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THE HOMER OF THE PACIFIC: MELVILLE'S ART AND THE AMBIGUITIES OF JUDGING EVIL

Lee C. Bollinger*

And there arose among them the heroic son of Atreus, Agamemnon whose sway was wide. He was angry; his black heart was filled with a great rage, and his eyes were like a blazing fire. First he spoke to Calchas, and gave him a malignant look: "Seer of evil; never yet have you told me anything favourable. You delight, always, in prophesying evil; never have you either said or done anything good."†

Writing in 1952 of Herman Melville's work and its significance, Albert Camus praised Melville as the "Homer of the Pacific."¹ Such Olympian fame was deserved, Camus wrote, because "[i]f it is true that talent recreates life, while genius has the additional gift of crowning it with myths, Melville is first and foremost a creator of myths."² This essay concerns one aspect of those myths, Melville's exploration of man's struggle with the injustice and evil that originates from both within and without himself, and asserts its relevance to an understanding of the judicial process.

It should not be surprising that Herman Melville has an important message for students of the legal system, when one reflects for a moment on his biography and the subject matter of his writings. Melville had an intimate exposure to various legal systems ranging from the very crude to the more sophisticated, due in part at least to close personal ties with people who were themselves connected with the law in one way or another. When Melville was thirteen years old his father declared himself bankrupt, then went mad and died. Melville's cousin had presided over a widely publicized and criticized court-martial aboard a naval vessel in 1842, in which three sailors, one of whom was the son of the Secretary of War, John C. Spenser, were convicted and hanged for mutiny. Melville's older brother, Gansevoort, had studied law, and his next younger brother,

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† HOMER, THE ILLIAD, Book I.

1. Article published in *Les Ecrivains celebres*, Editions Mazenod, Vol. III, 1952, reprinted in A. CAMUS, LYRICAL AND CRITICAL ESSAYS, 288, 291 (Vintage ed. 1968).

2. *Id.* at 290.

Allan, practiced law on Wall Street. For several years, in fact, brothers Herman and Allan and their respective families shared a home in New York City, during which time Melville transformed and refined his artistic skills with the writing of *Mardi*, *Redburn*, and *White Jacket*.³ Finally, the author had close personal ties with Lemuel Shaw, at that time the Chief Justice of the Massachusetts Supreme Judicial Court, who was a close friend of Melville's father, a source of comfort and guidance for the Melville family after the father's death, and a generous and attentive father-in-law to Melville. Judge Shaw's presence and influence should not be underestimated; in 1852 he even arranged for Melville to vacation with him in Nantucket and Martha's Vineyard when, after the poor reception that greeted the publication of *Moby Dick* and *Pierre, Or the Ambiguities*, Melville's family decided that the struggling writer might be revitalized by some new contacts with seaports and their inhabitants.

Melville's familiarity with the operations of law, however, was based on considerably more than a mere acquaintance with its functionaries. Of undeniable significance were Melville's years spent as a sailor and seaman aboard a merchant vessel, several whaling ships, and a United States man-o'-war. Within these microcosms Melville was a close witness to the workings of a discrete, albeit unique, legal system in a way that few people ever are. The impact of these experiences is hard to grasp in the abstract, but a brief illustration perhaps will help make the point. From August 30, 1843, to October 3, 1844, Melville sailed as a common seaman from Honolulu Bay to Boston aboard the naval frigate *United States*. At that time it was the practice to call all sailors to the deck to witness two extraordinary events. One was the complete reading, every month, of the Articles of War, which detailed the various transgressions for which a sailor could be punished, and which usually ended with the ominous refrain, "shall suffer death." The other was to observe the punishment, by flogging, of fellow seamen for infractions of these rules, which varied in magnitude from swearing to thievery, and generally involved twelve lashes with a cat-o'-nine-tails. During his fourteen months aboard the *United States* Melville witnessed the flogging of some 163 seamen.⁴ Both of these spectacles, but particularly that of flogging, were later movingly portrayed in Melville's book *White Jacket*.

3. Melville's close relationship with his younger brother, together with his ultimate lack of popular success as an author, are two pieces of data which, if kept in mind when reading *Bartleby, the Scrivener*, make that oddly amusing story about a Wall Street lawyer and his clerk so very poignant.

4. See C. ANDERSON, *MELVILLE IN THE SOUTH SEAS* 425 (Dover ed. 1966).

My immediate point is that for Melville the "law" was not an abstraction, but rather just the opposite. It was part of his life at sea to know the rules, frequently to witness the events that resulted in punishment, to hear the charges and the responses, to observe the inflictions of punishment, and to know the people involved—to see their faces, hear their voices, and observe their actions. Law must have had an immediacy, an intensity of involvement for everyone aboard ship. In this respect life at sea must have borne some resemblance to life in the classical Greek polis. Perhaps the contemporary analogue would be to imagine the impact on our society had the American public been required to watch on television the trial, conviction, and execution of Gary Gilmore.

