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LAW AND LITERATURE. THE DEATH OF JUSTICE IN HERMAN MELVILLE'S *BILLY BUDD.*

BACHELOR THESIS

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DEGREE IN LAW

DATE: May 13th, 2024.

ABSTRACT

Herman Melville's novella *Billy Budd*, set in a ship in war time, exposes the arguments that lead the Captain to execute a sailor, based on the strict application of the law and on a potential threat of mutiny. This morally ambiguous verdict presents a profound question about justice, whose answer is entangled in different topics of philosophy of law such as utilitarianism, the banality of evil, obedience and disobedience of the law, tragic cases and moral dilemmas. Analyzing the events of the story through this philosophical lens, the notion of justice will be examined, exposing at the same time the richness that both law and literature can gain by interacting with each other.

Key words: law, literature, philosophy, Billy Budd, justice.

RESUMEN

La novela corta *Billy Budd* de Herman Melville, que se desenlaza en un barco en tiempos de guerra, expone los argumentos que llevan al Capitán a ejecutar a un marinero, basándose en la estricta aplicación de la ley y en una potencial amenaza de amotinamiento. Este moralmente ambiguo veredicto presenta una profunda pregunta sobre la justicia, cuya respuesta se encuentra enredada en diferentes cuestiones de la filosofía del derecho, como el utilitarismo, la banalidad del mal, la obediencia y la desobediencia a la ley, los casos trágicos y los dilemas morales. Analizando los eventos que ocurren en la novela a través de la filosofía, la noción de justicia será examinada, exponiendo al mismo tiempo la riqueza que tanto el derecho como la literatura pueden obtener mediante la interacción mutua.

Palabras clave: derecho, literatura, filosofía, Billy Budd, justicia.

LABURPENA

Herman Melvillen Billy Budd istorioa, gerra garaian itsasontzi batean ematen dena, Kapitaina marinal bat exekutatzera eramaten duten argudioak azaltzen ditu, oinarri bezala legearen aplikazio zorrotza eta matxinatze mehatxu potentzial bat hartuz. Moralki zalantzagarria den epai hau justiziari buruzko galdera sakon bat aurkezten du,

eta haren erantzuna zuzenbidearen filosofiarekin erlazionatuta dauden gai desberdinetan korapilatuta dago: utilitarismoa, gaizkiaren hutsalkeria, legearekiko obedientzia eta desobedientzia, kasu tragikoak eta dilema moralak, esate baterako. Istorioaren gertakerak filosofiaren bidez aztertuz, justiziaren nozioa ikertu egingo da, aldi berean, zuzenbideak eta literaturak elkarrekintzaren bidez lor dezaketen aberastasuna azaleratuz.

Gako-hitzak: zuzenbidea, literatura, filosofia, Billy Budd, justizia.

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1. INTRODUCTION

There have been countless pages written about Herman Melville's novella *Billy Budd*, most certainly because of the weight of the underlying subjects in the story. When thinking about Melville, what comes to mind to the average reader is the grandiose *Moby Dick*, which has become his immortal signature classic, and although deserving so, eclipsing other of his literary masterpieces as a result.

Still, scholars have definitely not lost sight of his *Billy Budd*, particularly in the legal field of Philosophy of Law, and inside this field, even more concretely, in the realm of Law and Literature, as its a story that brings out, not the usual black or white morality quest, but a gray and ambiguous question about justice. In WEISBERG's words, one of the pioneers of the movement, Melville's "*Billy Budd* has come to mean Law and Literature"[1]. It's precisely the realm of Law and Literature the place from which this thesis will be approached.

Throughout the degree of Law I realized that all the technical knowledge that was being taught was lacking a light that guided them: Philosophy of Law. Out of two hundred and forty credits, Philosophy of Law nourishes law students with solely eight credits, even when it's the foundation of all the remaining two hundred and thirty-two ones.

Thinking of Philosophy of Law as a tree and the rest of the legal subjects as its fruits, I've considered complementary readings on philosophy as vital throughout the degree, accompanying them with more literary works to see the philosophy through the stories.

When I read *Billy Budd*, it left me shaken and longing for a deep dive into its richness, so I took this thesis as some kind of gift from the university to indulge in something I was really passionate about.

However, as I read thesis after thesis upon the story, I was left with a bittersweet taste in my mouth. There's many essays on *Billy Budd* from a law and literature perspective that

[1] LEVINE, Robert., *The new Cambridge companion to Herman Melville*. Cambridge University Press, Cambridge (United Kingdom), 2013, p. 143.

are enlightening in some aspect of the story or another[2], but very few of them[3] actually take the step to provide a map of philosophical arguments in order to answer the question that story raises: is Captain Vere's verdict just?

In this scenario, I realized that I wasn't finding what I would have liked to read. There's probably a main reason why I wasn't encountering the answer: because it required authors to enter into the terrifying abyss of morality and opinion. As aware as I am about the colossal, some may say utopic, challenge that is answering the question, I can't help but think that it's worth a try, for there's a lot to lose at stake.

Thus, this thesis provides an analysis of the themes of philosophy underlying throughout the story, guiding both the reader and the author as a lighthouse, in order to reach an answer to the question on Billy's case.

In order to investigate the topics of the thesis, I've read works of philosophers such as Martha NUSSBAUM, Henry David THOUREAU, Michael J. SANDEL, Marina GASCÓN and Hannah ARENDT, as well as articles about philosophers whose work I hadn't gathered the courage to read before, like KANT, HART and BENTHAM.

Keeping in mind the field of law this thesis belongs to, I added to my reading list the most discussed literary works from the Law and Literature movement, such as SHAKESPEARE's *The Merchant of Venice*, with Shylock's dramatic bloody contract, KAFKA's *The Trial*, which follows Joseph K. through the suffocating labyrinth of

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[2] See GABRIEL MAINO, Carlos Alberto., "Billy Budd o sobre la existencia del derecho natural", *Prudentia Iuris*, July 2018, pp. 21-34, which focuses on natural law; see ROCA TRIAS, Encarnación., "Billy Budd. El juez en su laberinto", *InDret*, Nº 1, 2020, pp. 470-482, which explores the judges' freedom in front of the law and their interpretative work; see BONORINO RAMÍREZ, Pablo Raúl., "Sobre el uso de la literatura en la enseñanza del derecho", *Revista Jurídica de Investigación e Innovación Educativa (REJIE Nueva Época)*, Nº 4, July 2011, pp. 73-90, who touches upon utilitarianism and the inquisitive process; also, CORRE, Jacob. & McADAMS Richard., "New light on the trial of Billy Budd", *Public Law and Legal Theory Working Papers*, Nº 684, November 2018, pp. 1-20, is great at analyzing the context of the story.

[3] In LARIGUET, Guillermo., "El desafío de Billy Budd. Dilemas morales y dimensión institucional del derecho", *CRÍTICA Revista Hispanoamericana de Filosofía*, Vol. 39, Nº 116, August 2007, pp. 51-78, he presents guidelines to answer the question of the story; apart from him, maybe the closest to giving a founded answer that I've encountered has been in WEISBERG, Richard., "How judges speak: some lessons on adjudication in Billy Budd, Sailor, with an application to justice rehnquist", *New York University Law Review*, 1982, pp. 42-58, in which the author answers the question by stating that Captain Vere manipulates the law in order to execute Billy, which has been both a criticized and acclaimed interpretation.

bureaucracy and oppression of the process, and SOPHOCLES' *Antigone*, whose Antigone is the divine law's heroine, rebelling against his royal uncle Creon's laws.

I've also had to carefully scrutinize Melville's *Billy Budd*, for it's the source of the thesis. With the intention to take in different perspectives on the story, I've also seen 1962's cinematic adaptation by Peter Ustinov, although it's important to note that this thesis is not based on the movie's portrayal of the characters, but on Melville's words.

The thesis tries to reach the previously mentioned answer through four blocks, from this introduction onwards:

The first block's aim is to explain the main lines of connection between law and literature, exploring the movement and hinting at some of the criticisms that have been thrown at it.

The second block highlights the relevance of *Billy Budd* and its author, but its main objective is to explain the story itself, so that the thesis can be followed.

The third block is the heaviest one, for it provides an analysis of the relevant events of the story. Every one of those events brings out some aspect of philosophy of law to the light: the basis of the legitimate defense, the importance of the procedural guarantees, the penal law of the enemy, the discussion and delimitation of moral dilemmas, the notion of tragic conflicts, the theories for obedience and disobedience to the law, the concept of the banality of evil, the sense of utilitarianism and its criticisms, and lastly, the classic, and not so classic, battle between positive and natural law. By explaining those topics, the answer starts taking form.

In the last block, the ideas that have been flowing in the previous block, finally crystallize into the answer to the question: is Captain Vere's verdict just?

The remaining part is dedicated to exposing the bibliography that has allowed for the answer to be formulated.

Having explained all of this, the boat can set sail to find the answer. In Melville's words: "It's not down on any map; true places never are"[4].

[4] MELVILLE, Herman., *Moby Dick*. Valdemar, Madrid (Spain), 2018, p. 148.

2. THE BOND BETWEEN LAW AND LITERATURE

In the ideal State there's no room for poets, for they are a corrupting agent towards reason; at least that's what PLATO claims[5]. The exile that poets undergo in his utopian Republic has gone down in history, drawing a thick line between poetry and reason.

The legal field was no stranger to this alienation, and in fact it seemed to have exiled literature, until 1973, when James BOYD WHITE published *The Legal Imagination*, which opened the door for a whole movement of *law and literature* to emerge[6], as it claimed that "law is -certainly from the point of view of the lawyer and judge- not a structure, but an activity of mind and imagination"[7]. This way, *The Legal Imagination* was the seed needed for the endless connections between law and literature to be pointed out by scholars.

One of the many theories built upon this connection differentiates, firstly, the area of *law in literature*, which references literary recreations of legal matters (e.g., trials, attorneys). Secondly, the area of *law of literature*, which alludes to the literary field in the realm of normative laws (e.g., intellectual property, editorial contracts). Lastly, it recalls the area of *law as literature*, which presents legal products as literary creations and undertakes legal products through literature's methodology of criticism and interpretation[8].

However, this well known approach has been no stranger to new proposals of systematizations. José CALVO GONZÁLEZ, for instance, offers three intersections to understand the bond between law and literature. The *instrumental intersection*[9] brings out sociological and philosophical notions of justice that can be useful for jurists, as well as poetic resources that they can apply in their texts. On the other hand, the *structural intersection*[10] explores dimensions of hermeneutics and aesthetics. Finally, he

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[5] PLATÓN, *República*. Gredos, Barcelona (Spain), 2020.
[6] SÁENZ, María Jimena., "Derecho y literatura", *Revista en Cultura de la Legalidad*, Nº 16, *April* 2019, p. 274.
[7] BOYD WHITE, James., *The legal imagination: studies in the nature of legal thought and expression (45th anniversary edition)*. Wolters Kluwer, New York (United States), 2018, p. 22.
[8] CALVO GONZÁLEZ, José., "Derecho y literatura. Intersecciones instrumental, estructural e institucional". *Anuario de filosofía del derecho*, Nº 24, 2007, p. 310.
[9] *Ibidem*, p. 313.
[10] *Ibidem*, p. 319.

assembles the *institutional intersection*[11], which highlights the common goal that law and literature share: institutionalizing social imaginaries[12], which has been portrayed in the legal world through texts and codes.

