(^ {48}\) and which usually involved a faked foreign registration, the fugitive slave cases involved an unashamed claim under federal law to what was deemed lawful property — an escaped slave. There was bitter resistance in the North, and the cases raised serious questions of federal supremacy, with federal law favoring the slavery interests. While Story had made a distinction in *La Jeune Eugénie* between slavery and the slave trade,\(^ {49}\) there is a great deal of extra-judicial evidence that he was a genuine abolitionist. Nonetheless, for a federal judge, the federal fugitive slave laws,
specifically sanctioned by the Constitution, raised difficult question, both legally and politically.

Prigg v. Pennsylvania was an appeal from a state court criminal conviction of a slave-catcher who had kidnaped Margaret Morgan, an alleged fugitive slave from Maryland, after a Pennsylvania justice of the peace had refused a warrant for her extradition. In fact, the case was a friendly dispute (though vigorously litigated), between Maryland and Pennsylvania, brought into court, apparently on agreed facts, so that a perennial irritant between these two bordering states, one slave, one free, could be resolved by the Supreme Court.

Prigg was convicted under a Pennsylvania law making it a felony to kidnap “any negro or mulatto” for the purpose of putting the person in slavery. Story, writing the Opinion of the Court, commended the cooperation between Pennsylvania and Maryland in bringing the case before the Supreme Court and pointed out that the Pennsylvania kidnaping statute had apparently been passed to satisfy Maryland on the topic of fugitive slaves. The critical issue was whether the Pennsylvania statute was unconstitutional as beyond Pennsylvania's powers under the Fugitive Slave Clause of the Constitution and the federal Fugitive Slave Act of 1793.

Story began with the words “[f]ew questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest.” He emphasized at some length the compromises that underlay the enactment of the Constitution, especially the Fugitive Slave Clause, concluding:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where
they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddlng with, or obstructing, or abolishing the rights of the owners of slaves.57

This is a far cry from Story in *La Jeune Eugénie* in 1822, or even from his more temperate opinions for the Court in *The Plattsburgh* and *The Amistad*. He twice calls the humans held in slavery "property" – even dehumanizing them to "this species of property" – and speaks of their "owners" "right and title" to them. On top of this, his argument that the Fugitive Slave Clause was critical to the adoption of the Constitution is doubtful historically. The Fugitive Slave Clause was inserted into the Constitution without any debate or dissent, almost as an afterthought in the waning days of the Constitutional Convention.58

Even more important than his rhetoric, Story held that the Fugitive Slave Clause was self-executing and thus gave slave owners and their agents a right of self-help that could not be regulated or interfered with by a state.59 Thus, the Pennsylvania statute was unconstitutional and Prigg's conviction had to be reversed.60 Of some solace to anti-slavery states, Story did hold that federal jurisdiction was exclusive,61 and that the states could not be required to allow their courts to be used to enforce the federal statute.62

Chief Justice Taney, a notorious supporter of slavery, concurred in part, arguing that not only were states disabled from interfering with a slave owner's rights under the Fugitive Slave Clause, but that they had an affirmative duty to aid the owner to recover his or her slaves.63 In fact, Taney, a true believer in states' rights except in slavery cases, claimed that the Constitution
affirmatively made the slave owner's property interest a part of all states' laws, wherever a slave might be found:

The Constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union; and is the paramount law. The right of the master, therefore, to seize his fugitive slave, is the law of each state; and no state has the power to abrogate or alter it. And why may not a state protect a right of property, acknowledged by its own paramount law? [Every state protects the rights of those who bring property into the state.] And in the absence of any express prohibition, I perceive no reason for establishing, by implication, a different rule in this instance; where, by the national compact, this right of property is recognised as an existing right in every state of the Union.64

Justice McLean, an Ohio Methodist who consistently opposed slavery, dissented at length,65 arguing that while states could not act to undermine the federal statute, they retained concurrent jurisdiction to protect free blacks from kidnaping and to afford escaped slaves access to judicial process.66 According to McLean, the justice of the peace who refused the warrant to the slave-catcher was wrong, but the slave-catcher's remedy was to go before a federal judge, not to exercise self-help.67