Melville's ultimate importance for the legal scholar, however, lies not in his *explicit* commentary on problems peculiar to the legal system. Apart from *Billy Budd*, one of the classics of that small diadem of "legal literature," Melville's works only infrequently make explicit symbolic use of legal personages or the judicial process. For Melville the dilemmas of judging were but illustrations of more general concerns about human activity. Like Homer, Melville is primarily concerned with man's attempt to act within the imperfect world he inherits. Although one writer speaks of the role of gods, and the other hints of the role of the unconscious, both were fascinated by the complex interaction of mixed human motives and fateful, external circumstances. Hector, for all his glory, fights and dies on behalf of a cause he knows is unjust.⁵ Thus, Melville's art, like Homer's, knows no intellectual boundaries. It speaks a universal language comprehensible to all "disciplines," and it has a rightful claim to the attention of all interested in understanding human behavior. Like Calchas, the prophet who tells the assembled Achaeans how Agamemnon has offended the gods and brought devastation upon them, Melville boldly speaks of the evil and injustice in the world and of our complicity, although not always, to be sure, to a grateful audience.

I.

The theme of man's struggle with injustice and evil is a continuous thread running throughout Melville's works. Instead of developing this idea through a comprehensive survey of Melville's novels and short stories, however, I have chosen to focus on a single work, *Benito Cereno*, a tale based on events recounted in an obscure book that

5. This point is made most forcefully in Shakespeare's play *Troilus and Cressida*, act 2, scene 2.

Melville chanced to find, entitled *A Narrative of Voyages and Travels in the Northern and Southern Hemispheres*, by Captain Amasa Delano. By concentrating solely on this story, my hope is to sharpen the focus, to avoid being discursive and too abstract, and to aid the reader generally unfamiliar with Melville's works.

A.

Benito Cereno begins on a calm, gray day in 1799. The sea is "sleeked at the surface like waved lead that has cooled and set in the smelter's mould" and the sky seems "a gray surtout." An American cargo ship, replenishing its water supply, is anchored in the bay of a small deserted island off the coast of Chile. Near dawn, the captain, Amasa Delano, is advised of the appearance in the bay of a strange ship. The "lawlessness and loneliness of the spot," together with various odd particulars relating to the appearance and movement of the stranger, fairly justify some apprehension. But Delano is of an unsuspecting nature, and he promptly decides to visit the incoming ship in his whaleboat, so that in the event she is in distress he might help "pilot her in." As the whaleboat is launched Delano first envisions the stranger as some "white-washed monastery after a thunder-storm, seen perched upon some dun cliff among the Pyrenees. Peering over the bulwarks were what really seemed, in the hazy distance, throngs of dark cowls, while, fitfully revealed through the open portholes, other dark figures were dimly described, as of Black Friars pacing the cloisters." As the whaleboat draws nearer, the ship reveals itself not as a monastery, but as a Spanish merchantman, named the San Dominick, carrying a cargo of slaves. Once a stately, aristocratic ship, the San Dominick is now in a state of considerable disrepair. Observing the ship's features, Delano notes that the figurehead at the front of the ship is wrapped in canvas; beneath this is chalked the sentence "follow your leader."

Boarding the San Dominick, Delano is accosted by a noisy mob of African blacks and Spanish whites, from whom he quickly learns that the ship has been severely depopulated by scurvy and fever. After being nearly wrecked while navigating the waters around Cape Horn, the ship was becalmed, and its supplies quickly became depleted. The Spaniards had been more seriously thinned by these events than the slaves, and without provisions or officers the vessel had drifted to its present location. Discipline within the San Dominick seems to have given way to the necessities of bad fortune. The slaves move about unimpeded, and the few remaining Spaniards ap-

pear to be either disinclined or unable to maintain any semblance of order. In every respect the San Dominick reflects disarray and decay.

The captain of the San Dominick, Don Benito Cereno, is a slight man, about thirty years old, in obviously poor health. Dressed in his most decorous aristocratic uniform, Don Benito is like a once great but now ineffectual potentate clinging to the appearance of authority, and his ornate presence contrasts sharply with the surrounding squalor of his subjects. He is at odds moody, laconic, discourteous, absent-minded, and given to curious fits of severe indisposition and depression. When Delano questions him for more details about the ship's misfortunes, Don Benito silently stares first at Delano and then at the deck; uncomfortable in the face of this behavior, Delano turns around to leave, only then to be recalled to have Don Benito reluctantly recount the history of the San Dominick. As he describes the gales encountered near the Cape and the loss of life that resulted, Don Benito suddenly collapses into the arms of his servant. Recovering, Don Benito expresses his gratitude to "those negroes you see, who, though to your inexperienced eyes appearing unruly, have, indeed, conducted themselves with less restlessness than even their owner could have thought possible under such circumstances." Again he grows faint.

The owner of the slaves was Don Benito's friend from youth, Don Alexandro Aranda, said to have been a victim of the fever. Don Benito is obviously greatly distraught at the loss of his friend, and Delano seeks to comfort him by expressing what he believes "gives the keener edge to [Don Benito's] grief." To bury a friend at sea, to dispose of his remains "like scraps to the dogs," remarks Captain Delano, is unbearable. Delano suggests to Don Benito: "Were your friend's remains now on board this ship . . . not thus strangely would the mention of his name affect you." Seemingly horrified at this thought, Don Benito faints anew, and Delano wonders at the differences between men, and how what is comfort to one is but fuel to another's superstitious nature.