On another note, Andrés BOTERO BERNAL confronts the three classic law and literature dimensions with a six relationship model as an alternative[13]: the rhetoric model, the expository model, the methodological model, the analytic model, the legal model and the aesthetic model.

In any case, what these multiple proposals evidence is the factual bond that law and literature share. Even POSNER, whose criticism for the movement is well known, hasn't really denied the connection between the two[14].

POSNER claims that law should be evaluated economically rather than aesthetically[15], and so, he insists that literature can't be taken as a source for legal analysis[16]. He even affirms that the law and literature movement is a "false hope" that doesn't take into account the difference between the particular aims and functions of both law and literature[17]. Still, he was an advocate for including literature in the formative and pedagogic side of the law[18], and was even called a "bridge builder" between the two[19].

On another note, AGUIAR E SILVA highlights the common points between both disciplines, for both revolve around the human condition and in both of them words play a main role[20]. Similarly, François OST exposes how law is always looking at an

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[11] *Ibidem*, p. 324.
[12] CALVO GONZÁLEZ even uses the institutional intersection to point out the need to construct a new "legal geography", by a three phase process: reread, rewrite and oralize.
[13] CALVO GONZÁLEZ, José., *Implicación del derecho en la literatura. Contribuciones a una teoría literaria del derecho*. Comares, Granada (Spain), 2008, p. 33.
[14] CALVO GONZÁLEZ, José., "Derecho y literatura. Intersecciones instrumental, estructural e institucional". *Op. Cit.*, p. 309.
[15] BINDER, Guyora., "The poetics of the pragmatic: what literary criticisms of law offers Posner". *Stanford Law Review*, Vol. 53, Nº 6, July 2001, p. 1509.
[16] KARAM TRINDADE, André & MAGALHAES GUBERT, Roberta., "Derecho y literatura. Acercamientos y perspectivas para repensar el derecho". *Revista Electrónica del Instituto de Investigaciones Ambrosio L. Gioja,* Nº 4, *December* 2009, p. 185.
[17] *Ibidem*, p. 188.
[18] *Ibidem*.
[19] *Ibidem*, p. 185.
[20] *Ibidem*, p. 174.

imaginary social institution[21]. However, while law focuses on establishing norms and stereotyping situations, literature expands imaginative scenarios and plays with the ambivalence of situations[22]. Indeed, that's why literature has a role of subversive criticism, and, in some cases, can even embody a role of transformative creation[23].

Martha NUSSBAUM, one of the most well known figures in the law and literature movement, argues the need of poetic judges who enrich their reasoning through literature. Literature's endless fountain of human imagination provides reason with charity and helps it fight against cruelty and coldness[24]. She doesn't downplay the weight of technical skills[25] nor of fixated rules[26], for they guarantee stability and impartiality, but she proclaims that intellect without emotions is blind to values[27].

Ultimately, it seems as though literature, with its limitless vision and imagination, can throw light on the most complex and primary problems law has been facing throughout history[28].

3. HERMAN MELVILLE AND THE RELEVANCE OF HIS WORK *BILLY BUDD* IN LAW

It's impossible to talk about American literature without referencing Herman MELVILLE[29]. Born in 1819, he lived in the shadows of the success that would only flourish after his death in 1891. His commitment to exploring the suburbs of the human nature, just as DOSTOIEVSKI, has indisputably earned him a place amongst the most influential writers of all time[30].

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[21] OST, François., "El reflejo del derecho en la literatura". *Doxa, Cuadernos de Filosofía del Derecho*, Nº 29, 2006, p. 334.
[22] *Ibidem*, p. 335.
[23] *Ibidem*, p. 337.
[24] NUSSBAUM, Martha., *Justicia poética*. Andrés Bello, Barcelona (Spain), 1997, p. 73.
[25] *Ibidem*, p. 138.
[26] *Ibidem*, p. 123.
[27] *Ibidem*, p. 102.
[28] TALAVERA, Pedro., *Derecho y literatura. El reflejo de lo jurídico*. Comares, Granada (Spain), 2006, p. 59.
[29] As a hint, the *Melville Society* is one of the oldest single-author societies in the United States.
[30] For instance, the prestigious literary critic Harold Bloom included Melville in his book *Genius: a mosaic of One Hundred Exemplary Creative Minds.*

Although profusely studied in the literary field, just like his famous Moby Dick escaping from the never-ending harpoons thrown by Captain Ahab, Melville's work has rebelled against becoming stagnant in one academic field's interest solely.

In fact, the *law and literature* movement, with the potential of research that it has as an interdisciplinary tool, has not let MELVILLE escape its constant flow of examination. In other words, MELVILLE is one the most scrutinized writers among the movement; particularly, his novel *Billy Budd*, for reasons that will be apparent throughout the following pages. As mentioned in the introduction, WEISBERG, one of law and literature's most influential figures, claimed that "*Billy Budd* has come to mean Law and Literature"[31].

Billy Budd's plot goes as it follows: Billy is a pure hearted and good natured young sailor loved by everyone in the warship he was enforcedly enlisted in. However, Claggart, the Master-at-arms, seems to have taken an unfounded despise for the boy, which leads him to slander Billy by telling the ship's Captain, Captain Vere, that the youngster is plotting a mutiny.

When Vere demands an explanation, Billy, who has a total impediment of speech under circumstances of pressure, feeling the weight of the impossibility to defend his innocence through his words, throws a punch at Claggart, which kills him.

This tragedy happens in 1797[32], in the context of a British naval force that is fighting against Revolutionary France, with the sea as a central battlefield. As a note, during the XVIII century, the British Empire was cementing the thalassocracy that would be firmly established in the following years[33].

However, right before the events of the story, Britain's thalassocracy is put at risk by two mutinies: firstly, the mutiny of the Sipthead and secondly, the mutiny of the Nore, which happens on a larger scale, earning the name of "The Great Mutiny"[34]. To the British naval force, this mutiny, in the context of the war against the French, was "what

[31] LEVINE, Robert., *Op. Cit.,* p. 143.
[32] MELVILLE, Herman., *Billy Budd, Sailor*. Langre, Madrid (Spain), 2017., p. 33.
[33] MORENO ALMENDRAL, Raúl., "Los imperios en la Historia Global: concepto y reflexiones sobre su aplicabilidad en el discurso historiográfico", *Ab Initio*, Nº 8, 2013, p. 170.
[34] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 35.

a strike in the fire-brigade would be to London threatened by a general arson"[35]. As a result of the ongoing anxiety for mutinies, the naval institution becomes wary of the shipmen. Thus, the War Code dictates that every person who strikes a Superior Officer shall be punished with death.

In the aftermath of the novel, once Claggart is confirmed to be dead, Captain Vere summons a drum-head summary court and, sticking to the war article, ends up hanging Billy for killing a superior.

4. ANALYSIS OF THE EVENTS IN THE STORY.

4.1. BILLY'S INNOCENCE: the punch of an angel.

Billy's action is condemned by the War Code with the biggest punishment: death. Even though we could spiral around how this event should be sorted from a Penal Law perspective, that is not the purpose of this study. Instead, the aim is to briefly target the philosophical foundation of Billy's innocence, or at least, the need for a lower punishment.

It's indisputable that Billy's punch is an act of violence. In NUSSBAUM's words, however, the relevant facts, in some cases, are human facts, and it's the human sense of those facts what is at the center of the matter[36]. In this sense, if we take into consideration the humanity behind the act, it can't be ignored that Billy's action isn't simply a homicide, but a punch thrown as the only remedy to defend himself in a situation of impediment of speech under the pressure of a calumny of mutiny that could lead him to be hung.

According to St. Thomas AQUINAS, the justification for self-defense lies in the double effect principle, which claims that self-defense is just when the defendant doesn't have an intention to kill the aggressor, but to save himself. If the aggressor dies as a result of an act that intended to protect one's life, the act of violence will objectively be a mere

[35] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 32.
[36] NUSSBAUM, Martha., *Op. Cit.*, p.45.

act of self-defense instead of an act to kill[37]. Thus, Billy's reaction would be morally justified from a self-defense point of view.

As a way to illustrate the foundation of self-defense, the famous hegelian aphorism says: "Law has no need to give in to the unjust"[38]. GEYER goes as far as to say that the harm produced by the reaction of defense is balanced by the illicit aggression suffered by the defendant.

As a result, if the law punished the harm produced by the defendant to the aggressor, the balance would be altered, and the defendant would be punished twice: once, by the illicit aggression suffered, and twice, by the law[39]. Hence, by sentencing Billy with the death penalty, Captain Vere would be punishing him not only once, but twice, and he would not be restoring the law, but giving in to the unjust.

In a more radical, but not less insightful way, Hannah ARENDT quotes *Billy Budd* as a perfect portrayal of a situation in which a fast reaction of violence is the only appropriate remedy in order to reestablish justice's balance[40].

However, Billy is not solely innocent (at least to some degree) in relation to Claggart's death. We could switch the focus of his innocence towards the aim of the article of the War Code he is being condemned by.

The War Code assumes a direct correlation between striking a superior and manifesting an intention to mutine[41], and that's the reason why it's condemned with such a large punishment. To put it in other words, the real intention of the War Code is to tackle mutineers.

However, the intention behind an act has to be analyzed case by case, and in Billy's case, the punch wasn't thrown at Claggart as a strike against the authority of a Superior,

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[37] MONTANO GÓMEZ, Pedro J., "Legítima defensa: ¿el fin justifica los medios?", *Revista de Derecho de la Universidad de Montevideo,* Nº 29, July 2016*,* p. 61.
[38] LUZÓN PEÑA, Diego-Manuel., *Aspectos esenciales de la legítima defensa*. B de f, Montevideo (Uruguay), 2002, p. 35.
[39] MONTANO GÓMEZ, Pedro J., *Op. Cit.,* p. 60.
[40] ARENDT, Hannah., *Sobre la violencia*. Alianza, Madrid (Spain), 2005, p. 86.
[41] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 160.

but as an attack against a liar whose powerful position transforms the lie into a life threat.

This can lead us to reflect upon Billy's innocence in relation to the goal pursued by the article. In Federico DE CASTRO's words, "the word of the law has to be the starting point of the interpretation of the norm. Through it, the normative aim of the law can be explored. Because the norm is not an aim in itself, but part of a legal plan to organize society, we need to investigate the aim that corresponds to the norm in the system, considering this system in its totality; not solely the norm's immediate aim, but the general aim alongside that"[42].

Following this, the article has to be understood in thw general context of the War Code. As Captain Vere himself claims, this article is the Mutiny Act, and "the Mutiny Act, War's child, takes after the father"[43], meaning that the article is harsh, and has to be harshly enforced, because of the context of war that it belongs to.

This way, Vere's words confirm that the article is shaped by the disciplinary nature of the battlefield and by the need of a strong army in order to win the war. Hand in hand with that, the previous alarming mutinies are also an influencing agent towards the law[44]. As a result, the War Code's aim isn't to punish any punch, and even less, punches thrown as a defense mechanism; rather, its aim is to punish punches thrown as a behavior of sedition against the authority in the context of war.