Why does the opinion of the Court, by Story the abolitionist, seem so much closer to that of Taney, the ardent apologist for slavery, than to that of his fellow abolitionist, McLean? Story's son later wrote that by holding that state courts did not have to aid the slave-catchers his father was trying to undermine the fugitive slave law by forcing the slavery interests to find distant federal judges if they needed judicial help,68 but since Story had just allowed self-help without fear of prosecution, it is hard to see how his opinion would have had much practical impact on the slave-catchers. Robert Cover, on the other hand, says that Story retreated into formalism to avoid the tensions between his beliefs and the binding federal statute.69 Yet McLean was able to write a plausible dissent calling for the upholding of Prigg's conviction while acknowledging
the supremacy of the Fugitive Slave Law and conceding that the Pennsylvania justice of the peace had acted improperly in refusing to send Margaret Morgan back to Maryland. When we remember Story's piercing of formalities in *La Jeune Eugénie* and other slave trade cases, his refusal to do so here is doubly strange, and we may legitimately ask why Story did not join McLean in dissent instead of going out of his way to write a manifesto in favor of the Fugitive Slave Act.

**Frying Fish**

Is not the answer that as much as Story hated slavery he loved the Union more, that he felt that a decision allowing a free state to ban self-help by slave-catchers would send a message of hostility to the South and weaken the Union? All the South was watching *Prigg*, and an opinion supporting a free state's interference with the recapture process would have added to the sectional tension and the increasingly common talk of secession. This willingness to compromise by strong abolitionists was not new. It was apparent when the Constitutional Convention dealt with the hated slave trade. Benjamin Franklin, in 1787 the President of the Pennsylvania Society for the Abolition of Slavery, chose not even to present to the Convention a petition against the slave trade from his society's members. James Wilson, another strong opponents of slavery, told the Pennsylvania Ratifying Convention that a twenty year delay in the banning of the slave trade and a maximum head tax of $10 per imported slave "was all that could be obtained. I am sorry it was not more . . ." More could not be obtained because the Northern delegates were willing to trade an absolute ban for commercial benefits. Gouverneur Morris, an outspoken and unbridled delegate, who earlier had spoken at length against slavery and called it the “curse of heaven," said when the South sought a super-majority requirement
for navigation acts and the North sought a total ban on the slave trade, that “[t]hese things may form a bargain among the Northern and Southern States,” and just such a bargain was made. In later years, John Marshall made casuistic distinctions between moral and legal objections in an important slave trade case, The Antelope, and chastised Story for his passionate outbursts against the trade, but while doing so was able to free a sizable portion of the blacks on board the ships involved.

It seems that Story, too, would do what he could, but was unwilling to risk the enterprise. Like Captain Vere he was not forced to the result he reached, he reached the result because he thought that it was necessary, despite — or because — of its injustice. To Vere preventing mutiny was more important than Billy's life. To Story saving the Union was more important than Margaret Morgan's freedom. Story was, of course, not alone in this view. Lincoln stated it most clearly and eloquently in his famous letter to Horace Greeley in 1862:

I would save the Union. . . . If there be those who would not save the Union, unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. . . .

I have here stated my purpose according to my view of official duty; and I intend no modification of my oft-expressed personal wish that all men everywhere could be free.

The attitude permeated the Constitutional Convention, drove the various Nineteenth Century compromises on slavery in the territories and kept Lincoln from freeing the slaves until nearly two years into the Civil War. Later, it led the North to abandon Reconstruction and to
accept Jim Crow in the South, and led the Supreme Court to implement school desegregation only “with all deliberate speed.” It wasn't that we were monsters or didn't recognize the wrong. It was because there were more important things than how blacks were treated. We simply had bigger fish to fry.

The Black Bottom\textsuperscript{79} and America's Future

Twice we paid attention. The first time was the years around the Civil War, at most twenty-five years, from the early 1850s to 1876, when a deal over the presidential election ended military occupation of the South. The second was during the Civil Rights Movement, maybe six years, from the Birmingham church bombing that killed the four young girls, to the passage of the Fair Housing Act after the King riots of 1968. Resentment against the riots, opposition to integration in the North and Richard Nixon's southern strategy ended all that.