The servant who so devotedly attends Don Benito is a small black slave named Babo. Captain Delano is deeply impressed with the attention Babo lavishes on Don Benito and speaks openly of the remarkable relationship existing between a master and servant, although the friendship he has in mind is similar to that between a man and his dog.

After seeing the condition of the San Dominick and the state of its inhabitants, Captain Delano dispatches his whaleboat with orders

to return with food and drink. He remains aboard the *San Dominick* to await a rising wind that will permit him to bring her to anchor within the bay, where she can then be readied for the remainder of her voyage. The day continues motionless, however, and the *San Dominick* drifts slowly out to sea with the receding tide.

It is during this long interval that Captain Delano senses that the *San Dominick* is shrouded in some ineffable mystery. Various events unsettle Delano. At one point, while Don Benito and Delano are conversing, Don Benito takes Babo aside for a whispered conference, the subject of which seems to be Captain Delano. This ill behavior is compounded when Don Benito momentarily returns to ask Delano about such matters as the number of men aboard the American ship, their expected whereabouts for that evening, and details about the ship's cargo. Delano speculates as to whether he is confronted by either "innocent lunacy, or wicked imposture." Don Benito also appears at times both vicious and arrogant. After Babo nicks his master while shaving him, Captain Delano sees Babo with his cheek slashed, apparently the consequence of Don Benito's pique. Another scene reveals that Don Benito has a regal-looking slave named Atufal, reputed to have been a king in Africa, kept in chains, and brought before him every two hours to ask Don Benito's pardon for an offense long forgotten and of apparently trivial proportions.

Other events heighten the threatening atmosphere. A group of Ashantee slaves sit polishing rusted hatchets, while four elder slaves discreetly positioned on the deck sit silently picking "junk into oakum." When a Spanish boy is knifed by a slave boy, and a Spanish sailor is accosted by two slaves, no sanctions are imposed for these obvious transgressions of ordinary discipline. Several Spanish sailors seem intent on giving Delano meaningful looks, although to Captain Delano they remain enigmatic.

These circumstances at times cause Delano to be concerned for his own safety. But his fundamentally positive outlook on the world leads him to dismiss malign explanations and embrace innocent ones instead, upbraiding himself for succumbing to childish fears. Thus, Don Benito's haughty airs and inhospitality are easily attributed to his ill health, and to the loss of his friend Aranda and his sailors; the polishing of hatchets by the slaves is justified as a policy of keeping the slaves occupied; and so on. Visions of evil, therefore, shift into visions of innocence and back again.

Finally, in the late afternoon a breeze freshens and Delano is able to work the ship back into the bay. The whaleboat arrives to

return Delano to his ship for the night, and Don Benito follows him to the deck, being for once profusely thankful. As Delano enters the whaleboat and is about to depart, Don Benito suddenly leaps overboard into the boat. At first, Delano believes his worst fears about Don Benito are confirmed: Don Benito is acting to arouse the slaves by suggesting that he is being kidnapped. But when Babo follows Don Benito into the boat and then attacks him with a knife, Captain Delano grasps the significance of the preceding events. "With scales dropped from his eyes," Captain Delano sees "the negroes, not in misrule, not in tumult, not as if frantically concerned for Don Benito, but with mask torn away, flourishing hatchets and knives, in ferocious piratical revolt." In the ensuing fray, the canvas about the ship's bow is torn away, revealing a human skeleton as the ship's ghastly figurehead, over the inscription "follow your leader." Don Benito knows, and exclaims, that it is the skeleton of his friend, Aranda. In quick succession the story relates that the revolt was crushed, the San Dominick was retaken, and the ships then sailed to Lima, Peru. There a criminal prosecution was initiated against Babo and the slaves.

To reconstruct the events that had occurred aboard the San Dominick both before and after the arrival of Captain Delano, Melville sets forth, almost verbatim, Don Benito's deposition for the vice-regal courts in Lima. As legal prose sometimes does, the raw, prosaic recounting of events only intensifies the horror: Don Benito testifies, *inter alia*, that the San Dominick had sailed from Valparaiso for Callao with 160 slaves, property of Don Alexandro Aranda, along with thirty-six crew members and some passengers; that one week out of port the slaves had revolted, killing eighteen men and taking control of the ship; that by threatening to kill all remaining whites, Babo, the leader of the slaves, had obtained Don Benito's promise to navigate the ship to Senegal, after first visiting the island of Santa Maria to obtain the water necessary for the journey; that en route thereto, Babo had declared his intention to murder Don Alexandro Aranda, in order to insure the freedom of the blacks and to set an example for the other whites; that he requested Don Benito to order away Aranda's cabinmate, a good navigator, so that he would not also be killed; that despite Don Benito's pleadings that his friend's life be spared, he succumbed in the end and called away the cabinmate; that Aranda was then murdered; that Babo afterward ordered ten other Spaniards thrown into the sea, where they perished; that eventually the slaves murdered Aranda's cabinmate, the navigator; that several days after Aranda's murder, Babo took each Spaniard sepa-