As DE CASTRO concludes, "the only procedure of interpretation fit to the norms' nature is the teleological one, which is, as paradoxical as it may seem, the most secure and respectful towards the legislator's authority, who is presumed to be reasonable and avengeful"[45].

Thus, taking into consideration that the aim of the death penalty imposed by the article is to ensure that any intention of mutiny is extinguished, and knowing that the judges don't believe Billy to have that intention, doesn't that mean he is innocent in regards to

[42] VALLET DE GOYTISOLO, Juan Berclamans., "Los principios generales en la interpretación del derecho según el profesor Federico de Castro", *Anuario de derecho civil*, Nº 2, 1994, pp. 17.
[43] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 162.
[44] *Ibidem*, p. 145.
[45] *Ibidem*, p. 18.

the aim of the law? Why is he being punished for an intention no one believes him to hold?

Taking this into account, it seems as though Billy should be declared innocent both in regards to the death caused, for it was an act of self defense, and in regards to the intention of his action, as it wasn't to mutine, as so, it doesn't correspond to the inherent aim of the article.

4. 2. THE SUMMARY COURT: when speed wins over guarantees.

Before scrutinizing Captain Vere's final decision, we need to analyze the vehicle that Vere uses to manifest it.

In the story, the first action Vere takes as soon as Claggart is confirmed to be dead is to summon a drum-head summary court. Not only does he take upon the ultimate accountability of the judgment, but he also enhances his right to supervise the court, as well as to decide its members. Confusingly, Vere is also the sole witness of the case. Lastly, it's important to note that when the court talks to Billy, the boy has no legal support to defend his case, and sometimes he can't reach the understanding of the profound questions that are thrown at him[46].

It's not hard to see that this court is far from guaranteeing the due process. The due process is "a basic right that contains principles and guarantees that are indispensable to observe in the diverse procedures in order to obtain a substantially just solution"[47].

In Pablo LARSEN's words, "penal guarantees are conceived as limits destined to stop the Estate's punitive power from being arbitrary or abusive"[48]. In fact, HASSEMER goes as far as to claim that "a legal culture proves itself through those principles, whose injury would never allow, even when the injury meant greater gains"[49].

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[46] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 192.
[47] AGUDELO RAMÍREZ, Martín., "El debido proceso", *Revista Opinión Jurídica*, Vol. 4, Nº7, June 2005, p. 89.
[48] LARSEN, Pablo., "¿Por qué debemos respetar las garantías penales? Un enfoque consecuencialista", *Lecciones y Ensayos*, Nº 95, 2015, p. 197.
[49] *Ibidem*, p. 198.

With that in mind, Captain Vere seems to embody the abuse of the punitive power, demonstrating that "penal justice, in absence of guarantees, might generate in citicienz bigger dangers than the guilty's passions"[50]. What's more, by running over the due process, Vere is imposing the empire of the strongest to the weakest[51].

This way, he is using the penal law as a mere political instrument, which ties to the well known and criticized *criminal law of the enemy*. The criminal law of the enemy is a criminal law theory that claims that, in order to face certain types of criminality -in our story's case, sedition or mutiny-, it's possible to leave aside certain penal guarantees[52].

Through this theory's lens, penal guarantees are nothing but bureaucratic stumbling blocks towards the efficacy of the system[53]. In other words, the special danger of the subject (the enemy) enforces the legislator to fight against him in a specially aggravated way if he wants to maintain a minimum reliability of the social structure[54].

Accordingly, Captain Vere justifies the speed and flaws of the process with the nature of the crime Billy allegedly committed, affirming to himself that the legal brutality and the flaws of the process are not important when dealing with a mutineer. In fact, the objective of the measures imposed by the War Code that Vere brutally follows is, not only to stabilize the normative expectations, but also, and more importantly, to eliminate the danger, just like in the criminal law of the enemy[55].

This criminal method relies on the claim that some people are oriented in a general way against the law. However, SCHÜNEMANN neutralizes this foundation by showing that a criminal labeled as an enemy -like a mafia leader- might, in other areas of his life, respond in a satisfactory way to the expectations set upon him by the law -for example, by being a diligent family member, responding satisfactorily to family laws-[56]. Of

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[50] *Ibidem*, p. 200.
[51] AGUDELO RAMÍREZ, Martín., *Op. Cit.*, p. 92.
[52] LARSEN, Pablo., *Op. Cit,*, p. 203.
[53] *Ibidem,* p. 203.
[54] POLAINO-ORTS, Miguel., "Verdades y mentiras en el derecho penal del enemigo", *Revista de la Facultad de Derecho y Ciencias Sociales y Políticas,* Vol. 5, Nº9, 2011, p. 418.
[55] *Ibidem,* p. 427.
[56] RÍOS ÁLVAREZ, Rodrigo., "El derecho penal del enemigo. El problema de su legitimidad a la luz de algunos de sus defensores y detractores", *Ars Boni et Aequi*, Vol. 8, 2012, p. 160.

course, the fact that Billy is innocent in relation to the crime - the mutiny- makes the enforcement of the method even more brutal.

In addition to the points previously mentioned, it's important to point out the lack of impartiality Vere holds as a judge. FERRAJOLI affirms that impartiality is the judge's alienation, and he claims that a judge can't have a personal, public or institutional interest in the controversy[57]. Vere, as a witness, certainly lacks the alienation required. Seemingly, his position as the head of the ship denotes a possible institutional interest contamination in his judgment.

As a last argument for the unfair treatment towards Billy through the process, the lack of publicity can't be ignored. In Captain Vere's eyes, there's a necessity of a hurry to judge Billy, and to do so in secrecy, so that his acts don't encourage the rest of the shipmen to mutiny.

However, BECCARIA affirms that the publicity of the process is necessary because it is the vehicle that exists for the people to know that they aren't a Estate's slaves, but that they are defended by the Estate, as well as for opinions to stop the force and passions from contaminating the judgment[58].

Thus, he warns that "secrecy is tyranny's strongest shield", which sums up the hurricane of procedural arbitrariness that Billy is kept in during his trial[59].

4. 3. VERE'S INTERNAL BATTLE: wrestling with his conscience.

4.3.1. The dilemma.

"Tell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated in the Code under which alone we officially proceed"[60].

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[57] AGUDELO RAMÍREZ, Martín., *Op. Cit.*, p. 94
[58] VARELA CASTRO, Luciano., "Proceso penal y publicidad", *Jueces para la democracia*, Nº11, December 1990, p. 37.
[59] *Ibidem.*
[60] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 160.

This is claimed by Vere during the trial, revealing the fight between his moral obligation to obey the law and his moral obligation to not harm an innocent man. Thus, in this scenario, Vere seems to be facing a moral dilemma. Moral dilemmas are defined by Gustavo ORTIZ-MILLÁN as conflicts in which the agent finds himself having moral reason to do two actions, but in which it's not possible to do both of them[61].

As a side note it's important to mention the very prolific and ongoing disagreement between philosophers when it comes to admitting the existence of moral conflicts. Figures like PLATO, ARISTOTLE, AQUINAS and KANT are categorized by Guillermo LARIGUET as "non conflictualists".

In the following fragment of his *Foundations of the Metaphysics of Morals* KANT sums up the argument for the inexistence of these dilemmas:

> A conflict between obligations is inconceivable. The concepts of duty and obligation express the objective practical necessity of certain actions, and two rules in conflict can not be necessary at the same time. As a result, acting in accordance to the opposite rule is not our duty, and it can even be said that it is contrary to duty[62].

For this reason, KANT would define these moral dilemmas as "apparent conflicts" instead of "genuine conflicts". In addition to that, "non conflictualists" argue that moral dilemmas are mere epistemological problems, because, in their view, the apparent dilemmas are the consequence of the knowledge deficit of the agent, which could be answered if the agent had all the relevant information in the moment in which the dilemma is presented[63].

Meanwhile, the "conflictualists" argue that moral dilemmas do exist. Isaiah BERLIN claims that values can easily come into conflict in the heart of a single person, and that doesn't mean that some are true and others false[64]. In fact, he convinces

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[61] ORTIZ-MILLÁN, Gustavo., "Guillermo Lariguet, dilemas y conflictos trágicos. Una investigación conceptual", *Isonomía*, Nº34, April 2011, p. 164.
[62] KANT, Immanuel, *The Metaphysics of Morals*. Cambridge University Press, New York (United States), 1996, p. 16.
[63] ORTIZ-MILLÁN, Gustavo., *Op. Cit*., p. 165.
[64] *Ibidem*, p. 166.

ORTIZ-MILLAN to think that human decisions have a tragic dimension when he says that:

> The idea of a perfect unity, of a final solution in which all the good things coexist, seems not only unreachable, but conceptually incoherent, because some of the greatest goods can not coexist. This is a conceptual truth. We are condemned to choose and every decision can imply an unfixable loss"[65].

Michael J. SANDEL, another conflictualist, points to the existence of moral dilemmas by retelling a real case in which the agent needed to choose between two goods[66]. In 2005, a command of the marine force went on a secret mission to Afghanistan with the objective of looking for a Taliban leader who was very close to Osama bin Laden. During the mission, the marines encountered two afghan shepherds who were simply passing by with their goats, unarmed. The marines tied them to the floor and discussed what they should do.

Clearly, the shepherds were unarmed innocent civilians, but the marines knew that, by letting them escape, the shepherds could expose them, putting their life and mission in danger. The marines decided to let them go. However, the civilians did in fact expose them and all the marines in the group, except one who managed to escape, were killed. The moral dilemma showcased in this real story seems to affirm Isaiah BERLIN's argument that claims a denial for the coexistence of all good things.

In a similar line, Jean-Paul SARTRE, in his *Existentialism is a humanism*, emphasizes the existence of dilemmas by giving the example of a young french student who has to choose between two incompatible actions: take care of his mother or join the Allies against the nazis[67].

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[65] *Ibidem*, p.166.
[66] J. SANDEL, Michael., *Justicia. ¿Hacemos lo que es debido?*. Debate, Barcelona (Spain), 2024, p. 35.
[67] LARIGUET, Guillermo., "Conflictos trágicos y derecho. Posibles desafíos", *DOXA Cuadernos de Filosofía del Derecho*, Nº 27, November 2004, p. 322.

In relation to the existence of dilemmas in the legal field, it's important to mention the debate between HART and DWORKIN regarding the decision of the judge in difficult cases and whether or not there's solely one correct answer in those cases.

HART considers difficult cases -or problems of the penumbra- those in which there's doubts about whether the meaning of the legal rule reaches or doesn't reach the case[68]. This brings out the necessity of judicial discretion, turning the judge into a legislator for the particular case[69].

However, DWORKIN disagrees, stating that the legal system isn't made solely of rules, unlike HART's affirmation, but also of principles. Thus, in DWORKIN's eyes, there's no need for judges to be discretional in difficult cases, because when there's no rule or there are doubts about the rules, there will always be a legal principle that they can apply[70].

In addition to that, DWORKIN develops further his ideas with two arguments. Firstly, a democratic argument, which exposes how the judge becoming a legislator in difficult cases can't be allowed, for the judicial power is not legitimated to legislate[71]. And secondly, a liberal argument, consisting of a criticism to the legal uncertainty that would imply letting the judge create a norm *ex post facto*, applying a norm that didn't exist when the facts happened[72].