There have been lots of improvements in the past forty years. We have a black middle class and blacks are in places that few of us were ready to predict in 1970, except as fantasy, and it isn't only Oprah who is black, rich and influential. But the black underclass is as bad off as it was in 1970. Its children still go to segregated ghetto schools of poor quality. A huge percentage of the boys will end up in jail, and too many of the girls will be pregnant in their teens. Yes, now it is possible to get out, and some kids will be able to overcome the obstacles. But most won't. Eventually, the underclass of blacks may erode, but we don't have another century for this to happen. Blacks are still disproportionately poor and poverty is still disproportionately black. And our prison population is disproportionately poor \textit{and} black. In this year when a black man and a white woman are serious contenders for the presidency, the old saw that “anybody can become President” looks truer, but a lot of blacks are not “anybody.”
They are nobody. 80

In 1969 the Kerner Commission warned that we were becoming two nations, one rich and one poor, with the well-off huddled in suburban enclaves, protected by armed guards. The prediction quickly became reality, and while “respectable” blacks may be let in with the middle- and upper-class whites, young men of the black underclass are likely to be exactly the ones the guards are keeping out.

What I worry about is an increasing separation between the races, with middle- and upper-class blacks caught in the middle. If a large black lumpen proletariat continues to go to bad ghetto schools with strong prospects of prison for the boys and early pregnancy for the girls, the fact that a few can get out will not be enough. Especially if there are rising expectations, we may see what we presently consider anti-social behavior become politicized. 81 At the risk of sounding like a Cassandra, my fear is that this country will turn into Northern Ireland or Bosnia or the West Bank. The white majority will almost certainly win, but the cost to our nation — and to all its people — will be immeasurable.

Since blacks are dispersed around the country, it's hard to imagine real separatism with national territorial demands. (Detroit? Mississippi? South Central L.A.?) But it is not hard to imagine the cities becoming off-limits to all but poor blacks and even the near suburbs not being safe havens as the inner city blacks vent rage on whites, on other minorities — Asians and Hispanics in particular, and even on the better-off blacks who have been able to escape.

With luck this won't happen. But if it doesn't the past thirty years say that change, also, won't happen. Americans of African ancestry have been remarkably loyal to a country that hasn't treated them very well. Blacks have always rejected separatism. Most Jews in Russia under
the Czars never thought of themselves as Russians, but for all the justifiable anger and understandible rhetoric of separation, black Americans still think of themselves as Americans.\textsuperscript{82} Black Americans, especially the poorer ones, are cut off from whites outside the workplace, and for those who don't have a job, or have a menial one, the gulf between the races is even wider. Nonetheless, we have not become balkanized, and perhaps the rebellion I visualize won't ever happen. Yet if we do nothing about the hopeless condition of blacks at the bottom, and if they do not start an intifada, the nation may be worse off. Allowing this waste of people is not only the same immorality that we condemned in the slave owners and segregationists, it has an ever-increasing social cost, not only in crime, but in welfare and medical costs, and in a waste of talent.

“Well,” one may say, “that's plausible, but we've got two wars, social security, health care and a recession to worry about. And you admit that progress has been made and can continue to be made until the black underclass grows considerably smaller or even disappears as a serious problem.” But it took 100 years for the freed slaves to begin to be treated as equals. If poor blacks have to wait until the twenty-second century for their descendants to get out of the slum life, I can't believe that they won't explode. If you think I'm hysterical, just look around the world. Everywhere there is a tension between the expansion of the middle class and the anger of those left out. It could happen here.

Maybe only an explosion will make the issue central to the rest of us. I hope not. Hillary Clinton brought down a storm upon herself for saying that Martin Luther King couldn't have got the 1964 Civil Rights Act passed without President Johnson's strong support. She phrased it ineptly and paid a price, but she was right.\textsuperscript{83} The 1964 Act never would have made it, but for a
substantial and knowledgeable group of blacks who helped put together a grand interracial coalition, but the Senate was 100 percent white, and the House wasn't much better. Lyndon Johnson had a political need to get the bill through,\(^\text{84}\) and he got it through, though he knew the political cost. When Bill Moyers asked him, the night the bill passed, why he was depressed, LBJ said “I think we've just delivered the South to the Republican Party for the rest of my life, and yours,”\(^\text{85}\) and he was right.

Johnson and an enormous number of mostly white northern Democrats and liberal Republicans put everything they had into the bill, because they believed in it. For that moment, it was central to them. Claire Engel, a senator from California, was dying of brain cancer when the critical vote to break the southern filibuster was taken. They brought him in on a stretcher, and, since he could no longer speak, he touched a finger to his eye, to vote “aye” for cloture.\(^\text{86}\) Several of the liberal Republicans who were so important to the passage of the bill eventually were defeated in primaries, and the Democratic party did lose the South. But it was worth the cost because they changed America.

