

## **Admiralty Law and Imaginative Precision in *Lord Jim***

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**Abstract:** In this paper, it is argued that *Lord Jim* provides verisimilitude in relation to the law and practice of contemporary inquiries and investigations into marine casualties; and that the novel is a case study for academic and practising admiralty lawyers: illustrating the use and abuse of the law and procedures of Courts of Inquiry; exposing violations of the obligations owed by master and officers to their passengers; questioning notions of fair punishment; and suggesting drafting options for the enactment of statutes encouraging cooperation between seafarers and casualty investigators. The interpretation of such enactments should, it is argued, be adapted to the characteristics of the enactments, their interpreters, and their interpretive community at the International Maritime Organization of the United Nations.

### **1. Introduction**

*Lord Jim* fuses imaginative and technical language, reflecting the use and abuse of actual court procedures, laws and penalties. This legal reading of the great novel, a contribution to the vast body of multidisciplinary scholarship around the work, argues for its greater prominence in law and literature<sup>2</sup> and merges the hermeneutics of law and literature, reconciling their often antithetical tendencies. Can the densely adjectival and powerful imaginative language of deliberate ambivalence and sometimes bewildering complexity<sup>3</sup> in *Lord Jim* be fused with the concise technical language of precise legal meaning that awaits identification in the novel? Conrad answers in *The Mirror of the Sea*,

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<sup>2</sup> For an excellent account of the current status of law and literature, see Bard, Jennifer; Mayo, Thomas W.; and Tovino, Stacy A., 'Three Ways of Looking at a Health Law and Literature Class' (2009) *Scholarly Works, Paper 75* at pp. 512-572.

<sup>3</sup> Tadie, Alexis 'Perceptions of Language in *Lord Jim*' (2006) *Conradian* vol. 31 issue 1 at p. 16. As to Jim's 'uncertain positioning between language and silence' see Hannah, Daniel 'Under a cloud: Silence, Identity, and Interpretation in *Lord Jim*' (2008) *Conradiana* vol. 40 at p. 39. In regard to 'the extent to which Conrad is consciously dramatizing the very inadequacy of language' see Ray, Martin 'Conrad, Schopenhauer, and *le mot juste*' (2008) *Conradiana* vol. 33 at p. 31. As to the much quoted 'adjectival insistence' of Conrad's writing, see Leavis, F. R. (1948) reprinted 1976 *The Great Tradition* Pelican Books at pp. 204 -5. With regard to the 'bewildering complexity' of the language, see Miller, J. Hillis 'Lord Jim: Repetition as Subversion of Organic Form' reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 446. As to the 'duplication of language' in *Lord Jim* see, Said, Edward 'The Presentation of Narrative in *Lord Jim*' reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 454 and words conveying and concealing meaning, see Weinstein, Philip M. 'Nothing Can Touch Me: *Lord Jim*' reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 458-469.

Your journalist whether he takes charge of a ship or a fleet, almost invariably ‘casts’ his anchor. Now, an anchor is never cast, and to take a liberty with *technical language* is a crime against the clearness, precision, and beauty of perfected speech ... *technical language* is an instrument wrought into perfection ... the growth of the cable – [is one example of] a sailor’s phrase which has all the force, *precision*, and imagery of *technical language* ... [and a second example] we’ll take that foresail off her and put her head under her wing for the night ... in *imaginative precision* ... is one of the most expressive sentences I have ever heard on human lips (pp. 13-14).

This legal reading of the novel begins with the identification of its technical legal language of imaginative precision. Conrad, it will be shown, had an intimate knowledge of the law and procedure of a Court of Inquiry, arguably derived from his professional training, general awareness of legal proceedings, and especially his own appearances before such courts, on one occasion narrowly but fairly escaping cancellation of his certificate of competency. Kieran Dolin’s observation that Jim is ‘not convicted of a crime in the technical sense’ since he appears before a ‘marine court’<sup>4</sup> (which presumably means a Court of Inquiry) is demonstrably correct. Kieran Dolin’s persuasive study of Jim’s claim to ‘sympathetic interest’ depends on the fact that ‘unlike his skipper he did not attempt to evade the justice of the community.’<sup>5</sup> Jim’s treatment by the Court was however arguably irregular and unjust, further enhancing our sympathy for him. And when Jim’s voluntarily appearance before the Court is contrasted with the fugitive legal status of the master and other officers, it will be contended that *Lord Jim* provides legal drafters with a case study for the domestic enactment of international law better calibrated to achieve cooperation between seafarers and casualty investigators, the prevention of marine casualties, and justice for seafarers. Finally, it will be argued that the interpretation of such enactments requires a special approach, adapted to the unique characteristics of the enactments, of the interpreters, and of the interpretive community.

## 2. Court of Inquiry in *Lord Jim*

The word ‘inquiry,’ shorn of dense adjectives, is used 23 times, with consistent clarity throughout the novel. One reference is to the ‘Court of Inquiry,’ which was an actual and very active court. This court was established in 1876. It has since decided many thousands of cases,<sup>6</sup> which must have had a profound effect in saving life and property at sea. The Court is still important for safety of life at sea today. The word ‘inquiry,’ being employed in 20 other instances in the novel, refers consistently to a Court of Inquiry.

The establishment of the Court of Inquiry can be traced to the resolutions of a Select Committee of the House of Commons in 1836.<sup>7</sup> The Court was and is unique: it has its own statutorily defined jurisdiction, procedure and law. It proceeds in open court, employing a combination of inquisitorial and adversarial procedures when inquiring into marine casualties,<sup>8</sup> although the standard of proof it applies, either on a balance of probability or beyond a reasonable doubt, is unclear.

At the time *Lord Jim* was penned, the British Merchant Shipping Act of 1894 was in force. By virtue of s. 478(1), the Act applied to British possessions. The legislature of any British possession was empowered to authorise any court to ‘make enquiries as to ... charges of incompetency or misconduct ... when the master, mate or engineer of a British ship who is charged with incompetency or with misconduct on board that British ship is found in the British possession.’ Given the great extent of British

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<sup>4</sup> Kieran Dolin *Fiction and the Law Legal Discourse in Victorian and Modernist Literature* (1999 Cambridge, Cambridge University Press) pp. 148-149.

<sup>5</sup> Kieran Dolin *Fiction and the Law Legal Discourse in Victorian and Modernist Literature* (1999 Cambridge, Cambridge University Press) pp. 148-149.

<sup>6</sup> McMillan A.R.G. (1929) *Shipping Inquiries and Courts as Regulated by the Merchant Shipping Act* London: Stevens and Sons at p. v.

<sup>7</sup> Sir Walter Murton (1884) *Wreck inquiries: The Law and Practice Relating to Formal Investigations in the United Kingdom, British Possessions and Before Naval Courts into Shipping Casualties and the Incompetency and Misconduct of Ships’ Officers With an Introduction* London: Stevens and Sons at p 1.

<sup>8</sup> Sir Walter Murton (1884) *Wreck inquiries: The Law and Practice Relating to Formal Investigations in the United Kingdom, British Possessions and Before Naval Courts into Shipping Casualties and the Incompetency and Misconduct of Ships’ Officers With an Introduction* London: Stevens and Sons at p 5.

possessions, it comes as no surprise that Jim should appearance before a British Court of Inquiry in an Eastern port.

### 3. Questions Before the Court

Marlow says that there were,

several *questions* before the court. The first as to whether the ship was in every respect fit and seaworthy for the voyage. The court found she was not. The next point, I remember, was, whether up to the time of the accident the ship had been navigated with proper and seamanlike care. They said Yes to that, goodness knows why, and then they declared that there was no evidence to show the exact cause of the accident (p. 73).

The significance of the `questions` is very easily overlooked, since the unique features of the Court<sup>9</sup> were, and are, little known, even to many lawyers. The `questions` were specific to the circumstances of the casualty, formulated by the Board of Trade, and submitted by the Board to the Court.<sup>10</sup> This was considered appropriate, since the Board undertook `the superintendence of all matters relating to merchant shipping and seamen.`<sup>11</sup> The Shipping Casualty Rules<sup>12</sup> read together with s. 479 of the Merchant Shipping Act 1894 obligated the Board to, `shall state in open court upon what *questions* in reference to the causes of the casualty, and the conduct of persons connected therewith, they desire the opinion of the court.`<sup>13</sup>

The phrase `several questions before the court` in *Lord Jim* is therefore a precise reference to the questions that would have been submitted by the Board to the Court and not a loosely textured phrase broadly connoting the usual questions that may be expected of any other - and much more usual - court procedure. Given that the Board employed no standard questions (their formulation being virtually limitless since they were linked to the facts of each case), the particular question in *Lord Jim*, whether the ship had `been navigated with proper and seamanlike care`, is most remarkable, since the extant records show it to have been a verbatim question submitted by the Board to an actual Court.<sup>14</sup>

The course of legal proceedings in a Court of Inquiry is fundamentally determined by the questions put to the Court. The central legal question goes to the abandonment of the *Patna*. Not to ask that question would be inexcusable, suggesting a cover-up, an attempt to divert attention from the central question. But the central question might itself have been variously phrased. `Did the master conduct a proper abandonment of the *Patna*?` would have been an appropriate question given the master's legal obligations. Had that been the question, no finding could have been made against Jim, his certificate would have been safe from cancellation. `Did the master and officers conduct a proper abandonment the *Patna*?` is a question that would have obviously implicated all the officers. Phrasing the central question is therefore of crucial importance, being determined with reference to the facts of common notoriety, which facts would obviously not yet have been legally established in Court. It is therefore understandable that the central question may not always be sufficiently closely related to the cause of a casualty; or it may unfairly implicate particular seafarers, putting them to their own defence; or it may require clarification, especially by way of secondary questions. For such reasons, an `inquiry` may ironically widen rather than narrow the search for the truth. It is therefore an apt metaphor of imaginative precision,

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<sup>9</sup> McMillan A.R.G. (1929) *Shipping Inquiries and Courts as Regulated by the Merchant Shipping Act* London: Stevens and Sons at p. 1.