rately to the ship's prow, where a skeleton had been positioned as the figurehead, and asked each "whose skeleton that was, and whether, from its whiteness, he should not think it a white's; that upon discovering his face, the negro Babo, coming close, said words to this effect: 'Keep faith with the blacks from here to Senegal, or you shall in spirit as now in body, follow your leader . . .'; that upon arriving at the island of Santa Maria and encountering the American ship, Babo announced the scheme of pretending that Don Benito was still in control of the ship and that the conditions of the ship were due to fever and weather; that while Captain Delano was on board the San Dominick, Babo decided on a plan to capture the American ship that night; and that, of course, the entire revolt and scheme were frustrated by the intervention of Captain Delano and the Americans.

The deposition concludes with some details concerning the American recapture of the San Dominick. Apparently, the Americans killed one Spaniard when they misinterpreted his plea that they not board the ship. The Americans thought this evidence of the Spaniard's alignment with the slaves, whereas in fact the Spaniard feared that an attempt to recapture the ship would provoke the blacks into killing all remaining whites. Another Spaniard, his hands having been covered with tar by the slaves and a hatchet artificially secured in his upraised arm, was also shot by the Americans, mistaken for "a renegade seaman." Finally, after the revolt had been crushed and the ship anchored, some sailors had continued to kill slaves who were "shackled to the ring bolts on deck."

Melville then returns to the narrative and describes briefly the substance of the conversations between Don Benito and Captain Delano on the voyage from Santa Maria to Lima. Don Benito repeats "[a]gain and again . . . how hard it had been to enact the part forced on the Spaniard by Babo." After Don Benito and Captain Delano each graciously acknowledge that the other saved his life, Captain Delano remarks about how trusting he had been that day on board the San Dominick, and how "[o]nly at the end did [his] suspicions get the better of [him], and you know how wide of the mark they then proved." To this Don Benito responds:

Wide, indeed . . . you were with me all day; stood with me, sat with me, talked with me, looked at me, ate with me, drank with me; and yet, your last act was to clutch for a monster, not only an innocent man, but the most pitiable of all men. To such degree may malign machinations and deceptions impose. So far may even the best man err, in judging the conduct of one with the recesses of whose condition he is not acquainted. But you were forced

to it; and you were in time undeceived. Would that, in both respects, it was so ever, and with all men.

But Don Benito is profoundly unstrung by these events. Despite Captain Delano's urgings that he forget the past, to quit "moralizing" about it, it is clear that some wound within Don Benito has been opened and festers unhealed. "You are saved," Captain Delano exclaims, "what has cast such a shadow upon you?" Don Benito responds only: "The negro."

Don Benito is never able to look at Babo again. At the trial, when the judges order him to identify Babo, Don Benito faints.

Babo is convicted, hanged, and his body burned. The head, "that hive of subtlety," is positioned atop a stake in the plaza. "Unabashedly" it looks at the whites, at a church in the plaza, within which rest the bones of Don Alexander Aranda, and then finally at a monastery on a distant mountain, where "three months after being dismissed by the court, Benito Cereno, borne on the bier, did, indeed, follow his leader."

B.

The tale of Benito Cereno is a highly evocative story of broad intellectual dimensions. Melville's fascination with Delano's story is readily explainable, as it is richly suggestive in themes that Melville found absorbing. One senses, for example, the contrast between the decadence of the Old World, with its hollow aristocrats splendidly raimented to hide their fecklessness, and the New World, with its fresh, open, energetic common men. But this and other such themes are subsidiary to the much more awesome subject of evil within man and the world.

At its heart the story is about the omnipresence of evil and injustice. In our blemished world good and evil are inextricably linked in everything, with evil always ready to push forth and dominate at the first opportunity. When Delano has occasion to witness on the San Dominick a youthful black woman nursing her infant child, he remarks to himself: "There's naked nature, now; pure tenderness and love" The naiveté of this thought is later apparent when it is revealed that the black women had urged the black males to torture, not simply murder, Aranda, and that while other murders were being committed, they had sung melancholy songs to heighten the atmosphere of murderous frenzy. We also discern this intermingling of innocence and evil in the circumstances surrounding the slaves' revolt and the American recovery of the San Dominick from the slaves. Both incidents illustrate how close to the surface lies the

evil within man and how innocence blends almost unnoticeably into evil, like shades of colors, for both the slaves and the American seamen commit excesses of violence in pursuing their initially just goals. Violence, once loosed, even in the cause of righteousness, is not easily confined to its original purpose. To Melville we are given both a flawed world and imperfect souls. All attempts to make either the world or ourselves otherwise are doomed to failure. Merely to act is to make oneself the instrument of a fateful injustice within the world. Thus, in seeking the capture of the slaves, the American sailors innocently, but nonetheless effectively, kill two Spaniards.