This way, DWORKIN, contrary to HART, believes that there's "always only one correct answer"[73], which would put him in the group of the non conflictualists. As LARIGUET puts it when determining whether or not DWORKIN accepts the existence of genuine moral dilemmas, "it's clear that, if there's a correct answer, a moral dilemma or a tragic conflict can not be anything more than apparent"[74].

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[68] PÉREZ JARABA, María Dolores., "Principios y reglas: examen del debate entre R. Dworkin y H.L. Hart", *Revista de Estudios Jurídicos*, Nº 10, January 2011, p. 12.
[69] *Ibidem.*
[70] *Ibidem*, p.13.
[71] *Ibidem*, p.17.
[72] *Ibidem*.
[73] *Ibidem*, p.18.
[74] LARIGUET, Guillermo., "Conflictos trágicos genuinos y respuesta correcta en torno a algunas ideas de Ronald Dworkin", *Revista de la Facultad de Derecho de México*, Vol. 56, Nº 246, 2006, p. 209.

As it can be noted, the issue regarding the genuineness or the deceptive appearance of moral dilemmas has long been discussed both outside and inside the field of philosophy of law.

Leaving this debate aside, in order to argue that Captain Vere is, in fact, facing a moral dilemma, it's convenient to point out the different types of dilemmas that exist and to figure out if Vere is, in fact, being hit by a moral one. LARIGUET categorizes dilemmas under three labels: incommensurability dilemmas, parity dilemmas and sacrificing dilemmas.

Incommensurability dilemmas happen when the two obligations can not be compared and thus, none of them is better than the other, such as wanting to be a musician who plays concerts and wanting to be a missionary in Sierra Leone[75].

As a side note, David MARTÍNEZ CORRILLA points out that some authors, like Ruth CHANG, claim that we should distinguish the incommensurability dilemma from the incomparabilty dilemma. The first one means that two situations can not be measured in a scale, and the second one, that they can not be compared[76]. In any case, these dilemmas lead to the agent having difficulties with the criteria to choose.

On the other hand, *parity dilemmas* imply that the situations are, in fact, measurable and comparable, but the results end up being symmetrical[77]. In other words, the situations end up having the same values for the agent, and thus, he has problems choosing between them.

Finally, the *sacrificing dilemma* leads to the problem of a tragic choice, because both alternatives will cause an inevitable damage or an inevitable wrong[78]. The real case involving the marines and the afghan shepherds fits this category.

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[75] ORTIZ-MILLÁN, Gustavo., *Op. Cit.*, p. 168.
[76] MARTÍNEZ ZORRILLA, David., "Dilemas morales y derecho", *Revista Discusiones*, Nº8, March 2008, p. 28.
[77] ORTIZ-MILLÁN, Gustavo., *Op. Cit.*, p. 168.
[78] *Ibidem*, p.169.

LARIGUET argues that the sacrifice and the remainder are the defining characteristics of the moral dilemmas[79]. In conclusion, he claims that sacrificing dilemmas are what people refer to when talking about moral dilemmas.

Clearly, Captain Vere is facing a sacrificing dilemma, and thus, a moral dilemma, because he has to choose between two situations, and the main characteristic of it is that both choices will cause damage. If he follows the law, an innocent man will be killed; if he doesn't follow the law, first of all, the crew from the ship will take it as a sign of lack of severity, and so, a mutiny could strike, and second of all, he would be turning away from his obligation as a Captain to enforce the law in his ship.

In the same line of the sacrificing dilemmas, Manuel ATIENZA explores their counterpart in the legal field: the tragic cases. He defines them as "those cases in which it's not possible to find any legal solution that doesn't sacrifice some essential element of a value considered by the legal or moral lens as fundamental"[80], understanding the essential element as the core which gives identity and ensures that its object doesn't disappear or doesn't get denaturalized, annualted or destroyed[81].

To give a further explanation, ATIENZA presents the notion of minimum balance and optimal balance. On top of the minimum balance sits the optimal balance, which satisfies both the essential elements and the non essential ones[82]. However, in tragic cases, the only balance that can be reached is the salvation of one the pondered alternatives' essential elements and the total annulation of the other's[83].

ATIENZA gives two suggestions to the judge who is in front of a tragic case. Firstly, he argues that the fact that the legal world doesn't allow the judge to reach a correct answer doesn't mean there aren't answers that are better than others, so the judge must choose the least bad answer[84]. In fact, this is what the current thesis is trying to confirm or

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[79] *Ibidem*.
[80] ATIENZA, Manuel., "Los límites de la interpretación constitucional. De nuevo sobre los casos trágicos", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, Nº 1, 1997, p. 252.
[81] FIGUEROA ALFONZO, María Andrea., "¿Qué es un caso trágico?", *Revista Estrado*, Vol. 2, Nº 2, January 2015, p. 24.
[82] ATIENZA, Manuel., *Op. Cit*., p. 253.
[83] FIGUEROA ALFONZO, María Andrea., *Op. Cit*., p. 26.
[84] ATIENZA, Manuel., *Op. Cit*., p. 263.

disprove: whether Captain Vere, as a judge, chose the least bad answer in Billy's tragic case or not, because there's not a completely correct answer.

Secondly, ATIENZA suggests that when the law by itself doesn't provide any correct solution, the only alternative the judge has is to go to other realms of the practical reason: a certain political and moral philosophy[85].

In this same sense, Guillermo LARIGUET claims that the existence of tragic cases brings out the limitation of rationality, specifically, the limitation of the legal rationality[86]. However, LARIGUET admits that in a *dworkinian* sense -taking into account DWORKIN's ideas- , it could be argued that the limits of reason only exist if the law is separated from a moral base, because if there's a conceptual connection between law and morality, in the cases in which the law hesitates, morality can help to reach the right answer[87].

On another note, the sensibility to these tragic cases, which are based on the inevitability of paradoxes, on the precarious balance of opposites and on non-solved ambiguities and tensions[88], in MUGUERZA's opinion, is necessary to maintain the tension between law and morality[89]. He affirms that the judges' sensibility towards this kind of tragedy exposes that they have "a will towards morality, towards paying attention to conscience"[90].

Captain Vere does have sensibility towards Billy's tragic case, as he initially seems shaken by the situation. However, as MUGUERZA himself puts it, "good will by itself isn't enough to ensure the moral rightness, which depends also on our actions and on their consequences, and not only on intentions"[91].

In other words, Vere's sensibility to the tragedy does not have weight in reality unless he chooses to act upon the right moral choice, or, at least, upon the lesser bad choice.

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[85] *Ibidem*, p. 264.
[86] LARIGUET, Guillermo., "Conflictos trágicos y derecho. Posibles desafíos". *Op. Cit*., p. 319.
[87] *Ibidem*, p. 332.
[88] ATIENZA, Manuel., *Op. Cit*., p. 255.
[89] *Ibidem*, p. 256.
[90] *Ibidem*.
[91] *Ibidem*.

4.3.2. Obedience to the law.

As mentioned, Vere is in a maze with two exits: obedience to the law or listening to his conscience. In order to come up with the right decision, it's important to explain the philosophical reasons that could lead him to follow the law.

The basis for obeying the law has been one of the central topics philosophy of law has spiraled around[92]. Some of the most well known philosophers, such as AQUINAS, HOBBES, ROUSSEAU, KANT or KELSEN, have built systems around this issue, which can be taken as a testament for the importance of the matter.

One of the most radical advocates for the absolute obedience to the law is HOBBES. Even though he brings up the topic of the natural law, his relationship with it is not the same that AQUINAS has, who says that the human law is only law, and thus, has to be obeyed, if it lines up with the natural law[93]. Instead, HOBBES' idea of the natural law only implies that the subjects are linked to the sovereign by an unconditional compromise of obedience, and this pact between sovereign and subjects is the natural law that reigns over the people. The sovereign, he says, has to be obeyed even if he commands unjust laws[94].

In a different note, ROUSSEAU affirms obedience to the law with his social contract. The social contract implies that the legislative power belongs to the united will of the people. Thus, because the law is made by the people united, the people can not end up being unjust through the law to themselves[95]. This way, by confusing the author and the receiver, he assumes no one will approve of an arbitrary law, because they'll suffer it afterwards[96].

On a different direction, KANT thinks that the supremacy of the power of the State lies in the rational sovereign law[97]. He goes as far as to say that there isn't a right to rebel,

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[92] LEÓN CORREA, Francisco Javier., "Fundamentos ético-jurídicos de la objeción de conciencia de los profesionales de la salud", *Revista CONAMED*, Nº1, March 2007, p.3.
[93] *Ibidem*, p.3.
[94] GASCÓN ABELLÁN, Marina., *Obediencia al derecho y objeción de conciencia*. Centro de estudios políticos y constitucionales, Madrid (Spain), 1990, p.101.
[95] *Ibidem*, p.108.
[96] *Ibidem*, p.106.
[97] *Ibidem*, p.110.

even when the abuse of the power of the sovereign is unbearable, because if there was, the notion of sovereignty would be destroyed[98].

In KANT eyes, that would mean that the people would become the judge of their own cause[99]. In other words, the cause for individuals to exist in a State is sovereignty, and thus, if the right to rebel existed, the individuals would be going against themselves. Thus, he says that a change in the law can only be introduced by the own sovereign through a reform, but never through the people[100].

Adding a twist to the debate, KELSEN claims that obedience is not alienated from the norm. Instead, he affirms that obedience is a norm that prescribes a behavior to a subject. This way, he thinks that if a valid norm exists, that is enough reason for obedience to spark[101].

On a different line, authors like HART and PECES-BARBA advocate for obedience having its grounding in the acceptance, by the receivers, of the legal system and the procedures of recognition of the norms[102]. In such manner, what would be a mere legal obligation becomes a moral obligation[103].

In fact, HART criticizes KELSEN's idea of obligation to the norms harshly. KELSEN's notion of the legal system is strongly defined by the idea of sanction. As he puts it, "an individual is legally obliged to the contrary behavior of the behavior which the sanction goes after for"[104]. VON WRIGHT agrees with KELSEN by stating that "the function of the sanction is to constitute the reason of the obedience of the norm when there's no other reasons to obey and when disobedience happens"[105].

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[98] *Ibidem*, p. 111.
[99] *Ibidem*, p.111.
[100] *Ibidem*, p. 112.
[101] *Ibidem*, p. 92.
[102] *Ibidem*, p. 93.
[103] *Ibidem*, p. 94.
[104] *Ibidem*, p. 92.
[105] *Ibidem*, p. 93.

KELSEN's fixation on the sanctioning implications of the law has its origin in his belief on the aim of the law, which to him, is peace[106]. This conception of the law as a coercive order leads him to claim that "law is a reaction against the illicit, and so, as Thomas AQUINAS says so in the *Summa Theologica*, 1-11, 96, article 5, only the evil, but not the good, would be subject to the law"[107].

However, HART differed from KELSEN's idea by emphasizing the fact that legal rules can not be reduced to punishments and sanctions[108]. First and foremost, because he believes the legal system's function is, not only to control people's behavior, but also, to "drive their behavior towards certain objectives that have been previously set"[109]; in other words, a function of social direction.

From that derives the fact, in HART's opinion, that not all legal rules are sanctioning rules. In fact, he highlights the existence of recognition rules, which implies that, in order for a reason for obedience to exist, those who are going to receive it have to accept that the rules that are going to be created through certain procedures, will be obligatory[110].