<sup>10</sup> Sir Walter Murton (1884) *Wreck inquiries: The Law and Practice Relating to Formal Investigations in the United Kingdom, British Possessions and Before Naval Courts into Shipping Casualties and the Incompetency and Misconduct of Ships' Officers With an Introduction* London: Stevens and Sons at pp. 557-577.

<sup>11</sup> By virtue of s. 713 of the Merchant Shipping Act 1894.

<sup>12</sup> Rule 16 of the Shipping Casualty Rules.

<sup>13</sup> As to when the questions are stated in Court see: *The Carlisle* 1906 P.D. 301.

<sup>14</sup> Sir Walter Murton (1884) *Wreck inquiries: The Law and Practice Relating to Formal Investigations in the United Kingdom, British Possessions and Before Naval Courts into Shipping Casualties and the Incompetency and Misconduct of Ships' Officers With an Introduction* London: Stevens and Sons at p. 570; and at p. 121 as to the need for the questions to be in writing so as to afford seafarers an opportunity to defend themselves.

evoking the proliferating questions, multiple narratives, and differing answers that run in parallel in *Lord Jim* concerning the illusive character of Jim.

#### 4. Magistrate and Nautical Assessors

Marlow says,

The face of the presiding magistrate, clean shaved and impassable, looked at him deadly pale between the red faces of the two nautical assessors. The light of a broad window under the ceiling fell from above on the heads and shoulders of the three men, and they were fiercely distinct in the half-light of the big court-room where the audience seemed composed of staring shadows. They wanted facts. Facts! They demanded facts from him, as if facts could explain anything! (p. 14).

Again the language is technically exact. A `magistrate,` among others, could preside over a Court of Inquiry.<sup>15</sup> The presence of the `nautical assessors` (more technical language derived from the Merchant Shipping Act 1894),<sup>16</sup> means that the Court was empowered to cancel Jim's certificate, since under s. 466(3), where the inquiry appeared likely to involve the cancellation of a certificate, the court had to `hold the investigation with the assistance of not less than two such assessors,` who would have been chosen by the Secretary of State (the Board could not request the appointment of an individual assessor)<sup>17</sup> from the approved list of assessors who themselves possessed the necessary certificates and experience of command.<sup>18</sup> Today nautical assessors continue to sit on Courts of Inquiry in many jurisdictions around the world when cancellation is a possibility.<sup>19</sup>

#### 5. Cancellation of Certificate in Public

Marlow says of Jim in the Court,

He stared with parted lips, hanging upon the words of the man behind the desk. These came out into the stillness ... I ... caught only the fragments of official language ... Gustav So-and-so ... master ... native of Germany ... James So-and-so ... mate ...  
*certificates cancelled* (p. 73).

'Cancelled' is an exact technical word. Section 470(1)(b) of the Merchant Shipping Act 1894<sup>20</sup> stipulated that a certificate may have been `cancelled` if the court found the seafarer incompetent or guilty of gross misconduct.<sup>21</sup> Cancellation is the exact technical term still in use in many jurisdictions today. Jim's certificate was cancelled in open Court in accordance with Merchant Shipping Act 1894<sup>22</sup> and the

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<sup>15</sup> See Rule III of the Rules then in force in Sir Walter Murton (1884) *Wreck inquiries: The Law and Practice Relating to Formal Investigations in the United Kingdom, British Possessions and Before Naval Courts into Shipping Casualties and the Incompetency and Misconduct of Ships' Officers With an Introduction* London: Stevens and Sons, at p. 106.

<sup>16</sup> See s. 466(3) of the Merchant Shipping Act 1894.

<sup>17</sup> See the General Rules for Formal Investigations into Shipping Casualties 1895, rule 25.

<sup>18</sup> See the General Rules for Formal Investigations into Shipping Casualties 1895, rules 22, 23 and 24. See also Pulling, Alexander (1894) *The Shipping Code 1894* London: Stevens and Sons at p. xxxii.

<sup>19</sup> In Namibia, for instance, under s. 267 of the 1951 Act, the Court comprises the presiding officer and four assessors, although it may sit less than four assessors if, for example, an application for the removal of an assessor is made to the Court. In the Court of Marine Enquiry in Namibia in the Matter of the *MFV Meob Bay* (17 January 2005) a successful application was brought to remove an assessor.

<sup>20</sup> By virtue of s. 478(5) of the 1894 Act, the Court in a British possession would have had the same power to cancel a certificate.

<sup>21</sup> See Hart E. L and Bucknill A. T. (1911) 5 ed. *A Treatise on the Law of Merchant Shipping* London: Sweet and Maxwell at p. 217.

<sup>22</sup> By virtue of s. 470(2).

General Rules for Formal Investigations into Shipping Casualties 1895.<sup>23</sup> This publicity, as will be argued, was unwarranted in Jim's case and the rigidity of the rule should, as a matter of law reform, be relaxed in exceptional circumstances.

In summary, the depiction of the Court in *Lord Jim* is a remarkably accurate reflection of the unique and little known features of an actual Court. So, how did Conrad obtain such detailed legal knowledge? Hans van Marle and Pierre Lefranc describe the power of Conrad's imagination to combine and fuse together 'identifiable fragments of experience, places, episodes, and people'<sup>24</sup> into 'rich and varied patterns.'<sup>25</sup> These identifiable fragments include Conrad's concern about the dangers of navigation; his personal certification ordeals; and his direct experience of actual inquiries. Paying more attention to these fragments opens up new approaches to *Lord Jim* and the law with particular reference to casualty inquiries and investigations.

## 6. Conrad and the Law

Conrad, sailing at a time of much public concern about the dangers of navigation, was alert to inquiries and commissions dealing with safety. In *A Personal Record*, he paid tribute to Captain Froud, who 'had ... organized for us courses of professional lectures ... corresponded industriously with public bodies and members of Parliament ... as to the oncoming of some inquiry or commission relating to matters of the sea and to the work of seamen' (p. 11). On 3 July 1894, Conrad appeared before the Board of Trade's Departmental Committee on the Manning of Merchant Ships and answered 126 questions about the safe manning of ships.<sup>26</sup> From his answers, he was said to be 'proud to have been a professional seaman';<sup>27</sup> although in relation to his experience in sailing ships, his answers suggested 'modesty or perhaps insecurity?'<sup>28</sup> That Conrad chose to answer questions indicates his abiding interest in safety, which was also manifested in 'Some Reflections on the loss of the *Titanic*,'<sup>29</sup> although his speculation that the loss was caused by the design of the *Titanic* was not confirmed in the findings of the Court of Inquiry.

Conrad had a deep personal interest in the safety of ships at sea. He sailed, either as a passenger or a seafarer, intermittently over the period 15 December 1874 to 2 September 1892. Of the 20 ships on which Conrad sailed, eight were lost at sea.<sup>30</sup>

Conrad's learning of the law may have begun in the process of his certification as a master, since 'knowledge of legislation' was, as Bruyns points out, 'important for a candidate for master.'<sup>31</sup> Conrad failed twice in his professional examinations; Jim failed once in the professional discharge of his duties.<sup>32</sup>

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<sup>23</sup> By virtue of rule 15. See also *The Kestral* 1881 P.D.182 as to further reasons being stated in the Report after the court decision. *The Corchester* 1957 P.D. 84 at p. 89. Even a reprimand was regarded as a serious matter for the seafarer: *The Royal Star* 1928 P.D. 48 at pp. 51, 53.

<sup>24</sup> van Marle, Hans and Lefranc, Pierre 'Ashore and Afloat: New Perspectives on Topography and Geography in *Lord Jim*' (1988) *Conradiana* vol. 20 no. 2 p. 109 at p. 129.

<sup>25</sup> van Marle, Hans and Lefranc, Pierre 'Ashore and Afloat: New Perspectives on Topography and Geography in *Lord Jim*' (1988) *Conradiana* vol. 20 no. 2 p. 109 at p. 129.

<sup>26</sup> For all of Conrad's answers see: Bojarski, Edmund 'Conrad at the Crossroads: From Navigator Novelist with New Biographical Mysteries' (1968) *Texas Quarterly* at pp. 15-29. As to the accuracy of Conrad's answers, see Bruyns, Willem F.J. Morzer 'Conrad's Navigation: Joseph Conrad as a Professional Sailor' (2007) *International Journal of Maritime History* vol. XIX no. 2 p. 201 at pp. 215 - 220. As to Conrad's service on the *Falconhurst*, see Bojarski, Edmond and Stevens, Harold 'Joseph Conrad and the *Falconhurst*' (1970-1971) *Journal of Modern Literature* vol. 1 no. 2 p. 197 at p. 208.