I am not talking about the end to all prejudice, and I don't believe that everyone will ever have the same chance at success as those born with advantages, but the black bottom must truly become part of America, the way Catholic and Jews have become and the way Asians are becoming. Without the main stream caring – deeply caring – about getting them in, dramatic change just won't happen without the explosion.

But the pressure for that change has to come from blacks, and if we are not to wait for the explosion from the bottom, it must come from the middle and the top. It is said that when Fidel Castro came into power in Cuba in 1959 he called on young people to go into the country to
teach people how to read, and that within two years illiteracy was eliminated. If blacks who have got out of the ghetto (or never started there) were to go back in massive amounts to work with the children most at risk – providing men to replace missing fathers, providing some experience to help teenage mothers, spending time one-on-one in place of day care, supplementing reading teachers by listening to the kids read, showing the kids that there is a better life but that it depends in large part on school, that would be a start. Jim Brown, the great football player, has worked with gangs in Los Angeles for close to forty years; more tough men and women are needed. A lot of money will be needed despite all the volunteerism in the world, and it will have to come from Washington. The states don't have the money and however much the message gets through to the majority, the suburbs aren't likely to tax themselves heavily to help the inner cities.

It will take leadership. Any of the three candidates now in the race can lead the nation as a whole to see this as our problem: their models are a Republican from Illinois and a Democrat from Texas. They can be prodded, just as Lincoln and LBJ were. This wave of volunteers that I imagine can be the prod. It can be started first by the black churches and by many individual blacks, not just celebrities but people who got through school and got a decent job and go to that job every day and come home to a decent life in a comfortable home. If the rest of us, who are neither political leaders nor members of a minority, saw this happening, it might just galvanize us to add to the force, by doing and by supporting legislative change.

I fear that this sounds naive and sentimental, hopelessly idealistic. I have two responses. The first I have stated at some length: this existence of poor blacks hurts this country and will hurt it more, either by exploding or as a dead weight drag. The second is that I make no apology for having ideals; this nation was founded on ideals, most notably that anyone could succeed,
regardless of parentage or origins, unlike eighteenth century England and France, where rigid social structures and religious limitations greatly restricted opportunities. In 1776 “anyone” really meant any white man, and primarily any Protestant white man, but we have consistently expanded the definition of “anyone.” If we continue to allow lives to be wasted because children are born poor and black we violate the ideals of the Declaration of Independence and of the Preamble to the Constitution. The black bottom is not created equal. It does not have the blessings of Liberty that we sought to secure to ourselves and “our” Posterity. It is time that it

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1His appointment to the Columbia faculty was announced in 1968, while he was still a law student there. He later moved to Yale, where he was Chancellor Kent Professor of Law and Legal History. He died of a heart attack in 1986, at 42. Twenty-two years after his death, the Robert Cover Study Group still meets each year at the Association of American Law Schools meeting, and the Robert M. Cover Public Interest Law Retreat is held each spring. For more on Cover, see Tributes to Robert Cover, 96 Yale L.J. 1069 (1987).


3Billy Budd (An inside narrative), in Four Classic American Novels (Signet 1969) (1891). This edition is based on Melville's Billy Budd, edited by Frederick Barron Freeman and corrected by Elizabeth Treeman (1956). Since Melville died before Billy Budd was published, there are multiple texts available. All reference here will be to the Signet edition.

4See Cover, note 2, at 2-6, 252.

5 41 U.S. (16 Pet.) 536 (1842).
6 **Billy Budd, 7-8.**

7"It was not very long prior to the time of the narration that follows that he had entered the King's Service, having been impressed on the Narrow Seas from a homeward-bound English merchantman into a seventy-four outward bound, H..M.S. *Indomitable*; which ship, as was not unusual in those hurried days having been obliged to put to sea short of her proper complement of men." **Billy Budd,9-10.**

8"William Budd,' repeated Captain Vere with unfeigned astonishment; ‘and mean you the man that Lieutenant Ratcliffe took from the merchantman not very long ago—the young fellow who seems to be so popular with the men—Billy, the Handsome Sailor, as they call him?" **Id. at 54.**

9**Id., 51-57.**

10**Id., 57-61.**


12See Cover, supra note 2, at 5: “I cannot claim that Vere is Lemuel Shaw (though he might be), for there is no direct evidence. I can only say that it would be remarkable that in portraying a man caught in the horrible conflict between duty and conscience, between role and morality, between nature and positive law, Melville would be untouched by the figure of his father-in-law in the *Sims Case*, the Latimer affair, or the Burns controversy...”