Benito Cereno is, however, also a statement about appearances and reality, about the difficulties of getting a grip on the world around us. The very structure of *Benito Cereno* is built around continually shifting perceptions. What first seems from a distance to be a monastery becomes on closer inspection a slave ship, which, then again, is not exactly a correct perception. The irony of this juxtaposition of religious peace and innocence, itself an illusion that Melville unmask in other novels, and brutal slavery sets the tone for what then becomes a kaleidoscope of vacillating visions. Innocence and evil can each be disguised as the other. What seems devotedness in the servant is really the manipulation of a sinister puppeteer; and what seems the conniving, brutish conduct in Don Benito is really the behavior of a marionette. The crowning ambiguity comes when Melville hints, ever so slightly, just after presenting the deposition, that it too may be wrong; the full truth may be ultimately unknown and unascertainable.⁶

But difficult as it is to penetrate the illusions of the outer world, so much more so is it to probe the depths of our own hearts. For Don Benito is destroyed not by the acts of others, or by his failure to perceive accurately the reality of the outer world, but by a vision, however unconscious, into his own soul. There is sad irony in Don Benito's lament, when "moralizing" to Captain Delano about the preceding events, that all the time he was "not only an innocent man, but the most pitiable of all men." He would have the world believe that he is a victimized and misunderstood man. But although he physically refuses to look again upon Babo, the smiling face remains with him, and its mocking gaze rips through the veil of pretended innocence. For Don Benito's complicity in the unfolding events of evil is as deep as any. As captain of a slave ship he is hardly "inno-

6. Melville says cautiously, "If the Deposition has served as the key to fit into the lock of the complications which precede it, then, as a vault whose door has been flung back, the San Dominick's hull lies open today."

cent," although in some sense he is surely "pitiable." He was throughout the instrument of evil, first for his friend Aranda, and then later for Babo. Don Benito's efforts at self-delusion cannot overcome the gnawing agony of his inner knowledge.

As Captain Delano first nears the San Dominick in his whale-boat, he sees a carved crest on the stern. It is "intricately carved with the arms of Castile and Leon, medallioned about by groups of mythological or symbolic devices; uppermost and central of which was a dark satyr in a mask, holding his foot on the prostrate neck of a writhing figure, likewise masked." This, indeed, is a fitting symbol for the drama that follows. The satyr seeks to hide from others his own identity and from himself the identity of his evil deeds. Self-delusion and posturing are the inevitable hallmarks of an imperfect world gripped by evil.

II.

In shifting our thinking from a symbolic work of art like *Benito Cereno* to the workings of the legal system, we inevitably experience a slight weakness in the legs. An intellectual jet lag sets in, as if we have arrived at a distant world characterized by different concerns and by an almost wholly separate style of thought and mode of discourse. At first this difficulty in transition might be attributed to a belief that whereas literature is contrived, abstract, and ethereal, legal thinking, in contrast, is more concrete and concerned with the ordinary lives of people, thereby greatly magnifying existing analytical complexities. In an important sense, however, the situation is just the reverse: it is we participants in the legal system who think systematically about justice and who tend toward abstraction, with our principles, concepts, and theoretical structures; whereas an author like Melville is ultimately concerned with unraveling life itself, particularly the tangled skein of mixed purposes and fateful circumstances that underlie all human activity. Coming from the sunny heights of jurisprudential abstraction, it is difficult for the lawyer, judge, or legal scholar to descend into the muddy, dimly lit world behind the masks we all wear and put on others.⁷

Pursuing the belief, therefore, that an author like Melville can help us identify and pierce the myths, illusions, and hypocrisy that

7. For an attempt to assert and analyze the tendency of judges, and legal scholars, to treat litigants as "entities" rather than "persons," to "[suppress] the humanity of a participant in the [legal] process" (p. 20), see Professor John T. Noonan's recent book, *Persons & Masks of the Law*. Professor Noonan does not address the origins of the tendency he identifies. He also purports to deal with what he believes is a universal phenomenon and does not speak to the problems that arise from judicial complicity in injustice.

may surround us, the remainder of this essay will attempt to offer a richer appreciation of the complexity of the task of judging. The first of the two sections that follow briefly sets forth a thesis about the judicial involvement with injustice. The second section is a refinement and elaboration of that thesis through an examination of some contemporary legal scholarship.

A.

Those of us who are directly concerned with administering and understanding the legal process work and think within a more or less accepted mental framework, one that helps us to interpret the phenomena of our experience and that defines the relevant problems that ought to command our attention. One of the central hallmarks of our legal tradition is its fundamentally reformist outlook. The orientation of our thinking about legal decisionmaking is, generally speaking, concerned with the business of achieving justice. The scope of our inquiries is usually bounded by the questions what is justice? and how can it be achieved? Injustice within the system is recognized, but only with the reformer's optimistic eye, focusing on the identification and correction of problems. The triumph of justice, though perhaps distant, is nonetheless thought to be perceived. This is, I believe, largely as it should and must be. But in all this striving for justice, we resemble a man walking with his backside into a storm. Under the circumstances, it is useful occasionally to turn around and assess the full force of our condition.