<sup>27</sup> Bruyns, Willem F.J. Morzer 'Conrad's Navigation: Joseph Conrad as a Professional Sailor' (2007) *International Journal of Maritime History* vol. XIX no. 2 p. 201 at p. 215.

<sup>28</sup> Bruyns, Willem F.J. Morzer 'Conrad's Navigation: Joseph Conrad as a Professional Sailor' (2007) *International Journal of Maritime History* vol. XIX no. 2 p. 201 at p. 218.

<sup>29</sup> As to the 'sardonic, almost Swiftian, treatment' of the loss of the *Titanic* see Wolstenholme, Philip 'We are trusted: Conrad and the Blue Star Line Crosbie Smith' (2004) *The Conradian* vol. 29 at p. 39.

<sup>30</sup> Bojarshi, Edmond A. and Stevens, Harold Ray 'Joseph Conrad and the *Falconhurst*' (1970-1971) *Journal of Modern Literature* vol. 1 no. 2 197 at p. 208.

<sup>31</sup> Bruyns, Willem F.J. Morzer 'Conrad's Navigation: Joseph Conrad as a Professional Sailor' (2007) *International Journal of Maritime History* XIX No. 2 p. 201. As to the past and future training of seafarers see, for example, Kennerley, Alston 'Writing the History of Merchant Seafarer Education, Training and Welfare: Retrospect and Prospect' (2002) *The Northern Mariner* no. 2 p. 1.

<sup>32</sup> See the intriguing study of other parallels between Jim and Conrad by Watt, Ian 'Composition and Sources' reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 426.

On 17 November 1884, Conrad failed at his first attempt at the day's work (a navigation subject) in the examination for first mate. But he passed the examination on 3 December 1884; and, on 5 December 1884, he was awarded a certificate as first mate. Conrad failed in arithmetic and in the 'day's work' in his first attempt at the examination for his masters certificate on 28 July 1886. But, passing on 11 November 1886, he was awarded the certificate. 'It was a fact' said Conrad in *A Personal Record*, 'that I was now a British master mariner beyond a doubt.' He appears to have made no written mention of his failures<sup>33</sup>; not in his letters to his uncle Tadeusz Bobrowski; not in the *The Mirror of the Sea*; and not in *A Personal Record*. He said in the preface that 'the immediate aim' of *A Personal Record* 'is to give the record of personal memories by presenting faithfully the feelings and sensations connected with the writing of my first book and with my first contact with the sea.' This is not, as has been suggested, a promise of a full and frank confession. In *A Personal Record*, Conrad wrote of his 'fate' in being delivered into the hands of his three examiners. Of his examination for second mate, he said, 'I was not frightened of being plucked; that eventuality did not even present itself to my mind' (p. 74); nor did he fail, on that occasion. The failures were to follow, which may explain why he spoke in *A Personal Record* of the 'ordeal' in respect of his examination for first mate. He added however that his examiner remarked, 'You've done very well', although this would have been said in the context of his second and successful attempt. Having passed, he 'walked on air along Tower Hill, where so many good men had lost their heads because, I suppose, they were not resourceful enough to save them.' (p. 77) Given Conrad's examination ordeals, he must have been sensitised to failure; and the need for a second chance. A Court of Inquiry is, in essence, an inquiry into failure; and - if appropriate - it, too, should allow for a second chance; a chance, it will be argued, that Jim deserved - both ethically and legally - but which the Court denied.

## 7. Conrad and Courts of Inquiry

The widely held view that *Lord Jim* was primarily<sup>34</sup> based on the abandonment of the *Jeddah* is helpful; but the distinctions with the novel are more important. In August 1880 and when in London, Conrad heard about the uproar concerning the *Jeddah*, which involved a ship's officer only five years older than Conrad. When in Sydney in late 1880, he 'heard it endlessly debated during his seven weeks in the port.'<sup>35</sup> He read about it again in Newcastle in autumn 1881.<sup>36</sup> But, as Wolstenholme has remarked, the parallels with the *Jeddah* are 'significantly and deliberately inexact.'<sup>37</sup> Two legal distinctions are significant: first, the Court of Inquiry found Captain Clark of the *Jeddah* 'guilty of gross misconduct in being indirectly the cause of the deaths' of 21 persons; but no life was lost from the *Patna*. Second, Clark's certificate was suspended for three years; but Jim's certificate was cancelled. Those distinctions suggest that Conrad may well have intended the cancellation of Jim's certificate to be viewed as unfairly harsh, an argument that will later be further developed.

Conrad's first personal experience of an Inquiry arose in respect of the *Palestine*. On 17 September 1882, he sailed as second mate<sup>38</sup> on a vessel, which was lost. The Inquiry was held at the Police Court in Singapore on 2 April 1883. The President Senior Magistrate presided over the Court, assisted by two nautical assessors, indicating that the cancellation of certificates must have been foreseen as a possibility. The Court record reveals that a fire broke out in the cargo of coal. On 14 March, the decks blew up, fore and aft. The boats were provisioned, and the *Palestine* headed for the Sumatra shore. The *SS Somerset*

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<sup>33</sup> As to the possible reasons for Conrad's failures, see Bruyns, Willem F.J. Morzer 'Conrad's Navigation: Joseph Conrad as a Professional Sailor' (2007) *International Journal of Maritime History* vol. XIX no. 2 p. 201 at p. 209.

<sup>34</sup> See the excellent research of van Marle, Hans and Lefranc, Pierre 'Ashore and Afloat: New Perspectives on Topography and Geography in *Lord Jim*' (1988) *Conradiana* vol. 20 no. 2 p. 109 at pp. 116, 123 in respect of the *Patna* being primarily based on the *Jeddah*, the place of the *Patna* inquiry, and the route of the *Patna* voyage, the place of the abandonment of the *Patna* and the place of Brierly's suicide. Another excellent account is by Sherry, Norman 'The Pilgrim Ship Episode' reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at pp. 319-358.

<sup>35</sup> Allen, Jerry (1965) *The Sea Years of Joseph Conrad* at p. 148.

<sup>36</sup> van Marle, Hans and Lefranc, Pierre 'Ashore and Afloat: New Perspectives on Topography and Geography in *Lord Jim*' (1988) *Conradiana* vol. 20 no. 2 p. 109 at p. 112.

<sup>37</sup> See Wolstenholme, Philip 'We are trusted: Conrad and the Blue Star Line Crosbie Smith' (2004) *The Conradian* vol. 29 at p. 39.

<sup>38</sup> Zdzislaw, Najder (1983) *Joseph Conrad A Chronicle* at p. 76.

came alongside in answer to distress signals and took the *Palestine* in tow. But the fire rapidly increased and the tow rope was slipped. All hands got into the three boats. Conrad was in charge of one of the boats with three seafarers in it. The boats remained by the vessel until 8.30 am on 15 March, when she was a mass of fire. On 15 March, the boats arrived at Mintok and the master reported the casualty to the harbour master. After six days, Conrad and the crew were taken to Singapore on the *SS Sissie*, arriving on 22 March.<sup>39</sup> Conrad and the other officers surrendered their certificates of competency to the authorities at Singapore. Conrad appeared before the Court on 2 April,<sup>40</sup> which delivered its judgment on 3 April. It found that there were two ventilators fitted in the vessel; that the main hatch cover was frequently taken off during the voyage; that the coal had been loaded on board in a dry state; that no thermometers had been provided for testing the temperature in the hold; and that the fire was caused by spontaneous combustion. Despite the absence of thermometers which the captain ought to have ensured were provided, the Court held that 'the officers and crew appear to have done all in their power to subdue it, but, with limited means at their disposal, without success.'<sup>41</sup> And, since the *Palestine* was held not to have been abandoned prematurely, the certificates of competency were returned, and Conrad could continue to sail.

Conrad's second appearance before a Court of Inquiry arose in respect of the *Riversdale*. When the Court inquired into the loss of the *Riversdale*, Conrad must have appreciated his good fortune not to have been subpoenaed, since the commander of the vessel, Captain McDonald, directly implicated Conrad. On 10 September 1883, Conrad signed on as second mate,<sup>42</sup> but he was discharged at Madras by McDonald for making a statement to Dr Thompson, a District Surgeon at Madras, who was called out on the night of 9 April to attend to the captain. The statement that McDonald was suffering from drink was not volunteered by Conrad, but elicited in answers to questions (apparently innocuous but legally interrogative), by Dr Thompson.<sup>43</sup> The doctor however did not find the captain suffering from *delirium tremens*. And, on 12 April, Conrad wrote to McDonald, confessing that 'he found on consideration that the statements made to Dr Thompson were not borne out by facts within his personal knowledge and he withdraws them and declares them baseless.' He apologised, adding that 'there was never any intention to cast even the shadow of a doubt of a suspicion on Captain McDonald's personal or professional character.'<sup>44</sup> The wording of the letter and third party reference to the captain suggests that the letter may have been written on legal advice. On 15 April, Conrad was discharged by McDonald, which proved to be fortunate for Conrad. On 8 April, the *Riversdale* ventured from Madras bound for Vizagapatam. On 29 April, the ship stranded off Point Divi. Under s. 7 of the Indian Merchant Shipping Act 1883, a Court of Inquiry was convened at Madras. The Chief Presidency Magistrate presided over the inquiry, assisted by two assessors, indicating again that the cancellation of certificates must have been foreseen as a possibility. McDonald deposed to an affidavit in which he alleged:

I twice logged the second mate for sleeping on watch in Madras. I produce a letter I received from the second officer, 'Conrad Korzeniowski.' I never read entries in a log to a man unless he cannot read himself. Had a proper watch been kept on board, the ship would not have gone ashore. The lead was not properly attended to. I could hear the breakers distinctly when I came on deck.<sup>45</sup>

No explicit response to the allegation is in the record. The Court was probably of the view that, since Conrad had been discharged prior to the stranding, no blame could be attributed to him as responsibility for the watch and the lead would have passed to the first mate. The Court may also have regarded McDonald's allegations as self-serving and exculpatory; made in retaliation for Conrad's statement to Dr Thompson; and without corroboration. At the trial, the first mate testified that the captain was

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<sup>39</sup> Report of the Marine Court of Inquiry held at the Police Court in Singapore 2 April 1883. See also Zdzislaw, Najder (1983) *Joseph Conrad A Chronicle* at pp. 76-77; and Karl, Frederick R. (1979) *Joseph Conrad: The Three Lives* at p. 211.