4.3.3. Disobedience of the law.

As it has been stated, there's many theories that revolve around obedience to the law. Nonetheless, there's authors who have given foundation to the other side of the coin: disobedience.

One of the arguments for disobedience is presented by RUIZ MIGUEL, who calls it "the political argument". This argument holds itself in the belief that, in order for obedience to be demanded by the State, the State must maintain a fair compromise with the people by allowing the participation of the citizens, by giving information and space

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[106] BOTERO BERNAL, Andrés., "El debate Kelsen-Hart. Sobre la sanción normativa. Una mirada más allá del «Último mohicano»", *Revista Filosofía UIS*, Vol. 16, Nº 2, July-December 2017, p. 313.
[107] *Ibidem.*
[108] *Ibidem*, p. 314.
[109] *Ibidem.*
[110] GASCÓN ABELLÁN, Marina., *Op. Cit.*, p. 93.

for debate and by presenting a transparent public action[111]. Thus, when the State is lacking those qualities, disobedience is allowed.

On the other hand, the opinion of the authors who are in the side of the natural law can be summed up with the previously mentioned phrase AQUINAS claimed: human law is only law, and thus, has to be obeyed, if it lines up with the natural law[112]. As a result, they allow disobedience when the human law does not follow the natural law.

However, disobedience to the law does not need iusnaturalism in order to be affirmed. DWORKIN believes that "loyalty to a judicial system is morally obliged only when its norms are adjusted to certain principles of justice that protect human dignity and political equality"[113]. Actually, he goes as far as to argue that "a State which takes fundamental rights seriously can not say that citizens don't ever have the right to disobey the law"[114].

Following this idea, DREIDER states that disobedience is not only grounded on a moral basis, but on a political basis too, because when a citizen's fundamental right is violated, even when norms don't allow it, the political principles of the Constitution do[115]. In other words, the disobedience can't be punished, for it would end up harming the fundamental rights protected by the Constitution itself.

KANT himself, even if theoretically he advocated for an unshockable obedience to the law, in his personal life, he supported the revolutionary movements of his time[116].

As it can be seen, there's strong arguments for the foundation of disobedience. This led to a large current of authors articulating different types of disobedience. Joaquín RODRÍGUEZ-TOUBES claims that justifiable and non violent disobedience falls under

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[111] *Ibidem*, p. 200.
[112] LEÓN CORREA, Francisco Javier., *Op. Cit.*, p. 3.
[113] GASCÓN ABELLÁN, Marina., *Op. Cit.*, p. 208.
[114] *Ibidem*, p. 209.
[115] *Ibidem*, p. 210.
[116] *Ibidem*, p. 112.

three categories: revolutionary disobedience, civil disobedience and conscientious objection[117].

Revolutionary disobedience differences itself from the other two in regards to its pursuit. Joseph RAZ claims that it follows the aim to "change or contribute directly to a government change or to the constitutional dispositions (the governmental system)"[118].

On the contrary, civil disobedience doesn't have such ambitious aims. It's defined as a "public, spontaneous, group and non violent act of insubordination with an eminently political nature whose aim is to put pressure onto a government agenda or onto certain public policies to cause them to be changed, canceled or obeyed"[119]. Henry David THOUREAU is a well known advocate for this disobedience. His work *Civil Disobedience* offers affirmations like the following:

> There's unjust laws: ¿will we be satisfied with obeying them or will we try to correct them and obey until succeeding in doing so? ¿Or will we violate them right now? Under a government like ours, many believe they have to wait until convincing the majority about the necessity of changing it. They believe that, if they resisted, the remedy would be worse than the illness. But this is the fault of the own government. ¿Why is not on alert to preview and to ensure reforms? ¿Why does it not appreciate the value of that careful minority? ¿Why does it shout and resist before being injured? ¿Why does it not encourage its citizens to be on alert and to point out the error in order to improve in its action?[120]
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> ¿Is democracy as we know it the final possible achievement when it comes to government? ¿Is it not possible to put a foot ahead and recognize and organize the rights of the men? There will never be a truly free and wise State until it doesn't recognize the

[117] RODRÍGUEZ-TOUBES MUÑIZ, Joaquín., "Sobre el concepto de objeción de conciencia", *Dereito: Revista xurídica da Universidade de Santiago de Compostela*, Vol. 3, Nº 2, 1994, pp. 164.
[118] *Ibidem*, p.164.
[119] SOTO OBREGÓN, Martha Elena., & RUIZ CANIZALES, Raúl., "Tratamiento doctrinal de la objeción de conciencia y la desobediencia civil en Ronald Dworkin y Jürgen Habermas", *Opinión Jurídica: Publicación de la Facultad de Derecho de la Universidad de Medellín*, Vol. 12, Nº 23, March 2013, p. 153.
[120] THOREAU, Henry David., *Desobediencia civil y otros escritos*. Alianza, Madrid (Spain), 2022, p. 96.

> individual as a superior and independent power, from which its power and authority come from, and until it treats it likewise.[121]

On a different note, conscientious objection can be defined as "the internal reasoning of a person, which leads them to maintain a certain conviction and, thus, a certain attitude towards a particular situation, law or hierarchical superior order". This internal reasoning is a product of the values that the person has discovered on his own, or that has made his own through a religion[122].

There's been many works dedicated to properly differentiating civil disobedience from conscientious objection. GASCÓN ABELLÁN explains that, while the disobedient aims for a political impact with his act, the objector simply pursues a personal exception[123]. As PRIETO points out, the objector denies obedience "because" the law is unjust, not "for it to stop being" unjust[124]. Similarly, Iñigo ÁLVAREZ GÁLVEZ emphasizes that the behavior of the conscious objector is not an attack to the law, but a defense of himself, of his moral integrity[125]. His behavior, he says, is a moral allegation[126].

Coming back to Captain Vere's case, it's clear that he is presented with a choice to disobey the law, or to obey it. Now, which type of disobedience is Vere's inner voice telling him to follow?

Even though María José FALCÓN Y TELLA mentions Billy Budd's case as a literary portrait of a certain current of civil disobedience that would spark later in the history of the United States[127], it's pretty clear that Captain Vere is not being called to an act of civil disobedience, but to an act of conscientious objection.

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[121] *Ibidem*, p. 119.
[122] SOTO OBREGÓN, Martha Elena., & RUIZ CANIZALES, Raúl., *Op. Cit.*, p. 153.
[123] GASCÓN ABELLÁN, Marina., *Op. Cit.*, p. 75.
[124] *Ibidem*, p. 75.
[125] ÁLVAREZ GÁLVEZ, Íñigo., "Algunas notas sobre el concepto de objeción de conciencia", *Atenea (Universidad de Concepción)*, Nº 516, December 2017, p. 123.
[126] *Ibidem*, p.126.
[127] FALCÓN Y TELLA, María José., *La desobediencia civil*. Marcial Pons, Madrid (Spain), 2000, p. 429.

The explanation for that statement lies in the fact that Vere is not seeking to change the law, for the law is not unjust -although it could be argued that it is, in fact, too severe-. What Vere would want is to not apply the law, because in Billy's case, it's unjust. It's the application of the law, in this certain case, that is unjust, because Billy had punched a superior, not as an act of sedition, but as an act of self defense that lied in the false accusation of that same superior.

In this line, when writing about conscientious objection, DWORKIN argues that individuals have the moral privilege to refuse harming others[128]. This is exactly what Vere's inner morality is begging him to do. Not harm an innocent man through the law.

In one of his writings, THOREAU criticizes soldiers who march to face a war against their conscience, walking with an admirable order even though they're all pacifists. "Then, what are they", he asks, "men or little powder kegs to the service of whichever military command?"[129] By not exercising their moral sense with freedom and critique, they equal themselves to earth and stones in THOREAU's eyes. "Those individuals don't arouse more respect than straw men or clay"[130].

Thus, by not acting in accordance with his conscience and his moral calling, Vere is resigning himself to becoming a clay or a straw man.

4.3.4. The banality of evil.

If Vere's act is considered to be just because he obeyed the law, the same thing can be said about the nazis. Obviously, there's a difference between those two situations. Vere is killing one man, while the nazis were supporting an entire eugenic system. However, on an individual level, Vere shares the same characteristics that defined the behavior of nazi officials.

As Hannah ARENDT put it, "no one had to be a convinced nazi in order to adapt and forget overnight, not their social position, but the moral convictions that once

[128] GASCÓN ABELLÁN, Marina., *Op. Cit.*, p. 80.
[129] THOREAU, Henry David., *Op. Cit.*, p. 86.
[130] *Ibidem*, p. 87

accompanied them"[131]. In fact, in her eyes, the survival of the nazi regime resided in the normality of the officials. Thus, she argues that far from needing immoral reasons to commit evil and murder, what the officials needed was the normality inherent to jobholders and family men[132].

In regards to the factors that promote the alienation from morality of the normal person, ARENDT claims that it happens through the observance of roles and social expectations in the realms of organizations and social institutions. In other words, "the social actor is nothing but a mix of roles and social status whose meaning lies further away from his own interests and is determined by those organizations and social institutions, independently from his will"[133]. This leads to the annihilation of free and spontaneous actions[134] in pose of a "blind acceptance of the prevailing beliefs in society"[135].

Similarly, Vere loses himself in the role of the Captain he stands by in the naval institution. Thus, he feels like he needs to embody the role of the patriotic lawholder, even if that means killing an innocent man. Although he does have a mental breakdown when realizing the options he is left with, the truth is that he chooses to abandon the option that's based on the call of his morality for the same reasons that nazis did. His actions as a free man reach their limit in the role he has embodied, leaving him blind to his own morality.

On the other hand, ARENDT highlights the role of bureaucracy when it comes to alienating the person from the actions. She argues that bureaucratic institutions require individuals to limit their spontaneous and free actions in order to adapt to the codified norms and to the established behaviors, which leads them to lose sight of the meaning

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[131] DI PEGO, Anabella., "El problema del mal contemporáneo y el papel de la obediencia. Reconsideraciones sobre la banalidad del mal", *Revista de filosofía (Universidad Complutense de Madrid*), Vol. 1, Nº 48, 2023, p. 243.
[132] DI PEGO, Anabella., "Obediencia, control y producción de sujetos dóciles. Reflexiones sobre la banalidad y la normalidad del mal", *Astrolabio: revista internacional de filosofía*, Nº 24, 2020, p. 67
[133] ESTRADA SAAVEDRA, Marco., "La normalidad como excepción: la banalidad del mal, la conciencia y el juicio en la obra de Hannah Arendt", Revista Mexicana de Ciencias Políticas y Sociales, Vol. 49, Nº 201, 2007, p. 38.
[134] DI PEGO, Anabella., "El problema del mal contemporáneo y el papel de la obediencia. Reconsideraciones sobre la banalidad del mal", *Op. Cit.*, p. 242.
[135] ESTRADA SAAVEDRA, Marco., *Op. Cit.*, p. 38.

of their actions and to delegate the responsibility of those actions to superiors of the institutions[136].