When we do, we find that in fact a major ineradicable consequence of the judging process is the accomplishment of injustice. That this is the case should not be surprising upon a brief reflection. Given the imperfection of the people who define and administer the structure of justice, injustice is inevitable. Indeed, our ideas about such concepts as a written constitution, the adversarial system, and appellate review are premised on the assumption of imperfection. The yearly flurry of cases correcting what are thought to be clear injustices only further demonstrates our continued inability to achieve success. No one, of course, believes that each year's decisions push us into the black on the ledger of justice. Even those injustices that are rectified have typically existed for many years, perhaps decades, and most were recognized even then as being unjust.

The reality would seem to be that we are engaged in a continual struggle against injustice, one without hope of a successful conclusion. New laws are enacted and precedents created that leave a

wake of injustice before they are repealed or overturned. In the interim judges enforce these laws. Judicial complicity, however, goes well beyond that. Like all of us, judges are prone to accidents and mistakes, although theirs may lead innocent people to languish in prison, or even now to suffer death. But, even more important, it must be recognized that judges sometimes knowingly and deliberately employ their power in unjust ways, or in ways that contribute to injustice; they do so not simply for malicious or sinister reasons, but because they lack the will to extricate themselves from particular circumstances, because they refuse to confront certain aspects of their personalities, because of boredom, and because of a host of complex reasons that determine individual action. This is the rule and not the exception, and we could not expect it to be otherwise.

For the judge this existential reality has a special poignancy that is the result of two factors inherent in the judicial office. The first is the fact that to judge others it is necessary in some way to judge oneself, a process that, not surprisingly, creates some uneasiness. Learned Hand is said to have remarked of the sentencing of criminal defendants: "Here I am an old man in a long nightgown making muffled noises at people who may be no worse than I am."⁸ The anguish underlying Hand's statement is apparent and accounts for its power. To be sure, the process is not always conscious, for otherwise Hand's remark would not be so memorable; nor does it necessarily lead to just decisions. In fact, the opposite can occur, as, for example, when the judge, like Don Benito attempting to face Babo at trial, is rendered incapacitated in the face of evil. The symbolic functions of the institution comprise a second reason why judicial complicity bears a special edge. In our society the judge is the very paradigm of rectitude; he is the first person in our "system of justice." Yet his shortcomings in that regard must continuously remind him of the ultimate contradiction between the world as it is and as we idealize it.

Considering all of this, we should expect to discern within the judicial process a style of thought and expression that seeks to deny the force of this painful reality. In the interplay between the judge's personal and official imperfections and his identification with the fulfillment of justice, judges could be expected to more or less pretend to live according to the image and not the full reality. As a result, their decisionmaking is characterized by the desire to avoid a recognition of complicity. Its elements are complex, but it may manifest

8. Quoted in M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 16 (1973).

itself in a certain self-righteousness, or in a tendency toward abstraction in reasoning, passionless ratiocination, offered to show the inexorability of the result. We are familiar with this posturing and usually attribute it to a judicial concern to avoid appearing to have utilized personal value preferences in choosing one result over other possibilities. But that can be only a guise; the concern over complicity cuts much deeper.

The difficulty with pretense is that it may lead to a kind of moral blindness. The posture we have assumed becomes more important to us than the reality of what we are doing. If that is so with the judge, then he is surely the quintessence of the person caught in an imperfect world. Within that world he becomes both the victim and the perpetrator of injustice, reflecting in this way the tragedy of Don Benito.

B.

There is much in contemporary legal literature that pertains to the preceding observations on the inevitability and pervasiveness of injustice and the consequent posturing. Frequently, however, authors fail to appreciate the full dimensions of the problem of systemic evil. Writers approach the dilemma but then pull back, leaving important questions unasked and unresolved.

In the remainder of this essay I shall discuss three recent works of legal scholarship that I believe best provide a context in which to illustrate and clarify the thesis presented earlier. The first two books—one entitled *Capital Punishment: The Inevitability of Caprice and Mistake*, by Professor Charles Black, and the other *Criminal Sentences: Law Without Order*, by Judge Marvin Frankel—help to point out the enormity of the problem of injustice as well as to suggest some of its origins and the reasons for its pervasiveness. Both books, however, fall squarely within the reformist legal tradition of thinking that I identified earlier. What I draw from these books is secondary to their explicit agendas. The final book discussed here, *Justice Accused: Antislavery and the Judicial Process*, by Professor Robert Cover, is different in this regard. Its purpose is to deal directly with the effect on judges of dispensing injustice through the administration of unjust laws, rather than to focus on injustice as a predicate for reform. Although its subject is historical, its intended objective is to address a timeless and universal judicial conundrum. As such it is a significant aid to understanding the problem considered here. But helpful though it is, its in-depth treatment

necessarily narrows its focus, and, as I shall argue, it is ambiguous on critical questions relating to the problem of judicial complicity in evil.