<sup>40</sup> van Marle, Hans and Lefranc, Pierre 'Ashore and Afloat: New Perspectives on Topography and Geography in *Lord Jim*' (1988) *Conradiana* vol. 20 no. 2 p. 109 at p. 110.

<sup>41</sup> Report of the Marine Court of Inquiry held at the Police Court in Singapore 2 April 1883

<sup>42</sup> Zdzislaw, Najder (1983) *Joseph Conrad: A Chronicle* at p. 80.

<sup>43</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>44</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>45</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

intemperate throughout the voyage; the sail maker witnessed the intoxication of the captain on 29 April; and the quartermaster testified that the captain had not been sober on 29 April and had staggered about on deck.<sup>46</sup> But no witness testified to seeing the captain incapable or incompetent to command his ship,<sup>47</sup> and since Dr Thompson stated that the symptoms he had observed might have been attributable to sunstroke,<sup>48</sup> the Court found insufficient evidence adverse to the sobriety of McDonald. What the Court did find was that, 'Either he [the captain] did not know where he was going, in which case there was culpable recklessness; or, he did not know where he was, in which case there was equally culpable negligence or ignorance.'<sup>49</sup> His certificate of competency was suspended for twelve months. In casting the lead and performing the soundings, the chief mate was held to have contributed to the casualty. But leniency was requested by the assessors,<sup>50</sup> and his certificate was suspended for three months. Had Conrad not been discharged, it seems that he would have faced the risk of a similar suspension. He was also fortunate in that the Court was forced, for lack of government lawyers, into the invidious (and irregular) task of acting as both prosecutors and judges;<sup>51</sup> and a court accustomed to adversarial proceedings, is naturally cautious, even hesitant, in pursuing prosecutions. Government lawyers, on the other hand, would probably have been more aggressive prosecutors and on the basis of McDonald's affidavit may well have taken the view that Conrad should have been put to his defence. Alternatively, the prosecutors may have used Conrad's statement to Dr Thompson to charge McDonald with drunkenness, calling Conrad as a witness, seeking independent corroboration of his statement, and thereby negating Conrad's withdrawal of his statement. Either way, Conrad may have found himself before the Court and in the witness box, standing uncomfortably exposed to cross-examination. So, given Conrad's interest, knowledge and close experience of Inquiries, how are the suspended certificates in the *Jeddah* and the *Riversdale* to be reconciled, if at all, with the cancellation of Jim's certificate?

## 8. Cancellation or Suspension ?

Jim's jump from the *Patna*, according to the established view, was disgraceful; wrong in morality and law; and therefore cancellation of his certificate was morally and legally fully justified; but the justification is open to challenge. Marlow, emphasising the inherent limitations of the law, says that the issue was 'beyond the competency of a court of inquiry: it was a subtle and momentous quarrel as to the true essence of life, and did not want a judge.' (p. 43) But the Court<sup>52</sup> had to do the best it could with the legally admissible facts, drawing inferences and determining probabilities, even though the 'language of facts', as Marlow observes, 'are so often more enigmatic than the craftiest arrangement of words.' (p. 154) What is more, not every fact, every consideration (whether admissible or not), was before the Court: there 'were things,' observes Marlow, that Jim 'could not explain to the court.' Since the reader knows more about Jim's thoughts, acts and omissions aboard the *Patna* than may be inferred from the sparse and enigmatic facts before the Court, care has to be exercised in any legal criticism of the judgment. As Marlow observes, the Court,

was beating futilely round the well-known fact, and the play of questions upon it was as instructive as the tapping with a hammer on an iron box, were the object to find out what's inside. However, an official inquiry could not be any other thing. Its object was not the fundamental why, but the superficial how, of this affair (p. 26).

The legally admissible facts before the Court, derived from the testimony of Jim and the helmsman, although difficult to assemble, would have been something as follows. The *Patna* was owned by a

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<sup>46</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>47</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>48</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>49</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>50</sup> Opinion of the assessors on the evidence tendered at the *Riversdale* Court of Inquiry by Charles Reeves Master of the *Umvoti* and John H. Roberts Master of the *Medusa* 6 July 1884.

<sup>51</sup> Report of the Court of Inquiry into the *Riversdale* of 7 July 1884.

<sup>52</sup> As to how the language of facts is elucidated by trauma and shame theories see, for example, Martin, William A. 'To grapple with another man's intimate need: Trauma-shame interdependency (masochism) in Joseph Conrad's *Lord Jim*' (2001) *Conradiana* vol. 33 issue 3 at p. 231.

Chinaman, chartered by an Arab, and commanded by a German. She carried more or less eight hundred pilgrims. The *Patna* collided with something afloat. Jim, the chief mate, was ordered by the captain to go forward and ascertain if there was any damage done. He saw that the forepeak was more than half full of water and thought that there must be a big hole below the water-line. The second engineer thought that the bulkhead would give way in a minute, and that the vessel would immediately sink. All the officers, including Jim, believed that the vessel would sink very fast at any moment. There were seven life-boats aboard the *Patna*, which were enough for about half the passengers. There were four life-boats on one side of the bridge and three life-boats on the other side. To Jim it was clear that there was no time to save the passengers; nonetheless he tried to cut the life-boats clear of the *Patna* for the use of the passengers, and decided not to join the other officers in releasing a boat and abandoning the ship. But later, when a squall hit the *Patna* and the men in the life-boat were calling out for George to jump, Jim jumped into the life-boat. At no stage was anything done by any officer, other than Jim, to attempt to secure the safety of the passengers. But the *Patna* did not sink and all the passengers and crew survived.

How might another court have judged these facts? The abandonment of a vessel is a matter of fact,<sup>53</sup> judged in relation to its own particular facts. In the *MFV Meob Bay*,<sup>54</sup> the Court rejected the notion of the `normal practice` of abandonment. Instead, it held that:

to judge the abandonment of the vessel against the normal practice is not ... to pay adequate regard to the particular circumstances of each case. The circumstances of each abandonment can differ widely: the *Titanic* ... sank within a matter of hours, but the *MFV Meob Bay* ... sank within a matter of minutes. To judge the abandonment of the *MFV Meob Bay* by the standards of the abandonment of the *Titanic* is ... wrong. It is not surprising that other courts have considered questions of abandonment in accordance with the circumstances of the case.<sup>55</sup>

Although there can be no definition of a normal abandonment, the master would, almost invariably, need to remain on board for the purpose of discharging the captain's duties and not for the romantic notion of going down with the ship, dying a heroic death, as landlubbers expect of seafarers. Duty does not, as a matter of law (putting aside questions of honour), include suicide.<sup>56</sup> In *The Magnolia*,<sup>57</sup> Willmer J put it thus:

If one man had to remain on board ... that man must be the skipper himself. ... It must be remembered that, as skipper, he was in honour bound to remain on board his ship and do what he could to bring her to safety, so long as his remaining on board could achieve any useful purpose at all. ... it is to be said that it was his duty, as skipper, to remain on board his ship until the last safe moment.

So, the master must stay on board until the last safe moment; and is under a double duty, not only to take all possible and necessary steps to save his crew, but also to save his ship.<sup>58</sup> To these ends, the master must resist and quell panic, exercise self-control, and calmly exercise judgment in an emergency, giving orders and dispelling panic among the passengers and crew,<sup>59</sup> until the arrival of the last safe moment, when the vessel may be abandoned. In the *MV Ovalau II*<sup>60</sup> the passengers were taken off the doomed ship in two separate stages. Only after the passengers were evacuated, did the master and crew abandon the

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<sup>53</sup> *The Albion* [1942] 72 Ll. L. Rep. 91 at 95 where Lord Greene MR said, within the context of a claim for salvage, that: 'Whether or not there has been an abandonment in fact must depend on the facts of each individual case'. See also *The Ilona* [1923] Ll. L. Rep. 569.

<sup>54</sup> Report of the Court of Marine Enquiry in Namibia in the Matter of the *MFV Meob Bay* (17 January 2005).

<sup>55</sup> Report of the Court of Marine Enquiry in Namibia in the Matter of the *MFV Meob Bay* (17 January 2005).