13**Id. at 4.**
16 I have no desire to get into a dispute over literary criticism; a masterpiece like *Billy Budd* may be understood in many different ways.

17 *Billy Budd*, 62.

18 Id., 62-63.

19 Id. at 72.

20 The opera has a libretto by E. M. Forster, and clearly both Forster and Britten thought deeply about the characterization. Ustinov's film was made in 1962 and is based on a play by Louis Coxe and Robert Chapman, produced on Broadway in 1951. Pauline Kael, who had roughly the same reading of Melville as I do, strongly criticized Ustinov's shaping of the character of Captain Vere. See Pauline Kael, Review of *Billy Budd*, 16 Film Quarterly 53 (1963). I think that she overstates her case in suggesting that Captain Vere is the villain of the piece, which he surely is not.

21 *Billy Budd* at 73. Billy's last words appear at page 80 and Captain Vere's at page 85.

22 Id., 64-71.


24 *Billy Budd* at 62.
25 Id. at 70.

26 When Captain Vere informed the crew of Billy's killing of Claggart and his conviction and condemnation, "[t]he word *mutiny* was not named in what he said. He refrained too from making the occasion an opportunity for any preachment as to the maintenance of discipline, thinking perhaps that under existing circumstances in the navy the consequences for violating discipline should be made to speak for itself." Id. at 74 (the italics are Melville's).

27 Until well after the Civil War the federal court system consisted of two courts of original jurisdiction and the Supreme Court. The District Courts consisted of one district judge and had minor criminal jurisdiction and admiralty jurisdiction. The more important trial court was the Circuit Court, which consisted during most of the nineteenth century of a district judge and the Justice of the Supreme Court assigned to the circuit (the Circuit Justice). "Riding circuit" was an important, and often burdensome part of the job of a supreme court justice. See generally the classic history of the federal judicial system (despite its misleading title), Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927).


30 She had a movable deck, a very large main hatchway with three iron bars, enough water to supply two hundred men for a month (her crew numbered 19), enough food to supply the crew for five months, a number of handcuffs and fetters, and a surgeon on board with a supply of medicines. There was also testimony that the captain had said that he would have all his cargo of slaves in twenty days, and hearsay that he was to have 250 or 300 slaves. Id. at 834.
32 Id.

33 Id.

34 Id. at 840.

35 Id. at 841.

36 Id.

37 Id. at 842. Story ruled that even if the vessel had been improperly seized he would not automatically turn her over to the claimants, but would be “bound to sift to the very bottom the merits of the present claim,” id., and would hold the ship for her true owners. He then spent several pages on a discussion whether the evidence found was inadmissible if the boarding of the Eugénie was improper. Story rejected the modern “fruit of the poisonous tree” doctrine that drives much of modern criminal procedure, and held that the evidence would be admissible. Id. at 842-44.

38 Id. at 845.

39 Id.

40 Id. at 846.

41 See id. Story’s opinion is an important way-station in the development of international law in the American courts. See generally Jordan J. Paust, International Law As Law of the United States 4-12, 23 n. 14, 31 n. 20, 60 n. 83 (2d ed. 2003).

42 26 Fed. Cas. at 846.

43 Id. Story agreed to allow the ship to be given over to the King of France to do with as he
wished. In doing so, he acceded to a request of the Government, and according to Professor G. Edward White, as a result, the Monroe Administration, which feared diplomatic repercussions, did not take the case to the Supreme Court. See G. Edward White, The Marshall Court and Cultural Change 1815-1835 at 696 (1991). Judge John Noonan has a slightly different reading: the Monroe Administration instructed the United States District Attorney to give the case up. Since the United States had brought the case as libelant and had won before Story, the appeal to the Supreme Court would have been brought by the French Vice Consul. See John M. Noonan, Jr., The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams 74 (1977).


4623 U.S. (10 Wheat.) 133 (1825).


48The South opposed the slave traders because they competed with the domestic sale of slaves “grown” on slave farms. The North opposed them for the reasons given by Story in La Jeune Eugénie: they were kidnappers.