It's easy to see how Vere loses sight of the weight of his action the moment he takes his role as a Captain. He seems to accept that the consequences of his decision lie in the institution he has sworn loyalty to. In this sense, he even voices: "Would it really be us who are condemning him when it's the war code operating through us? For that law and the rigor of it, we are not responsible. Our responsibility lies here: however merciless the law may be, we nevertheless must adhere to it and apply it "[137]. Allegorically, ARENDT says that the loyalty to the institution, its norms and objectives, can shadow these nazi officials' moral convictions[138].

As a result, what can be affirmed is that, sometimes, it's not the disobedience of the law that is wrong, as it classically was hinted at, but the obedience of it[139]. Obedience, in Hannah's eyes, can not attenuate or eradicate the responsibility of the actions; Rather, it's a way of committing evil and supporting evil institutions[140].

This notion of evil Hannah ARENDT is known for is called "banality of evil", as that's the concept she explores in her report on the famous trial of the nazi official Eichmann. This idea of the banality of evil does not mean that evil is not important; it means that evil turns banal for the agent when he thinks it's being derived from a certain truth[141]. Eichmann's truth was the role he had to play in the nazi regime, while Vere's truth was the role he had to play in the naval force.

Just like Captain Vere, it's not so much that the nazis put their consciousness to sleep, but that they changed the direction of those conscious instincts. This way, both Captain Vere and Eichmann "didn't say: How horrible is what I do to others!, they said: How

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[136] *Ibidem*, p. 39.
[137] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 160.
[138] ESTRADA SAAVEDRA, Marco.,*Op. Cit.*, p. 39.
[139] DI PEGO, Anabella., "El problema del mal contemporáneo y el papel de la obediencia. Reconsideraciones sobre la banalidad del mal",*Op. Cit.*, p. 239.
[140] *Ibidem*. p. 250.
[141] CANO CABILDO, Sissi., "Sentido arendtiano de la banalidad del mal", *Horizonte: Revista de Estudos de Teologia e Ciências da Religiao*, Vol. 3, Nº 5, 2004, p. 109.

horrible spectacles I have to contemplate in the fulfillment of my duty, how hard is my mission!"[142].

The similarity of both cases can be grounded, not only in Hannah ARENDT's banality of evil, but also in KANT's well known notion of the age minority. Kant describes incapacity as "the impossibility of serving oneself without the guidance of another", and he claims that:

> This incapacity is guilty because its cause doesn't lie in lack of intelligence, but lack of decision and courage to serve oneself using it without the tutelage of another. *¡Sapere aude!* ¡Have the courage to serve yourself with your own reason![143]

It seems as though KANT is speaking directly to Captain Vere through this passage. Therefore, if Captain Vere is not brave enough to act in accordance to his own reason and consciousness, and instead, he hides in the naval institution and the mercilessness of the war code, he is acting no different to an Eichmann in the nazi regime.

4.4. THE VERDICT: justifying the execution.

In an atmosphere of confusion, in which the judges seem to be feeling the guilt creeping inside their hearts, Captain Vere annihilates their clemency by bringing two main arguments to the table.

The first argument resides in the idea that, in order to maintain order in the ship, showing mercilessness towards Billy is necessary. Vere tells the judges that the ship's marines are used to arbitrariness, and so, even if they gave them an explanation for the exceptionality of Billy's case, they would not understand why the law wasn't followed[144]. As a result, they would take the exceptional judgment as a sign of "pusillanimously"[145], which would lead to them thinking that they can, in fact, organize a mutiny.

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[142] *Ibidem*, p. 108.
[143] KANT, Emmanuel., "¿Qué es la Ilustración?", *Foro de Educación*, Nº 11, 2009, p. 249.
[144] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 162.
[145] *Ibidem,* p. 164.

Through this idea, Captain Vere convinces the other judges that, given their circumstances, the execution is the only way to maintain the order, and therefore, that it's the only way to ensure victory in war. If we look further into this issue, it leads us to discuss a certain theory of justice: utilitarianism.

The second argument, as it has been mentioned in previous sections, has to do with the duty they have as marine officials to follow the law. Therefore, even if the law is unproportionately harsh and even though it leads to injustice, as officials, they can not go against it, and so, they have to execute Billy. This points to the classic dilemma between iuspositivism and iusnaturalism.

4.4.1. Utilitarianism: the tragedy of morality.

As it has been stated, the first argument that leads to Billy's execution can be summed up by the following sentence: the execution is needed to maintain order in the ship and in the naval institution, and therefore, it's necessary to ensure victory in war.

This reasoning presents resemblance to utilitarian strategies that have famously been used in wars throughout History. The countless civilians killed in Hiroshima and Nagasaki by the atomic bomb in World War II and the bloody invasion of Iraq to, supposedly, find weapons of mass destruction, to name a few, are examples in which a utilitarian view has led to horrible outcomes.

As J. SOLOVE puts it, *Billy Budd*'s story is a literary example of how, "during times of crisis, our leaders have made profound sacrifices in the name of security, ones that we later realized need not have been made"[146].

This idea of basing the justification of the means in the consequences achieved is often linked to utilitarianism. Jeremy BENTHAM, the father of utilitarianism, grounded his convictions in the idea that:

> Nature has put humanity under the governance of two sovereign lords, pain and pleasure. Only they can point out what we should do, as well as determine what we will

[146] J. SOLOVE, Daniel., "Melville's Billy Budd and security in times of crisis", *Cardozo Law Review*, Vol. 26, Nº 6, 2005, p. 2.443.

> do. On the one hand, the norm of good and evil, on the other hand, the chain of causes and effects, are all under the throne of pain and pleasure.[147]

Under this light, BENTHAM believed that the principle which had to lead the human action resided in doing what maximizes utility, understanding utility as whatever produces pleasure or happiness and avoids pain or suffering[148].

As BAQUERO PUERTA points out, the author's method is clearly based on consequentialism, which states that "the value of the actions depends on the value of the consequences produced, or, more precisely, actions are considered as triggers of changes in reality, and so, these changes are what have to be evaluated"[149].

Similarly, Captain Vere, by holding onto the idea of suppressing any possibility of mutiny, thinks he is guiding his nation to be victorious in the war, which, to him, is a consequence that will justify anything he does in between. His utilitarian view, however, can be confronted by multiple authors who have gone against BENTHAM's ideas.

As a start, a quote from David WALSH comes to mind: "everytime evil is systematically committed in the name of good, that's when we know with clarity that every residue of morality in the exercise of power has been completely evacuated"[150].

In a similar line, Michael J. SANDEL exposes the intuitive aversion utilitarian practices ignites by giving multiple examples. Following utilitarianism, we'd have to assume that throwing christians to the lions in the Colosseum of Ancient Rome was justified, because the audience were roaring with happiness watching the feast[151].

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147 MONTOYA RENDÓN, Julio Cesar and MONTAÑO HURTADO, José Luis., "Del utilitarismo a la ética y los principios: indispensables en los modelos económicos", *Revista Estrategia Organizacional*, Nº 2, December 2013, p. 191.
148 J. SANDEL, Michael., *Op. Cit.*, p. 45.
149 BAQUERO PUERTA, Karolina., "Bentham y la máxima utilitarista de la mayor felicidad para el mayor número: ¿crítica fundada o autor incomprendido?", *Revista Ambiente Jurídico*, Nº 21, 2017, p. 138.
150 CHÁVEZ-FERNÁNDEZ POSTIGO, José and SANTA MARÍA D'ANGELO, Rafael., *Derecho natural y iusnaturalismos. VIII Jornadas Internacionales de Derecho Natural y III de Filosofía del Derecho*. Palestra Editores, Lima (Peru), 2014, p. 153.
151 J. SANDEL, Michael., *Op. Cit.*, p. 49.

As another example, he exposes how utilitarians would have to be in a peaceful state of mind while torturing the innocent child of a terrorist, in order to make the terrorist reveal the location of the bomb he put, and so, save the people who would've been killed by the bomb[152].

In a more theoretical way, SANDEL confronts utilitarianism with two ideas. First, he alludes to individual rights, and claims that, by taking into account the sum of the number of individuals who find pleasure in something, BENTHAM is running over the individuals who find pain in that same thing[153]. In other words, if seven individuals are going to find happiness in a certain act, the two who are going to find pain are going to be run over by the action taken, because the action will be justified by producing more pleasure than pain.

Secondly, SANDEL points out that utilitarianism does math by pondering preferences of pleasure, assuming that every pleasure has the same value[154]. In economics, for example, he claims that not everything can be translated into an amount of money. Even if the Estate saves up money by letting youngsters take drugs until they die, because they won't need assistance as elders and won't need pensions, their life can not be reduced to dollars, and so, the Estate shouldn't do that[155].

On the same note, Salvador ANÍBAL OCHOA RAMÍREZ points out numerous problems that utilitarianism presents[156]. As a start, he claims that it can lead to a mentality of "the ends justify the means". Just like SANDEL, he warns that this theory can not protect the rights of the minority, because the goal is to provide the happiness of the majority - just like in times of slavery, he says-. He also highlights that it's based on the prediction of consequences, but, oddly enough, humans are not omniscient, and thus, can not know exactly what the outcome to a certain action will be.

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[152] *Ibidem,* p. 51.
[153] *Ibidem,* p. 48.
[154] *Ibidem,* p. 53.
[155] *Ibidem,* p. 54.
[156] ANÍBAL OCHOA RAMÍREZ, Salvador., "El utilitarismo como fundamento actual de la administración financiera y el cobro de intereses", *NovaRua: Revista Universitaria de Administración*, Vol. 1, Nº 2, January 2011, p. 27.

On top of all, Salvador claims that utilitarianism doesn't give any objective basis to judge the results[157], and so, if results are the mechanism used to judge the actions, it doesn't provide a basis to judge the actions either.

In addition to that, it's essential to include KANT's take on utilitarianism. He believed human beings are defined by two inherent abilities: he believed one of those abilities was the ability to feel[158], understanding it as the ability to act upon sensations (like BENTHAM's pain and pleasure), but, alongside that, KANT believed human beings to have a rational ability[159].

This way, KANT differentiated between *autonomy*, which is the real freedom of choice, and *heteronomy*, which is the submission of the choice to external determinations[160]. Thus, BENTHAM's utilitarianism, in KANT's eyes, is based on heteronomical acts, and instead of leading to freedom, it leads to "slavery of pain and pleasure"[161], and so, leaves people being "not authors of what they pursue, but rather, instruments of it"[162].

In a similar manner, A. C. GRAYLING sums up his lesson on utilitarianism saying that there's a strong consensus between philosophers that claims the error BENTHAM committed when reducing all human motivations to a same path of pain and pleasure, and thus, his view takes the risk of "being too simplistic"[163].

Now, coming back to Vere's utilitarian justification of the execution, his action can be analyzed and confronted through two arguments: an argument that questions it using his own utilitarian theory and an argument that goes against using utilitarianism to give the answer.

Firstly, Vere's reasoning can be confronted using the same theory he is using to justify himself. In utilitarianism, utility -the pleasure and happiness of the individuals- has to

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[157] *Ibidem,* p. 27.
[158] J. SANDEL, Michael., *Op. Cit.*, p. 126.
[159] *Ibidem.*
[160] *Ibidem,* p. 127.
[161] *Ibidem,* p. 126.
[162] *Ibidem,* p. 129.
[163] GRAYLING, Anthony C., *Historia de la filosofía. Un viaje por el pensamiento universal*. Ariel, Barcelona (Spain), 2023, p. 380.

be the political principle that determines the collective aims[164]. To clarify, the interest of the community is the sum of the individual happiness of the people[165] However, an important question comes quickly to one's mind: where does the sum start and where does it end?