<sup>56</sup> Compare the fine account of the `code that sometimes demanded suicide` and of the duty that in its `extreme form includes suicide` by Lefranc, Pierre` Conradian Backgrounds and Contexts for *Lord Jim*` in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at pp. 319-358. The demands of honour may exceed the duty of the law.

<sup>57</sup> [1955] 1 Ll. L. Rep. 417

<sup>58</sup> *Brown v Board of Trade* (1890) 28 SLR 22

<sup>59</sup> *Brown v Board of Trade* (1890) 28 SLR 22.

<sup>60</sup> [2005] FJHC 369 (5 January 2005).

vessel. In the *MFV Meob Bay*,<sup>61</sup> which sank with heavy loss of life, it was alleged that the abandonment was driven by panic, since the crew grabbed at life jackets, while others jumped overboard. But, given that it must have been obvious that the vessel was about to sink at any moment, the Court held that:

a degree of terror would not have been an unnatural reaction in a crew member ... there is a difference between terror and irrational actions driven by panic ... The force of the water was all around the crew, who had to hold onto the steel work and move across the deck on their hands and knees. ... To grab at a life jacket in these circumstances was ... perfectly natural and not indicative of panic. ... For some of the crew to have jumped into the water before the release of a life raft when it was dangerous to stay on board and when attempts to release the life rafts had proved to be unsuccessful was not ... improper. When the Court has regard to the heavy heaving swells, the force of the wind and the waves, the heavy list of the vessel, and the fact that the doomed vessel was only about two and a half minutes away from its fate, it is clear ... that the Skipper and crew conducted a proper abandonment of the vessel and took every reasonable step that could have been expected.<sup>62</sup>

Applying the law to the captain of the *Patna*, the cancellation of his certificate is unimpeachable: without self-control, overwhelmed by panic, oblivious of his double duty, he deserted his vessel without attempting any judgment as to the last safe moment, a moment that never arrived.

When the captain deserted, the double duty to save life and the ship would have fallen on Jim. After discovering the ingress of water, he decided that, `There was nothing to do but to sink with the ship. No use making a disturbance about it. Was there? He waited upstanding, without a sound, stiffened in the idea of some sort of heroic discretion.` But then he jumped. The jump, described by Marlow as `impulsive` and `unreflecting`, has been analysed as an `instinctive reflex, an unconscious physical reaction to danger and death` which `disrupts the direct causal relationship between Jim's psyche and body, but that neither Jim nor Marlow entirely dismiss the jump.`<sup>63</sup> A mere error of judgment (exercised calmly in the course of duty in deciding between two courses) committed in a moment of great peril would have been a good defence;<sup>64</sup> but Jim committed no error of judgment; there was *no* judgment, merely an unconscious reaction in which judgment was subsumed by panic. Jim's failure was to panic for an instant in a moment of terror. And, as was held in *Brown v Board of Trade*,<sup>65</sup> `here the fault is no error of judgment, but a failure ... to exercise ... judgment at all, a surrender of ... judgment to the influence of an unreasonable panic.` In defence of himself, Jim explained to Marlow,

I know very well--I jumped ... but I tell you they were too much for any man. It was their doing as plainly as if they had reached up with a boat-hook and pulled me over. Can't you see it? You must see it (p. 57).

This is no legal defence. The crew in the boat called for George not for Jim; but assuming they called Jim and beckoned him to jump, Jim's explanation, being based on obedience to orders, could not have been portrayed as a mere error of judgment between competing, and balanced, alternatives. This was a simple dereliction of duty - too clear and too gross - to admit of such a construction; and that consideration, together with Jim's attempt to shift the blame to others, further qualifies our sympathy for Jim.<sup>66</sup> But was the penalty of cancellation fair?

There are extenuating factors, of variable weight, which distinguish Jim from his captain. Jim did try to cut lose the life-boats for the passengers and, in deciding to stay with the passengers and ship, he had attempted to quell his panic. Jim was not yet 24 years old. Youthfulness, it has been held, may require the

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<sup>61</sup> Report of the Court of Marine Enquiry in Namibia in the Matter of the *MFV Meob Bay* (17 January 2005).

<sup>62</sup> Report of the Court of Marine Enquiry in Namibia in the Matter of the *MFV Meob Bay* (17 January 2005).

<sup>63</sup> Kim, Sung Ryol `Lord Jim's heroic identity` (2001) *Conradiana* vol. 33 issue 2 at p. 83.

<sup>64</sup> *The Famenoth* (1882) 7 P.D. 207 at 215, 5 Asp MLC 35; *Watson v Board of Trade* 1884 22 SLR 22.

<sup>65</sup> 1890 18 R (Ct of Sessions) 291, 28 SLR 22 (Scot).

<sup>66</sup> See the masterful study of sympathy for, and judgment of, Jim by Guerard, Albert J. `Lord Jim` reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at pp. 397-423.

suspension of a certificate for a specified period of the certificate.<sup>67</sup> Of those who abandoned the *Patna*, Jim was the only one 'willing to face' (p. 26) the Court of Inquiry. 'The rest,' as Jim said, 'got out of it in one way or another.' (p. 36) But Jim took himself to Court, where he answered all the questions: 'he remembered everything. He wanted to go on talking for truth's sake, perhaps for his own sake also.' (p.15) He was not evasive and he co-operated fully with the inquiry, even though, as Marlow says, 'the inquiry was a severe punishment to Jim, and that his facing it – practically of his own free will – was a redeeming feature in his abominable case.' (p.32) The remorse that Jim showed, the shame that he suffered, as he was pilloried in public, was obvious to Brierly and must have been clear to the other members of the Court. For these reasons, rehabilitation, rather than punishment, should have been achieved by the suspension of the certificate for, say, two years, coupled with training<sup>68</sup> in abandonment drills. As a matter of the fair application of the law, this would have balanced the right of the public to safe ships and given Jim the opportunity to return to sea service, allowing him a chance of seeking and finding redemption at sea. That is not of course to suggest that such an application of the law would in itself have quelled Jim's own intense sense shame; that would remain a private struggle for Jim.

That Conrad had the Court punish Jim with the cancellation of his certificate - in contrast with the penalties in the *Jeddah* and the *Riversdale* and other cases<sup>69</sup> - for momentary panic, instantly regretted, should be regarded as unfairly harsh. This evokes sympathy for Jim and impugns the enforcement of the law as unfair. Marlow observes that, 'The real significance of crime is in its being a breach of faith with the community of mankind, and from that point of view he [Jim] was no mean traitor, but his execution was a hole-and-corner affair' (p. 72). As Conrad would have known from his understanding of the law, another Court would most probably not have cancelled, but suspended, Jim's certificate.

The proceedings in the *Patna* were, in any event, fatally irregular due to the interventions of Captain Brierly (who was based on an actual person).<sup>70</sup> As a self-appointed representative of the honour of the merchant marine,<sup>71</sup> he holds 'silent inquiry into his own case' (p. 27) and leaps into the sea. Although his suicide is of course no ground for setting aside the judgment, Brierly had already crossed a legal line when - during the course of the Inquiry - he asked Marlow,

'Why are we tormenting that young chap?' ... Can't he see that wretched skipper of his has cleared out? What does he expect to happen? Nothing can save him. He's done for.' ... It costs some money to run away. 'Does it? Not always,' he said, with a bitter laugh, and to some further remark of mine—'Well, then, let him creep twenty feet underground and stay there! By heavens! I would.' I tell you what, I will put up two hundred rupees if you put up another hundred and undertake to make the beggar clear out early to-morrow morning. ... 'I'll give you two hundred rupees now, Marlow, and you just talk to that chap ... I can't do it myself--but you ... Of course I declined to meddle. The tone of this last 'but you' (poor Brierly couldn't help it), that seemed to imply I was no more noticeable than an insect, caused me to look at the proposal with indignation (p. 31).

Passing judgment before hearing all the evidence; attempting to persuade Marlow to talk Jim into fleeing the Court;<sup>72</sup> trying by bribery to obstruct the proceedings which, by virtue of his appointment, he was obliged to uphold, were, legally speaking, grossly improper; even though enacted out of some misguided notion of honourable conduct. In an actual Court, such a nautical assessor would be removed;

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<sup>67</sup> See the report of the Court of Marine Enquiry in Fiji into The Sinking of the *MV Ovalau II* [2005] FJHC 369 (5 January 2005).

<sup>68</sup> See the report of the Court of Marine Enquiry in Fiji into The Sinking of the *MV Ovalau II* [2005] FJHC 369 (5 January 2005).

<sup>69</sup> *The Kestral* 1881 P.D.182 at p. 192; *Brown v Board of Trade* 1890 18 R (Ct of Sessions) 291, 28 SLR 22 (Scot).

<sup>70</sup> See Wolstenholme, Philip 'We are trusted: Conrad and the Blue Star Line Crosbie Smith' (2004) *The Conradian* Spring vol. 29 at p. 39 who provides an excellent historicist analysis of Brierly.

<sup>71</sup> See GoGwilt, Christopher 'Lord Jim and the invention of the West' *Conradiana* vol. 27 at p. 45 where there Brierly's decency is perceptively analysed and revealed to be based on a 'simple trading reason – old rags and pilgrims are so much cargo'.