49See the quotation from La Jeune Eugénie in text accompanying note 39, supra.

50“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such
Service or Labour, but shall be delivered up on Claim of the Party to whom such Service may be
due." U. S. Const. Art. IV § 2 cl. 3.

51 41 U.S. (16 Pet.) 536 (1842).

52 The anti-slavery forces seem to have made a tactical error in apparently allowing the
agreed facts to concede that Margaret Morgan, was in fact an escaped slave. Id. at 556-58 (jury
(1993), this was untrue -- Margaret Morgan had at least informally been set free and her children
were born free. The information put before the Court in the record, however, made the case into
a generic fugitive slave case, which made the Opinion of the Court much easier to write.

53 41 U.S. (16 Pet.) at 588-90 (argument of Attorney General Johnson of Pennsylvania);
608 (Opinion of the Court).

54 Id. at 608-09.

55 1 Stat. 302 (1793).

56 41 U.S. (16 Pet.) at 610.

57 Id. at 611.

1966) ("Ferrand"). It is possible, of course, that an off-the-record deal had been made, but there
is no evidence of this or that it was critical to the adoption of the Constitution. Accord, Don

59 Id. at 625-26.

60 Id. at 622.

63 41 U.S. (16 Pet.) at 626-27.

64 Id. at 628.

65 Id. at 658-73.

66 Id. at 669-73.

67 Id. at 673.

68 Cover, supra note 2, at 241. Taney complained about the difficulty for slave catchers and dissented on this point.

69 Id..

70 Supplement to Max Ferrand's The Records of the Federal Convention of 1787 at 44 n. 1 (James H. Hutson, ed. 1987); 3 Ferrand, supra note 58, at 361.

71 3 id. at 161. Some 200,000 Africans were captured and enslaved during the twenty year delay.

72 2 id. at 221-22.

73 The South had no fleet of its own and was dependent on foreign trade for its agricultural products. It feared that a Northern simple majority in Congress might eliminate foreign competition by passing “navigation acts” requiring all shipments to be in American bottoms. The
Southern delegates proposed a two-thirds requirement for these acts.

742 id. at 374.

75Supra note 44.

76See text accompanying note 45, supra.

77See The Antelope, supra note 44, 23 U.S. (10 Wheat.) at 127-32. The lower court had freed only sixteen Africans; Marshall was able to raise the number to about 120. See id. and Noonan, supra note 43.


79I hope the term doesn't offend, and I do recognize that much of the black culture that has so enriched America has come from the poor. The “black bottom” was a dance that already was an obvious *double entendre*. This makes it triple. The term stands in contrast to W. E. B. DuBois's emphasis, a century ago, on “the talented tenth.” The top and the bottom, as well as the black working class, all needed relief from obstacles. The others have got some, at least. The bottom group essentially has not.

80I realize that much of this can be said about other minorities, most notably Hispanics and Native Americans, and in a real sense, poor whites, especially in Appalachia and other parts of the South. Their problems are real, but the problems of poor blacks are even worse.

81Let us not forget that during his twenty-six years in prison Nelson Mandela was considered by the apartheid régime in South Africa simply to have been a co-conspirator to murder.
82 Even as the Rev. Jeremiah Wright repeated and defended his comments critical of the United States' treatment of people of color, he reminded his listeners that he had served six years in the Navy and the Marine Corps.

83 Bill Moyers appears to agree, and adds that LBJ equally needed Dr. King. See Moyers on Clinton, Obama, King and Johnson: A Bill Moyers Essay, http://www.pbs.org/moyers/journal/01182008/profile4.html. (Last visited April 17, 2008.) For the record, the author supports Senator Obama.

84 As of the spring of 1964 Johnson feared losing the black and liberal voters in the North to Nelson Rockefeller.

85

"Finally, the impact of the 1964 act on the American political scene was profound. Bill Moyers, a former aide to LBJ, recalled, in a statement during a 1990 symposium at the Johnson Library: ‘The night that the Civil Rights Act of 1964 was passed, I found him in the bedroom, exceedingly depressed. The headline of the bulldog edition of the Washington Post said, “Johnson Signs Civil Rights Act.” The airwaves were full of discussions about how unprecedented this was and historic, and yet he was depressed. I asked him why. ‘He said, “I think we've just delivered the South to the Republican Party for the rest of my life, and yours.” ’"