Let's analyze Vere's decision taking into account this question. Vere argues that killing Billy is justified because the nation will obtain happiness from the fact that the scenario for a mutiny won't exist, and so, the people of the nation will benefit from a powerful naval force and from a win in war. However, on a larger scale, does Britain winning the war really cause more pleasure?

Of course, it will cause pleasure to the individuals who live in Britain because it will avoid the effects of another nation oppressing them and poverty from kicking in. But what about the nations that will lose to Britain? In the context of the war that the story is set in, there's clashing interests, and so, there's clashing happinesses between the nation's citizens and institutions.

Nevertheless, it's not necessary to look at such a large scale in order to question Vere's utilitarian reasoning using his own basis. The marines of his own ship are enough to put it under doubt. If the marines want to mutine, doesn't that cause more happiness in the ship than not allowing it? Following utilitarian calculations, the sum of pleasures can lead to quite the opposite answer Captain Vere gave to the situation.

In addition to that, Vere killing Billy could have consequences that led to pain in different senses. For example, it could set a precedent in terms of poor guarantees in trials for marines in the naval institution. It could also normalize harsh treatments and more severe arbitrariness that marines, and even citizens, would have to endure.

As it can be noted, utilitarianism seems to provide measurements, but measurements that are rather relative. That's why it doesn't give justified answers to the dilemma Vere is facing.

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[164] MONTOYA RENDÓN, Julio Cesar., & MONTAÑO HURTADO, José Luis., *Op. Cit.*, p. 192.

[165] BORÓN, Atilio Alberto., *La filosofía política moderna. De Hobbes a Marx.* Consejo Latinoamericano de Ciencias Sociales, Buenos Aires (Argentina), 2000, p. 275.

Secondly, his justification can be confronted by an argument that confronts utilitarianism in itself, the argument of human rights. As it has been stated previously, human rights can not be reached by the measurements of pain and pleasure. They're valuable on their own, autonomously, without needing to be pondered through calculations against other units. Billy's life, if taken unjustly, can never be justified by a victorious outcome in war, because human dignity and victory in war belong to different realms.

As a last hint upon the matter, the well known Ursula K. LE GUIN, a science fiction writer who creates stories based on profound philosophical questions, provides a needed reflection on utilitarianism through one of her stories[166], *The Ones Who Walk Away From Omelas*.

On this occasion, LE GUIN asks the readers to imagine a utopian city, Omelas, in which everyone is happy, vibrant and satisfied. However, their happiness relies on something: it requires one kid to suffer perpetually in misery, hunger, pain and darkness. Everyone in Omelas knows it. Only some, after seeing the kid, decide to leave the city, with no route in mind, but still, "they seem to know where they go, the ones who leave Omelas"[167].

In his ship, Billy is like the kid in Omelas. Captain Vere didn't just see the kid and stay in the city, he is the one who made the happiness of Omelas reside in the misfortune of that child, in the misfortune of Billy.

4.4.2. Iuspositivism: when the law becomes blind.

In order to convince the judges, Captain Vere insists that, as marine officials, they have to follow the law, even if their notion of justice tells them otherwise.

This creates a conflict between the decision that shines under the light of the natural law, which tells them to follow their instinct to respect the dignity, honor and literal life

[166] J. SANDEL, Michael., *Op. Cit.*, p. 52
[167] LE GUIN, Ursula K., *Quienes se marchan de Omelas*. Nórdica Libros, Madrid (Spain), 2023, p. 34.

of Billy, and between the decision that shines under the light of the positive law, which pushes them to obey the Article of War that says:

> "If any Officer, Mariner, Soldier or other Person in the Fleet, shall strike any of his Superior Officers on any Pretense whatsoever, every such Person being convicted of any such Offense, by the Sentence of a Court Martial, shall suffer Death".[168]

To understand these clashing philosophies that lie under Captain Vere's verdict, it's necessary to point out what natural law and positive law claim. As José Juan MORESO puts it, both doctrines put their focus on the same two thesis:

The first one is the *thesis of objectiveness*, which claims that there is a set of guidelines, independent from human will, which posses a practical objectiveness, meaning that they're obligatory for all humankind[169].

The second is called the *binding thesis*, which affirms that those guidelines which, having been established by human authorities, go against the ones which are independent from human will, are not valid.[170]

While natural law holds both thesis as true, positive law either denies both, or denies the binding thesis, accepting the thesis of objectiveness[171].

One of the most radical approaches of positivism was defended by Thomas HOBBES, who claimed that "laws are the rule of the just and the unjust, which implies that if something doesn't go against a law can not be unjust"[172]. In other words, he firmly stated that the only morality that existed resided in the law, by explaining that he didn't equate "good law" with "just law", because "no law can be unjust"[173].

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[168] IVES, C.B., "Billy Budd and the Articles of War", *American Literature*, Vol. 34, Nº 1, March 1962, p. 32.
[169] MORESO, Josep Joan., "El fundamento moral del derecho (sobre el positivismo jurídico, de nuevo)", *Anales de la Cátedra Francisco Suárez*, Vol. 56, January 2022, p. 34.
[170] *Ibidem.*
[171] *Ibidem.*
[172] FARRELL, Martín Diego., *Enseñando Ética.* Editorial Universidad de Palermo, Buenos Aires (Argentina), 2015, p. 290.
[173] *Ibidem.*

HOBBES aside, Hans KELSEN was another one of the authors who stood by positivism most radically. KELSEN believed in the separation thesis, which declares that law and morality constitute different social orders[174]. He shooted harshly at natural law by highlighting, firstly, that morality had no capacity to sanction nor to coerce, and secondly, that morality was rationally unknowable[175].

In fact, iuspositivists go as far as to claim that moral judgements are relative and subjective. This leads positive scholars to affirm that "the idea that an immutable, universal and reason-reachable natural law exists, is a vain, though noble, illusion"[176]. The previously mentioned Jeremy BENTHAM even discredited natural law by saying that is was nothing but a "nonsense upon stilts"[177].

As a response, authors like MORESO say that it's the "radical skepticism"[178] of positive law which constitutes the futile nonsense, and he ignites the iusnaturalist intuition in people's minds by recalling how unjust were the regulations during the *apartheid*.

Far from being nonsense, iusnaturalism is a deep rooted doctrine whose grounds have been thoroughly discussed, leaving three alternatives as its basis:

Firstly, *theological iusnaturalists*, led by figures such as St. AUGUSTINE and St. Thomas AQUINAS, advocate for the idea that God's will constitutes the eternal law, which drives everything to maintain the natural order and the divine aims[179]. Alongside the eternal law, they say, there's the natural law, which is "the eternal law written in the heart and conscience of humans"[180]. Far for both of them, the human law coexists through the legislators, but in order to be just, what is established by the human law has to obey the natural law, and so, the eternal law too[181].

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[174] CARRILLO DE LA ROSA, Yezid., & CABALLERO HERNÁNDEZ, Joe., "Positivismo jurídico", *Prolegómenos*, Vol. 24, Nº 48, December 2021, p. 20.
[175] *Ibidem,* p. 21.
[176] DOS SANTOS MELGAREJO, José Ángel., "El iusnaturalismo y el positivismo jurídico", *Revista Jurídica. Investigación en ciencias jurídicas y sociales*, Nº 3, 2013, p. 24.
[177] J. SANDEL, Michael., *Op. Cit.*, p. 45.
[178] MORESO, Josep Joan., *Op. Cit.*, p. 38.
[179] DOS SANTOS MELGAREJO, José Ángel., *Op. Cit.*, p. 14.
[180] *Ibidem.*
[181] DOS SANTOS MELGAREJO, José Ángel., *Op. Cit.*, p. 15.

Secondly, *rational iusnaturalists*, guided by authors like GROCIO, KANT and ROUSSEAU, dismiss the idea that natural law comes from God, and instead, believe it to come from the structure of the human reason. They claim that there's some fundamental characters and values ingrained in human nature, such as preservation of life, freedom and equality[182]. Hugo GROCIO, the father of rational iusnaturalism, grounded iusnaturalism on reason by stating that "law is the product that results from the social appetite that humans have of living in organized groups, in which a common force prevails"[183].

Thirdly, in the hands of SAVIGNY, the *Historical School of Law* takes a turn on the basis of iusnaturalism to claim that "law is a product of a historical evolution of society and of the spirit of the nation". In SAVIGNY's eyes, every nation has a certain spirit, conceptualized as the *volksgeist*, and it manifests itself in different forms: "morality, art, language, folklore, law…""[184]. This way, this doctrine believes that positive law is secondary, because it has to obey the "popular judicial conscience" of the *volksgeist*, in order to be just[185].

The classic clash between iuspositivism and iusnaturalism grew a thicker layer in the twentieth century by the contribution of the debate between H. L. A. HART and Lon FULLER, as they both took a step away from their traditional scholar predecessors.

On the one hand, HART belonged to the positivist scholars, but included new aspects in the arguments. Contrary to some of his precursors, although he didn't claim law and morality as interdependent on each other, HART did acknowledge the close relationship that they shared[186]. He even believed that the cases which couldn't be solved through the core of the positive law -the "problems of the penumbra", as he called them- had to be solved by taking into account the intersection between law and morals[187].

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[182] DOS SANTOS MELGAREJO, José Ángel., *Op. Cit.*, p. 17.
[183] *Ibidem.*
[184] DOS SANTOS MELGAREJO, José Ángel., *Op. Cit.*, p. 20.
[185] *Ibidem.*
[186] BANERJEE, Sonali., "The relevance of the Hart & Fuller debate relating to law and morality. A critical analysis", *International Journal of Law and Legal Jurisprudence Studies*, Vol. 4, Nº 2, 2017, p. 123.
[187] *Ibidem,* p. 124.

His idea of positivism is also defined by his notion of "the rule of recognition". In HART's eyes, the legal system consists of primary rules, which impose duties to citizens, and of secondary rules, which contain the manner in which the primary rules can be recognized and in which power can be conferred to them[188]. Thus, the rule of recognition binds both systems of rules, creating one.

However, this rule of recognition, in order to validate the law, requires a minimum of morality[189]. HART stated that this "minimum morality of law" consists of: human vulnerability (human beings can harmed, so the laws have to prohibit harming one-another), approximate equality (humans are equal in power and intelligence because they can form alliances to defeat opponents, so there's a necessity for a system of mutual forbearance), limited resources (law is necessary to adjudicate competing claims and to protect property), limited altruism (there's a need to live peacefully with each other in society) and limited understanding and strength of will (the law has to protect us both from others and from ourselves)[190] .

On the other hand, Lon FULLER stood by his iusnaturalist counterparts, but instead of focusing on the substantive dimension of iusnaturalism, which consists of ethics and principles in a material sense, he put the focus on a more institutional dimension, which consists on principles and ethics in a formal sense[191]. This way, he believed that "for a law to be called a law in true sense, it must pass a moral functional test"[192]. Thus, in order to be conceived as a law, the rule or set of rules has to be measured with some standards that approve its "internal morality"[193].