<sup>72</sup> See Wolstenholme, Philip 'We are trusted: Conrad and the Blue Star Line Crosbie Smith' (2004) *The Conradian* vol. 29 at p. 39 who suggests that Marlow actually conveyed the offer of a bribe to Jim, who rejected the bribe. The text can be variously interpreted. Did Marlow actually offer three hundred rupees to Jim? Either way, Brierly's attempt at bribery was clearly unlawful.

and if the assessor had influenced the proceedings as a whole, the inquiry would start *de nova* with fresh members. But, smitten by shame,<sup>73</sup> and unaware of the irregularity, Jim does not appeal the cancellation of his certificate.

## 9. Imaginative Precision of “Inquiry”

It is the extended inquiries - in and out of Court - that gives Jim his significance, not the answers. *Lord Jim* gives no answers, take no sides;<sup>74</sup> it is a novel that resists a single meaning; changing with each reading,<sup>75</sup> it is a structure of mutually competing coherences<sup>76</sup> with a multiplicity of possible incompatible explanations.<sup>77</sup> So, the imaginative precision of inquiry, with its association of proliferating questions, is an apt analogical equivalent. Jim is viewed from multiple inquiring perspectives<sup>78</sup> as the inquiry extends from the *Patna* to Patusan. Otherwise, Jim would have vanished without curiosity, for as Marlow observes of him, I had seen better men go out, disappear, vanish utterly, without provoking a sound of curiosity or sorrow. (p. 102)

*Lord Jim*, in laying bare the inherent limitations of the Court of Inquiry, reveals the additional need for, and effect of, a multiplicity of different inquiries, yielding greater insights into Jim, all of which either severally or jointly remain incomplete. Of the inquiries, the closest is conducted by Marlow, who is caught up by it, baffled by it and ultimately matured by it.<sup>79</sup> Although a friend,<sup>80</sup> Marlow he never acts as Jim's confessor, giving him redemption,<sup>81</sup> but judges him variously. The multiple - and competing - inquiries into Jim persist until his equivocal and enigmatic end, and then remain unresolved, so that technical language becomes, as Conrad would have wanted, the language of imaginative precision.

## 10. Suspension in Camera

Jim's own sense of shame springs indelibly into existence the moment he jumps from the *Patna*. But it is in the Court that he is shamed publically, his failure being minutely dissected under the public gaze and the reasons for the cancellation of his certificate being detailed. That punishment destroys his reputation wherever the news of it spreads. These proceedings, as Marlow observes, had all the cold vengefulness of a death-sentence, and the cruelty of a sentence of exile. (p. 73) And, as Brierly exclaims, let him [Jim] creep twenty feet underground and stay there! (p. 91)

A Court would, as a matter of public policy, have intended the cancellation of any seafarer's certificate to serve as a warning to others. Jim's Prometheus-like suffering is disproportionate to his momentary failure. His intense sense of shame<sup>82</sup> at his failure to live up to his own heroic ego-ideal and

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<sup>73</sup> See, for example, the compelling application of shame and trauma theory in Martin, William A. To grapple with another man's intimate need: Trauma-shame interdependency (masochism) in Joseph Conrad's *Lord Jim* (2001) *Conradiana* vol. 33 issue 3 p. 231.

<sup>74</sup> Malbone, Raymond Gates How to Be: Marlow's Quest in *Lord Jim* *Twentieth-Century Literature* 10 (1965) at p. 177 and Sung Ryol Kim *Lord Jim's* heroic identity (2001) *Conradiana* vol. 33 issue 2 at p. 83.

<sup>75</sup> See Guerard, Albert J. *Lord Jim* reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 409.

<sup>76</sup> Shires, Linda M. The Privileged Reader and narrative methodology in *Lord Jim* (1985) *Conradiana* vol. XVII no. 1 19 at p. 28.

<sup>77</sup> See Miller, J. Hillis *Lord Jim: Repetition as Subversion of Organic Form* reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 426.

<sup>78</sup> Shires, Linda M. The Privileged Reader and narrative methodology in *Lord Jim* (1985) *Conradiana* vol. XVII no. 1 p. 19 at p. 28.

<sup>79</sup> For an excellent analysis of the development of Marlow's perspective see Bruss, Paul S. *Lord Jim: the maturing of Marlow* (1976) *Conradiana* vol. VIII no. 1 at p. 13.

<sup>80</sup> For comments on that friendship, see Watt, Ian *Composition and Sources* reprinted in (1996) *Joseph Conrad Lord Jim* London: W.W. Norton & Company at p. 430.

<sup>81</sup> As to the redemption of Jim, see Condon, Matthew G. The cost of redemption in Conrad's *Lord Jim* (1998) *Literature & Theology* vol. 12 no. 2 p. 135.

<sup>82</sup> For a most illuminating discussion of guilt and the psychological implications of shame in *Lord Jim* see Watt Ian P. *The Ending of Lord Jim* (1979) *Conradiana* vol. 11 no. 1 p. 3 at p. 7 as well as the work of Max Scheler cited therein.

his public acceptance of punishment<sup>83</sup> enhances our sympathy (although qualified) for his self-imposed plight and pity at his death, especially since he tries his utmost (whether or not we agree with his actions), to atone for his failure and to redeem himself.<sup>84</sup> Jim's public excoriation and public shaming as part of the legal process, seems excessive; and this raises the prospect that a Court, in balancing deterrence, punishment, rehabilitation, and public and private interests should, in exceptional circumstances, have the power to impose its penalties anonymously. But this would require law reform. Conrad's appearance before the committee on safe manning suggests his commitment in principle to reform. His view that the world is neither just nor unjust, that the cosmos is godless and indifferent, would not, it is suggested, have rendered legal reform meaningless to Conrad. So, while an argument arises for the striking of Jim's name (and others like him) from the record; for the master of the *Patna* and the other officers the greater the public shame the greater the warning for other such seafarers.

## 11. *Lord Jim* and Law Reform

Today many marine casualty investigations are conducted under the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (the Code), which was done under the auspices of the International Maritime Organization, a specialised agency of the United Nations. On 1 January 2010, Part II of the Code became mandatory for states parties to the Safety of Life at Sea Convention 1974 (SOLAS 1974).<sup>85</sup> Part III is recommendatory. There are 159 states parties to SOLAS 1974. The ships flying the flags of these states comprise 99.04% of the tonnage of the world's fleet.<sup>86</sup> The Code is of crucial importance to the investigation of loss of life and property at sea, aiming to achieve fair procedures resulting in reliable lessons for the prevention, as far as possible, of the loss of life and property at sea.

If a state is a party to SOLAS 1974 and bound under that Convention to give full and complete effect to the Code, the legal drafter tasked with the domestic enactment of the Code may, it is argued, gain guidance from *Lord Jim*. Here, Jim and his captain may be regarded as representative of types imaginatively facing investigation pursuant to the Code. In this context, the novel speaks to the difficult choice of options confronting the legal drafter.

Consider the options. Should only the mandatory provisions of Part II of the Code be enacted; or should the recommendatory provisions in Part III be additionally enacted? When *Jim* brought himself before the court, he earned our sympathy, even some respect. But his captain 'departed, disappeared, vanished, absconded' (at page 22) and the other officers were also fugitives from justice. For safety lessons to be learned from a casualty investigation under the Code, it is crucial that all seafarers cooperate fully and frankly. Fearing criminal prosecution and/or other legal liability, a minority of seafarers may cooperate; but the majority would not, it is suggested, voluntarily bring themselves before casualty investigators. So, how could a legal drafter giving domestic effect to SOLAS 1974 and the Code attempt to secure the cooperation of fugitive seafarers?

The best hope of cooperation is the *guarantee* of a no-blame and confidential investigation so that no confession, self-incriminating statement, or any adverse admission would be admissible in any parallel or subsequent criminal, civil, administrative, or disciplinary proceeding. While the promise of such a non-blame and confidential investigation appears to be reasonably assured in Part II of the Code, the text of Part III is deeply indeterminate. In Part II, chapter 12.2 it is stipulated that:

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<sup>83</sup> Condon, Matthew G. argues that Jim 'publicly accepts responsibility for his actions by facing the censure of the Court of Inquiry' in 'The cost of redemption in Conrad's *Lord Jim*' (1998) *Literature & Theology* vol. 12 no. 2 p. 135 at p. 136.

<sup>84</sup> See the persuasive argument of Brundy, Daniel that Jim 'wants to be good and yet as key moments cannot shed himself enough to be so' see '*Lord Jim* and Moral Judgment: Literature and Moral Philosophy' (1998) *Journal of Aesthetics and Art Criticism* vol. 56 no. 3 p. 265 at p. 280.

<sup>85</sup> The Maritime Safety Committee of the IMO, at its eighty-fourth session (7 to 16 May 2008), adopted the Casualty Investigation Code by resolution MSC.255(84) and a new regulation 6 in chapter XI-1 of the SOLAS Convention by resolution MSC.257(84). The Code thus became mandatory.

<sup>86</sup> For SOLAS Protocol 1978, the figure is 114 (representing 96.16% of the world's tonnage) and for SOLAS Protocol 1988 the figure is 96 (representing 94.4% of the world's tonnage).