In 1974 Professor Charles Black published a book detailing the serious problems that inhere in the administration of capital punishment laws. Of the most immediate interest here, however, is not so much the author's discussion of capital punishment, but rather his sober and disturbing assessment of the criminal justice system in general. In developing his powerful argument about capital punishment, Professor Black forces us to begin to examine closely the imperfections of the legal process.

Professor Black's thesis is that capital punishment is intolerable in any humanly conceived and administered system of justice because both mistake and irrational and arbitrary results are inevitable components. He explores this thesis by examining the various stages of a criminal prosecution: the prosecutor's decisions as to the appropriate criminal charge and the matters relating to plea bargaining, the jury's decisions on guilt and innocence, the issue of deserved punishment, the appellate review of questions of law, and finally, the clemency process. Each step is shown to be ripe for the possibility of mistake where rules exist, or for caprice and arbitrariness where only vague and uncertain standards apply, which of course is the more typical situation. Black's position is that we are not dealing here with a minor flaw in the system that is capable of remedy or is to be dismissed as of infrequent occurrence. Rather, he considers this the fundamental character of the criminal law. Perhaps nothing captures this better than his characterization of the insanity doctrine:

Once again, let us remember that we have committed ourselves not to kill by law, or even to punish, anyone who satisfies certain criteria as to the connection of "insanity" with the commission of the act. Yet the astounding fact is that, having made this commitment, for what must be the most imperative moral reasons, we cannot state these criteria in any understandable form, in any form satisfying to the relevant specialists or comprehensible to either judge or jury, despite repeated and earnest trials. The upshot of the best writing on the subject is that we have so far failed in defining exculpatory "insanity," and that success is nowhere in sight. Yet we have to assume, unless the whole thing has been a solemn frolic, that we execute some people, and put others into medical custody, because we think that the ones we execute fall on one side of this line, and the others on the other side.⁹

9. C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 52-53 (1974).

What Black says about the possibility of arbitrarily electing between execution and a declaration of insanity also applies, of course, when the choice is between incarceration and a declaration of insanity. Black recognizes this, but he does not make the extravagant argument that the entire criminal law system must be scrapped. Rather, he makes the more limited claim that punishment by death compounds these incorrigible evils by its finality and is therefore distinguishable.

Although no remedial consequences flow from his observations, the book is a powerful statement on the condition of criminal justice. What Black describes has a significance in itself, although his immediate goal does not lead him to consider its implications. As a by-product of his scholarship, we have a glimpse of the injustice arising from human limitations and a reminder of the American seamen mistakenly killing the Spaniards who appeared to be rebels aligned with the slaves.

This perception of the stark reality of the criminal process is expanded upon in *Criminal Sentences: Law Without Order*, by Marvin Frankel, a respected federal district judge for the Southern District of New York. As a critique of the sentencing process, this book speaks with the peculiar force accorded an insider's view of officialdom. But its principal value, its originality and power, derives from the intelligence and candor with which Frankel explores a process that he quite obviously finds a private horror, and he spares neither himself nor other judges as he describes the Kafkaesque process of incarceration.

Frankel argues that the sentencing process suffers from a near-total absence of law. Legislative guidelines are vague or virtually nonexistent; appellate review is precluded by doctrine that recognizes sentencing as a discretionary matter for the trial judge; no rule requires the sentencing judge to publish a statement of reasons for his decision; public and scholarly attention are generally focused on other aspects of the criminal process, particularly those connected with the guilt-determining stage; and so on. Within this unbounded territory of power judges roam about fixing punishment. In such an environment it is hardly surprising that there flourish "monstrous evils perpetrated daily for all of us, and with our implicit or express acquiescence."¹⁰ The evils arising from the system are generally familiar; there is, for example, the widely acknowledged injustice of grossly disparate sentences, which even judges on the same court usually do little or nothing

10. M. FRANKEL, *supra* note 8, at 124.

to minimize. But evil also exists within each courtroom. With tyrannical power placed in his hands, "[c]onditioned in the direction of authoritarianism by his daily life in court, long habituated as a lawyer to the stance of the aggressive contestant,"¹¹ some judges cannot resist being tyrants. Instances of unconscionable use of sentencing power are familiar to everyone, of course, but Frankel provides us with a few shocking additions, one involving a judge who confided to Frankel and other judges at a cocktail party that, when a defendant at the sentencing hearing strongly criticized the judge and the proceedings in which he had been convicted, he "simply gave the son of a bitch five years instead of the four" he had originally decided upon.¹²

What is so interesting about Frankel's book is that it does not purport to depict sentencing injustices as the product of aberrant behavior of a discrete set of judges. There is recognition, however subdued, that all judges more or less participate, trapped by their own imperfections and those of a system that seems to exist with a will of its own.¹³ As a footnote to the anecdote just noted, for example, Frankel writes, "[t]here is other evidence—including, I fear, some results of my own introspection—that the defendant's rare outbursts may carry a monstrous price."¹⁴ Such a confession by certainly one of our most conscientious judges ought to have a profound effect on us.