In order to develop the internal morality of the law, FULLER's work *The Morality of Law* follows the several failures of Rex, a fictional king, while trying to establish a new juridic order in his kingdom[194]. Through Rex's misfortunes, FULLER arrives at eight

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[188] *Ibidem.*
[189] *Ibidem,* p. 129.
[190] STARR, William C., "Law and morality in H.L.A. Hart's legal philosophy", *Marquette Law Review,* Vol. 67, Nº 4, January 1984, p. 685.
[191] BARZOTTO, Luis Fernando., "Legalidad y derecho natural institucional", *Prudentia Iuris*, Nº 78, 2014, p. 56.
[192] BANERJEE, Sonali., *Op. Cit*., p. 125.
[193] *Ibidem.*
[194] PEÑA FREIRE, Antonio Manuel., "La filiación filosófica de Lon Fuller: iuspositivismo normativo (ni iusnaturalismo ni principialismo)", *Cuadernos Electrónicos de Filosofía del Derecho*, Nº 46, June 2022, p. 156.

principles which have to be considered when determining whether a law is or is not acceptable.

The eight requirements go as it follows: firstly, the law has to be conceived in a general manner, not specifically towards every case; secondly, it has to be promulgated so that the people who will receive it know about it; thirdly, retrospectiveness should be avoided; next, there should be clarity in law; also, the law shouldn't contain contradictory mandates; following, the law should not impose impossible standards of action on its receivers; in addition, it should not be constantly altered; lastly, he claims that there should be a congruence between the rules and the ruler's actions[195]. If these principles, if this "internal morality", can not be found in the law, then, in FULLER's eyes, the law is not valid.

FULLER and HART's debate on their idea of the validity of the law emerged with the so-called *Grudge Informer Case*. In the case, a woman had accused his husband of making private remarks about Hitler during the nazi regime, leading him to be sentenced to death by the nazi laws. After the war, when the regime had come to an end, the woman was convicted by a provincial Court for "unlawful deprivation of her husband's liberty"[196].

In the context of this case, HART's positivist-alike position claimed that the woman shouldn't have been convicted, because the nazi law had been issued from a competent legislator and following the promised procedure[197], and thus, it fulfilled his rule of recognition[198], meaning that it was, in fact, valid.

On the contrary, FULLER, in his natural law mindset, approved of the decision of the Court, because the nazi law did not follow his requirements of internal morality, and so, it could not be considered as a valid law[199].

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[195] BANERJEE, Sonali., *Op. Cit*., p. 126.
[196] LAVIS, Simon., "The distorted jurisprudential discourse of Nazi Law: unconvering the Rupture Thesis in the anglo-american legal academy", *International Journal for the Semiotics of Law*, Vol. 31, Nº 4, January 2018, pp. 758.
[197] BANERJEE, Sonali., *Op. Cit*., p. 127.
[198] *Ibidem,* p. 128.
[199] *Ibidem,* p. 127.

In any case, coming back to a bigger picture of the natural and positive debate, the classic advocates for iusnaturalism agree on the function that the natural law holds, which is being the ideal parameter of the juridic reality and the creative force that leads to modifications and change[200].

In this sense, Emilio SERRANO exposes the double influence that the natural law has over the positive law: a negative influence, because it works as a barrier of prohibitions towards the legislative, jurisprudential and doctrinal initiatives, and a positive influence, for it is, at the same time, a source of directives and orientation towards them[201].

This idea of natural law drawing a circle of prohibitions around the positive law is emphasized by Carlos Alberto GABRIEL MAINO when he asks the readers to picture the law as a frozen lake: the superficial layer of crystalized water is the positive law, concretized and used, but it's being held by a voluminous liquid mass, the natural law, which is also the liquid that the layer of ice is made of[202]. This way, when the ice becomes unjust, the gigantic mass of liquid underneath emerges, cracking it and breaking through it.

In addition to that, some of the greatest imagery that conceptualizes the idea of the natural law was given by CICERO himself, as he explained how the unjust laws don't deserve the name of *laws*, just like when ignorants prescribe poisonous substances instead of doctors, these don't deserve to be called *medical prescriptions*[203].

However, even if the constant battle between authors from the positive and the natural doctrine can induce people to think in terms of an irreconcilable clash, GRANERIS highlights the fact that both are one same *"corpus iuris"*, and not two bodies, for if they were separate, they would be dead[204]. That's why he claims that "the positive element constitutes the body, and the natural element represents the soul"[205] of the law.

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[200] SERRANO VILLAFAÑE, Emilio., "Aportación del derecho natural al derecho positivo", *Anuario de filosofía del derecho*, Nº 12, December 1966, p. 306.
[201] *Ibidem.*
[202] CHÁVEZ-FERNÁNDEZ POSTIGO, José. and SANTA MARÍA D'ANGELO, Rafael., *Derecho natural y iusnaturalismos. VIII Jornadas Internacionales de Derecho Natural y III de Filosofía del Derecho*. Palestra, Lima (Perú), 2014, p. 103.
[203] MORESO, Josep Joan., *Op. Cit.*, p. 35.
[204] SERRANO VILLAFAÑE, Emilio., *Op. Cit.*, p. 306.
[205] *Ibidem.*

Following this idea of iusnaturalism, by acting upon the War Code solely, without acting upon the fact that its application is leading to an injustice, Captain Vere is denying the natural law.

Therefore, by recognizing only the body of the Law -the positive-, and by leaving the soul behind -the natural-, Vere is ripping the *corpus iuris* apart, and instead of prescribing medicine to Billy, he is prescribing him poison.

5. CONCLUSIONS.

It wouldn’t be fair to proceed to answer the leading question of this thesis directly. First, there’s something that needs to be said about the field that sparked this examination: law and literature.

The aim of this thesis, as it was explained in the introduction, isn't to analyze the contributions of the law and literature movement, but to answer a certain question. However, arriving at an answer would not have been possible if it wasn’t for using that field as a vehicle. If one stays for months living in an unknown house, inevitably, some thoughts about the house will appear. Likewise, after working for months in the realm of law and literature, there’s some ideas that have emerged.

Firstly, the potential of the field. The enrichening power that it contains is patent. Philosophy of law can be used to pierce through the layers of a story, and the outcome enriches both the legal field and the literature field.

The legal field benefits from the freedom of imagination that literature provides, letting it explore new cases, and through it, show both the strong assets of the law and the aspects that are corrupted or flawed. Likewise, the literature field benefits from philosophy of law scrutinizing its stories, because that way, they gain the potential to make the law turn in a better direction, which means that stories are no longer pages in a book, but activists and change-inducing agents.

Throughout the thesis it’s also clear, from a legal formative perspective, that law and literature can work as a grounder of subjects and as a creativity igniter for the students. By using it as a teaching tool, students, who are forced to be focused on the technical

aspect of the law, would benefit from using their creativity to connect stories with legal topics and thus, arrive at innovative answers.

Lastly, this field shines as a remainder for the law of the importance of imagination. It inspires jurists to regain a mindset led by nonconformity, critical spirit, insightfulness, sensitivity and creativity, and to be visionaries instead of surrendering completely to the legal technicalities.

Having stated those remarks, it's time to answer the question raised by Melville: is Captain Vere's verdict just? In order to do so, it's necessary to walk through the several insights that have been gathered through the pages.

As a start, the very action that calls the law against Billy, his deadly punch, is out of the realm of guilt, as it's justified from a legitimate defense perspective. This means that the law is being enforced on an innocent man who never intended to mutine, but to defend himself, which debunks the aim of the law, as the aim is to eradicate any risk of mutiny.

In addition to that, the process that is followed to judge Billy is manifestly deficient, as it runs over Billy's right to defend himself, forcing him to answer questions in a state of shock; answers that he doesn't even understand sometimes. The lack of publicity and impartiality of Vere also take the trial further away from the due process. Really, Captain Vere is justifying these procedural flaws by the theory of the criminal law of the enemy, for he believes that in the context of mutiny, legal guarantees can not be offered, and thus, he is using the law as a mere political instrument, confusing politics with justice.

As it can be noted, Billy didn't deserve the penalty that he received, and even if he had really intended to mutine, which he didn't, the very flaws of the process would be enough to raise an alarm of injustice. Therefore, from a legal perspective, Vere's verdict is not just.

However, we can dive deeper and ask whether or not the philosophy that ignites his decision makes the verdict just. As it has been hinted through the pages, the answer is no.

Clearly, Captain Vere is aware that he is facing a sacrificing moral dilemma, but his thoughts soon simplify the situation, clenching onto his duty towards the law of the naval institution and towards the war.

In regards to the naval law, Vere shows a stoic sense of obedience. In a similar manner to the nazis, he doesn't let his consciousness outdo his role in the institution, making himself nothing more than a shell of a man and a puppet of others' politics. Instead of taking the time to create a rational answer out of his inner intuition of unfairness, he decides to shove his intuition off and not even contemplate being a conscientious objector in the case.

As it's been argued, though obedience to the law is important, and it's the basis of the State's existence, it's not less true that the State can become corrupted and unjust. In those cases, disobedience to the law is not an anarchical response, but a rational one. Instead of victimizing himself for having to make sacrifices for the naval institution, as the nazis did, Vere could have stood up for Billy and for his own dignity, but he didn't.

In relation to that, Captain Vere's decision to brutally enforce the law seems to dismiss any sense of iusnaturalism he may perceive. It's not that he doesn't feel a calling from a higher law to not execute Billy. He does, but he doesn't have the courage to act upon it. If his radical iuspositivism is accepted, the apartheid, german nazism and all the other killed Billys have to be accepted too.

Although it's a debate that has been going on for centuries, this thesis humbly stands for the need of iusnaturalism as the ideal towards which the positive law has to be directed at. Otherwise, there would be no way to measure and change the atrocities of the law, as it would put the legislator high up in the sky where it couldn't be reached. Vere, by executing Billy, is standing up for all the legal abominations, and he is not listening to his morality. It's easier to stand up for a written law instead of justifying a sense of morality.

Lastly, Vere's motive for the British Empire's position in the war has to be examined. As it was explained, he is being guided by a utilitarian philosophy. The Captain, deep in his conscience, doesn't believe Billy to be a mutineer. His real fear is that if the shipmen

know that he didn't enforce the law to the boy after he killed a superior, they will mutine, and so, there will be less chances of winning the war. Thus, the application of the law goes from being directed at the person who committed the act, as it should be, to sacrificing that person in order to ensure a position in war, which, once again, confuses justice with politics.

As a Captain, it's understandable that he would be motivated by the war, but as a judge, that motive becomes a cheap resource for executing a man. And it's a cheap resource because of all the criticism utilitarianism has received. Who will benefit from Britain winning? Who will benefit from a comrade being executed without proper legal guarantees? Maybe the answer isn't "a majority", as it depends on how far the question is taken, but maybe the answer is "Captain Vere".

What's clear is that morality won't benefit from masking an execution with war medals and committing evil in the name of good. The ends don't justify the means. This thesis concludes that it's unacceptable for Billy to be mistreated in the dark room of Omelas while the citizens smile; this thesis walks away from Omelas.

Melville asks: "Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blindingly enter into the other?"[206]. As aware as I am of the blurry line between righteousness and unrighteousness in this case, I hope to have, at least slightly, made the line clearer than it was before.

[206] MELVILLE, Herman., *Billy Budd, Sailor, Op. Cit.*, p. 144.

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