All seafarers from whom evidence is sought shall be informed of the nature and basis of the marine safety investigation. Further, a seafarer from whom evidence is sought shall be informed, and allowed access to legal advice, regarding: .1 any potential risk that they may incriminate themselves in any proceedings subsequent to the marine safety investigation; .2 any right not to self-incriminate or to remain silent; .3 any protections afforded to the seafarer to prevent the evidence being used against them if they provide the evidence to the marine safety investigation.

Is the risk of legal liability excluded? In the second sentence, the phrase ‘shall be informed’ is mandatory, admitting of no exceptions so that a failure or refusal to inform the seafarer of the ‘risk,’ ‘right’ and ‘protections’ would, if the seafarer has suffered prejudice, render the legal proceedings a nullity. A right to be informed is thus created by chapter 12.2, which a state party is obliged to enact domestically. But the right is limited to ‘any proceedings subsequent’ to the investigation, since the right would not by implication cover *parallel* legal proceedings. Furthermore, no right not to self-incriminate or to remain silent is created, since reference to that right is prefaced by the word ‘any,’ implying that the seafarer must be informed of that right but only if the right *already* exists (the same argument would, it is argued, apply to ‘any protections’). The word ‘any’ is thus to be read as meaning ‘if any.’ If no such right or protection already exists, the right to be informed about a non-existent right or protection would be pointless; but since such a right or protection is enshrined in human rights conventions,<sup>87</sup> binding on many states, it should already exist in the law of many states. But the right to be informed does not explicitly relate to civil, administrative or disciplinary proceedings. So, in summary, the mandatory provisions of chapter 12.2 should reasonably assure - but not guarantee - that no self-incriminating disclosure is admissible in subsequent criminal proceedings. However, a seafarer who makes a self-incriminating disclosure would be at risk of the disclosure being admissible in parallel criminal proceedings and in parallel and subsequent civil, administrative or disciplinary proceedings. It is therefore doubtful that chapter 12.2 would, apart from Jim, ensure the cooperation of the other officers of the *Patna*. Conversely, the enactment of chapter 23.1 of Part III would virtually ensure their non-cooperation. Chapter 23.1 provides that:

States should ensure that investigator(s) carrying out a marine safety investigation only disclose information from a marine safety record where: .1 it is necessary or desirable to do so for transport safety purposes and any impact on the future availability of safety information to a marine safety investigation is taken into account; or .2 as otherwise permitted in accordance with this Code,

and Chapter 23.2 states that:

States involved in marine safety investigation under this Code should ensure that any marine safety record in its possession is not disclosed in criminal, civil, disciplinary or administrative proceedings unless: .1 the appropriate authority for the administration of justice in the State determines that any adverse domestic or international impact that the disclosure of the information might have on any current or future marine safety investigations is outweighed by the public interest in the administration of justice; and .2 where appropriate in the circumstances, the State which provided the marine safety record to the marine safety investigation authorizes its disclosure.

Here are no peremptory strictures against the admissibility of self-incriminating disclosures made in an investigation; ‘should’ not ‘shall’ being employed throughout Chapters 23.1 and 23.2. On the contrary, information is admissible, for example, if the information is ‘necessary or desirable,’ or in ‘the public interest in the administration of justice’ or where ‘appropriate in the circumstances.’ Since the meanings of these loosely textured terms will often be a matter for argument in court, there can be no

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<sup>87</sup> See, for example, the International Covenant on Civil and Political Rights;<sup>87</sup> the African Charter on Human and Peoples’ Rights; the American Convention on Human Rights; the Standard Minimum Rules for the Treatment of Prisoners; and the European Convention on Human Rights.

guarantee of confidentiality: full and frank co-operation with an investigating officer might nonetheless result in self-incriminating evidence being admissible in separate criminal, civil, disciplinary or administrative proceedings against seafarers. *Lord Jim* strongly suggests that Chapters 23.1 and 23.2 of Part III should not be enacted into national statutes.

## 12. Literary and Legal Interpretation

How should enactments of SOLAS 1974 and the Code be interpreted? And can literary interpretation assist in legal interpretation? Professor Dworkin contends that ‘we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly law.’<sup>88</sup> It will be argued that this contested view,<sup>89</sup> although correct in principle, requires considerable qualification given the unique characteristics of SOLAS 1974 and the Code.

Statutes enacting SOLAS 1974 have their historical genesis in the recommendations of the Court of Inquiry<sup>90</sup> into the loss of the *Titanic* handed down in 1912. Many of those recommendations were enshrined in the first International Convention for the Safety of Life at Sea of 20 January 1914,<sup>91</sup> the progenitor of SOLAS 1974.<sup>92</sup> All 159 state parties to SOLAS 1974 and the Code are obliged under international law ‘to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect;’<sup>93</sup> the implication being that a state may legislate for safety standards higher but not lower than those stipulated in the convention, so that the legislative discretion of states is fettered in a manner that is not applicable to other national statutes. What is more, the enactment of SOLAS 1974 must be deposited with the IMO,<sup>94</sup> which is another unique characteristic.

Flag States and substantially interested states<sup>95</sup> are under an international obligation<sup>96</sup> to investigate and report on very serious casualties to achieve an increased level of safety, improved marine environment protection, and a reduction in loss of life at sea. Under SOLAS 1974<sup>97</sup> each state party undertakes to conduct a casualty investigation ‘when it judges that such an investigation may assist in determining what changes to the present regulations may be desirable’ but that ‘no reports ... shall disclose the identity or nationality of the ships concerned or in any manner fix or imply responsibility upon any ship or person.’ The Code also stipulates that each flag state has a duty to conduct an investigation into any casualty occurring to any of its ships ‘when it judges that such an investigation may

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<sup>88</sup> Ronald Dworkin ‘Law as Interpretation’ (1982) *Texas Law Review* p. 527.

<sup>89</sup> Judge Posner, for example, contends that the ‘functions of legislation and law are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed so far for the one have no useful application to the other.’ Richard A. Posner ‘Law and Literature: A Relation Reargued’ (1986) 72 *Texas Law Review* 1351 at p. 1374.

<sup>90</sup> The Court of Inquiry was presided over by Lord Mersey. He handed down his judgment on 30 July 1912, which also contained recommendations. Recommendation 24 provided: ‘That (unless already done) steps should be taken to call an International Conference to consider and as far as possible to agree upon a common line of conduct in respect of (a) the sub-division of ships; (b) the provision and working of life-saving appliances; (c) the installation of wireless telegraphy and the method of working the same; (d) the reduction of speed or the alteration of course in the vicinity of ice, and (e) the use of searchlights.’

<sup>91</sup> There was at the time some opposition to the USA and the UK becoming parties to SOLAS 1914 see, for example, Andrew Furuseth (the President of the Seamen’s Union) *Safety of Life at Sea Analysis and Explanatory Notes of the London Convention on Safety of Life in relation to the American Merchant Marine* (1914) and Hansard 7 October 1912 vol. 42 cc 32-148 respectively. The opposition was unsuccessful. On 25/05/1980, SOLAS 1975 entered into force at the international level for the USA and the UK.

<sup>92</sup> SOLAS 1914 was followed by SOLAS 1929, SOLAS 1948, SOLAS 1960 and SOLAS 1974. The authentic text of SOLAS 1974, updated and consolidated, is available for purchase from the IMO.

<sup>93</sup> Article I(b) of SOLAS 1974.

<sup>94</sup> Article III(a) of SOLAS 1974.

<sup>95</sup> The IMO encourages co-operation and recognition of mutual interest through a number of resolutions: A.173(ES.IV); A.322(IX); A.440(XI); A.442(XI) and A.637(16).

<sup>96</sup> See, for example, MARPOL articles 8 and 12; the Load Lines Convention article 23; and the United Nations Convention on the Law of the Sea article 94(7). the need to encourage flag States and substantially interested States to meet their international obligation to investigate and report on very serious casualties so as to bring about an increased level of safety, improve protection for the marine environment and to reduce the number of deaths at sea, as well as document MSC 92/INF.8 (INTERCARGO) relating to casualties involving bulk carriers.

12.21 The Committee further instructed

<sup>97</sup> See regulation I/21 and XI-1/6 of SOLAS 1974.

assist in determining what changes in the present regulations may be desirable.’ The casualty reports reported to the IMO<sup>98</sup> are subjected to a comprehensive system of analysis.<sup>99</sup> Amendment of a convention is normally a long and protracted process but the tacit amendment procedure<sup>100</sup> provides that, unless there are a specified number of objections, an amendment of SOLAS 1974 will enter into force at a particular date. So amendment is greatly expedited; and keeping the Convention abreast of international developments is the shared responsibility of the community of maritime states. Also of significance is the worldwide enforcement of SOLAS 1974 and the Code by means of the principle of ‘no more favourable treatment’ so that ships flying the flags of states that have *decided not to become contracting parties* to the Convention are nonetheless subjected to the requirements of SOLAS 1974 in the ports of states parties, unless the ship was forced to deviate to that port from her intended voyage ‘due to stress of weather or any other cause of force majeure.’<sup>101</sup> Taken as a whole these unique characteristics of SOLAS 1974 suggest a specific approach to the interpretation of statutes giving domestic effect to the Convention.

For Dworkin the right interpretation of *any* statute requires the construction of ‘a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.’<sup>102</sup> This, he famously argues, requires the superhuman power of Justice Hercules (based on the classical mythological hero), who with complete mastery of all these legal materials finds but does not fabricate *the one right* answer to any question of law. And, just as literature is to be interpreted aesthetically as the best possible work of art, so says Dworkin should statutes similarly be interpreted to provide the best constructive interpretation of political morality.<sup>103</sup> But this theory (assuming its validity in common law systems), would not find general acceptance within the interpretive community of 170 states at the IMO. Limited by its common law paradigm, it would be rejected, as lacking universal applicability, even leading to domination by common law systems and to the hermeneutics of hegemony. In common law systems when judges decide new cases, it is as if, says Dworkin, they are acting as chain novelists, in a

‘complex chain enterprise of which innumerable decisions, structures, conventions, and practices are the history, it is his job to continue that history into the future through what he does on the day. He must interpret what have gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.’<sup>104</sup>

But in non-common law systems, with no principle of *stare decisis* and with judges proceeding inquisitorially,<sup>105</sup> this approach would not fit, resulting in a shambles. For enactments of SOLAS 1974 and the Code, interpretation is a reiterative process of discourse at the interpretive community of the IMO: interpretations are constantly reviewed and unified, definitions are deleted or added, and amendments are agreed. This is a never ending process of enhancing textual determinacy. And, since all interpretations are ultimately approved only by the interpretive community of the IMO, no interpretative approach should reference materials or considerations that lie outside the contemplation of the IMO. Such an approach could, it is submitted, be achieved by the following interpretation provision:

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<sup>98</sup> Reporting to IMO of marine safety investigations and marine casualties and incidents are based on the following IMO instruments: MSC.255(84), paragraph 14.1, chapter 14 of the mandatory Part II; resolution A.646(16), paragraph 3; MSC/Circ.539/Add.2, paragraph 2; MSC/Circ.753, paragraph 3; MSC/Circ.802, paragraph 3; MSC-MEPC.7/Circ.7, paragraph 4; and MSC-MEPC.3/Circ.3, paragraphs 6 and 8.

<sup>99</sup> The Sub-Committee on Flag State Implementation (‘FSI’), has a Correspondence Group and a Working Group on Casualty Analysis involved in the process of analysing reports of investigations into casualties received by the IMO. The recommendations of the Correspondence and Working Groups are approved by the FSI Sub-Committee and forwarded to other IMO bodies.

<sup>100</sup> See article VIII of SOLAS 1974.

<sup>101</sup> Article IV of SOLAS 1974.

<sup>102</sup> Ronald Dworkin *A Matter of Principle* (Harvard University Press) 1985 at pp. 116-117.

<sup>103</sup> Ronald Dworkin ‘Law as Interpretation’ (1982) *Texas Law Review* p. 527 at p. 531.

<sup>104</sup> Ronald Dworkin *A Matter of Principle* (Harvard University Press) 1985 at pp. 159.

<sup>105</sup> See, for example, Vincy Fon and Francesco Parisi ‘Judicial precedents in civil law systems: A dynamic analysis’ (2006) 26(4) *International Review of Law and Economics* 519.

Notwithstanding anything to the contrary in any other law, a court of law or any tribunal or any investigating officer may, in the interpretation of SOLAS 1974 and the Code, consider (a): the *travaux préparatoires* of SOLAS 1974 and the Code; (b) the official records of interventions made by states, inter-government organizations, and non-governmental organization in consultative status at the IMO (including the recorded verbal interventions); and (c) the different official language versions<sup>106</sup> of SOLAS 1974 and the Code.<sup>107</sup>

The opening clause would preclude Herculean and other such approaches that would otherwise reach for materials or considerations that would never have been within the contemplation of the IMO. Reference could however be made to the materials specified in (a) to (c), but the need for such a reference should be infrequent, given the large number of unified interpretations and definitions that are being constantly developed at the IMO and by international non-governmental organizations<sup>108</sup> to ensure that texts are clear, unambiguous, and easily applicable.

Although SOLAS 1974 concerns matters of life and death at sea, judges seldom interpret its terms. Instead, there is a multitude of non-judges, even non-lawyers, charged with the responsibility of interpreting and enforcing SOLAS 1974 and the Code. The practice is for master mariners (trained and certificated to the same international standards under the international convention)<sup>109</sup> to investigate casualties; peer judgment and sea-going experience trumping legal learning and courtroom experience in the determination of casualty causes. For seafarers no peer judgment is to be had from the superhuman and omniscient Justice Hercules. Perhaps Conrad's answer to Justice Hercules would be Captain MacWhirr, master of the *Nan-Shan*, depicted with masterful irony and ambivalence in *Typhoon*. Being the intellectual antithesis to Justice Hercules, the unimaginative mind of Captain MacWhirr 'had no pronounced characteristics whatever; it was simply ordinary, irresponsive, and unruffled;' (p. 133) considered a 'little pityingly' as if 'half-witted' by his father, (p. 135) he was the object of some ridicule by the highly imaginative and articulate young mate Jakes. Yet here is a master who, being without political prejudice, accepts with equal equanimity the Siamese flag and British ensign; was 'not in the least conceited;' (p. 134) who commanded every ship with 'harmony and peace;' (p. 134) and who had a reputation as a 'reliable skipper.' (p. 136) Under the 'burden' and 'loneliness of command' (p. 163), it is the 'frail,' 'indomitable' (p. 167) and 'resisting' (p. 170) words and physical presence of Captain MacWhirr to which Jakes clings in his terror of the typhoon. Privately believing that his ship 'could not possibly live another hour in such a sea' (p. 206), Captain MacWhirr orders Jake to attend to the 200 Chinese aboard the battered vessel with 'humane intention and a vague sense of the fitness of things,' (p. 199) giving them 'the same chance' of survival (p. 202) as the crew. No Court of Inquiry could make any finding except to commend Captain MacWhirr as strongly it would condemn the captain of the *Patna*.

But Captain MacWhirr is a 'literal' man, 'expostulating 'against the use of images in speech' (p. 151), angry with a lot of words that provide no 'glimmer of certitude' (p. 157). In judging his peers, he would interpret the domestic enactments of SOLAS 1974 and the Code unimaginatively and impatiently; but also literally (consistently with the many approved definitions and unified interpretations), practically and impartially for the multinational seafarers of the world. And, within the international interpretive community of his fellow master mariners at the IMO, the simple words of Captain MacWhirr would find more resonance than dissonance.

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<sup>106</sup> The official languages of the IMO are English, French, Spanish, Arabic, Chinese, and Russian.

<sup>107</sup> An approach, similar but different, was taken in the Wreck and Salvage Act 94 of 1996 of South Africa, (domestically enacting the 1989 International Salvage Convention), where it is provided in s. 2(5) that: 'Notwithstanding anything to the contrary in any other law or the common law contained, a court of law or any tribunal may, in the interpretation of the Convention, consider the preparatory texts to the Convention, decisions of foreign courts and any publication.' The reference to decisions of foreign courts and publication does however introduce work for Justice Hercules.

<sup>108</sup> The International Association of Ship Classification Societies, for instance, has developed 261 definitions and unified interpretations of SOLAS 1974.

<sup>109</sup> Certificates obtained by seafarers pursuant to the STCW Convention are recognised internationally.

### 13. Enduring Value of Lord Jim

While one of the greatest complaints against law and literature is that it fails to engage practising lawyers,<sup>110</sup> the epistemological inquiry in *Lord Jim* into the inherent limitations of the law is I think of value to practising admiralty lawyers. Conrad's location of the Court of Inquiry in a larger frame of ethical and epistemological reflection does not reject or even discount the law; instead it stimulates the reform of the law better calibrated to achieve cooperation between seafarers and casualty investigators, the prevention of marine casualties, and justice for seafarers.<sup>111</sup>

In *A Personal Record*, Conrad said, 'And what is a novel if not a conviction of our fellow-men's existence strong enough to take upon itself a form of imagined life clearer than reality and whose accumulated verisimilitude of selected episodes puts to shame the pride of documentary history' (p. 16). In 2005, I presided over a Court of Marine Inquiry in the *MFV Meob Bay*; and later, on reading *Lord Jim*, I was struck by its 'accumulated verisimilitude' in relation to the practice, procedure and public aims of contemporary inquiries and investigations into marine casualties. The novel is a canonical text for law and literature and case study for academic and *practising* admiralty lawyers: illustrating the use and abuse of the law and procedures of Courts of Inquiry; exposing violations of the obligations owed by master and officers to their passengers; questioning notions of fair punishment; and suggesting drafting options for the enactment of legislation encouraging cooperation between seafarers and casualty investigators. And the interpretation of such enactments should be adapted to the characteristics of the enactments, their interpreters, and their interpretive community. When I drafted such enactments for some states, Conrad's work played for me an indirect, discreet and valuable role, influencing the draft legislation and suggesting specific approaches to statutory interpretation.

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<sup>110</sup> Kornstein, Daniel J. 'A Practising Lawyer Looks Back on Law and Literature' (1989) *Cardozo Law and Literature* p. 117 at p. 118; also cited in Bard, Jennifer; Mayo, Thomas W.; and Tovino, Stacy A., 'Three Ways of Looking at a Health Law and Literature Class' (2009) *Scholarly Works*, Paper 75 at p. 530.

<sup>111</sup> I am indebted to the anonymous reviewer for his or her comments in this respect.