The process is indeed grisly. As Frankel almost wincingly describes it, judges generally spend little time thinking about individual sentencing cases, with the predictable consequence that decisions frequently are arbitrary, reflect considerations by any standard inappropriate, and rest on assumptions, such as the availability of rehabilitation facilities, which the judge knows to be false. The upshot is that judges are committing people to prisons under conditions that are in many respects as evil as the offenses that are being punished. Much of the evil that Frankel describes is inevitable, although this is not his purpose. But like Professor Black, Frankel, perhaps unknowingly, transcends his professed purpose, for the reforms he

11. *Id.* at 17.

12. *Id.* at 18.

13. Frankel says in his preface:

The evils I mean to portray are grim. They have come to impress me as unbearable by any society that styles itself civilized. But they are not secret or mysterious. Nor are they assignable to any handy set of villains. While there is ample blame to share among the judges, lawyers, legislators, and all of us, the fundamental problem, as usual, is in the system, or lack of it.

Id. at ix.

14. *Id.* at 19.

ultimately proposes, however sensible and desirable, cannot alter the fundamental human nature that is at the root of the problem.¹⁵

Thus, Frankel's book provides us with an even more disturbing statement of the reality of injustice in the legal system than Black's. In it we discern not just the unfortunate mistakes of good-minded people, but the traces of the more complex consequences of the precarious inner balance of good and evil. With the focus on the criminal system more limited, we see more deeply into the plight of the ordinary judge. Whereas Black speaks of the American seamen accidentally killing Spaniards in the pursuit of justice, Frankel speaks of the knowing complicity of Don Benito and of the forces of cruelty represented both in the black women during the slaves' revolt and in the final capturing and killing of the slaves by the American seamen.

Frankel takes us further than Black into the problem of injustice in another respect as well. In seeking to bring some light to the darker regions of sentencing and prisons he discusses what he styles the "walls of silence."¹⁶ Nearly every person convicted of a crime encounters this wall: the refusal of judges, as well as prison officials and parole boards, to make any attempt whatsoever to explain their decisions. Banishment is accomplished with the aid of the impenetrable screen of silence. This is a form of posturing, of pretense, as Frankel recognizes. The injustice produced by the system, or, more accurately, by those who make up the system, is masked by the facade of black robes (like Don Benito's aristocratic garments) and high benches and legal fictions, such as the idea that near-absolute discretion over sentencing properly rests in the trial judge because he alone has the opportunity to "observe" the defendant.¹⁷ All of us are uncomfortable with the reality of these "dank subjects," preferring instead "lovely or exciting things."¹⁸

Thus, Frankel's book advances our discussion in two important ways. It also, incidentally, provides us with some insight into the traits that we should wish for our judges. The book is remarkable

15. The reforms Frankel proposes include legislative statements of the purposes of punishment, a requirement that the judge list and weigh the factors contributing to the sentencing decision, appellate review of sentences, and a commission on sentencing. See *id.* at 105-23.

16. *Id.* at ch. 4.

17. *Id.* at 82-83.

18. *Id.* at ix. The same tendency to explain away evil as being simply "irrational behavior," or as involving only a few demented people, has been noted with respect to the infinitely more grotesque injustices perpetrated by twentieth century totalitarian governments. See H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951); R. NISBET, *THE QUEST FOR COMMUNITY* 194-96 (1953).

for its acknowledgement of involvement, for its evidence of internal struggle. But, unlike the Don Benitos of the world who wither under the stress of reality and adopt a stance toward the world of false innocence, which then leads them to even greater complicity, Frankel comes close to seeking the advice of Calchas, and in doing so may well be better able to do justice in the system of injustice.

But, in the end, Frankel's book is, like Black's, pervaded by the illusion of possible reform. The ultimate object is to be rid of the injustices, not to accept them as in some degree inevitable and then search for the meaning and consequences of that reality. In that way both books fail to pursue many of the critical questions about the role of injustice. Some of these questions are addressed more specifically by Professor Cover in his book on judicial decision-making and the nineteenth century slave laws, *Justice Accused: Antislavery and the Judicial Process*.

Professor Cover's book focuses on the slavery cases decided prior to the Civil War, particularly those involving the enforcement of the Fugitive Slave Act, and on the Northern antislavery judges who decided them. Cover presents these cases as illustrative of what he terms the moral-formal dilemma, which exists when a judge's official obligation to enforce the "law" conflicts with his personal beliefs as to the proper moral resolution of the case. That, of course, is the dilemma classically associated with the character of Captain Vere in Melville's *Billy Budd*, which Cover in fact uses as an introduction to the problem and as an aid in his attempt to analyze Chief Justice Lemuel Shaw, one of the antislavery judges Cover studies and, as noted earlier, Melville's father-in-law. Cover's study of fugitive rendition cases leads him to several observations. He finds, first, that the antislavery judges almost uniformly chose to enforce the law despite their personal moral predilections. Cover then seeks to determine how this affected their judicial work, employing as an analytical tool the psychological theory of cognitive dissonance.¹⁹ This theory states doctrinally what we know intuitively, that when forced to choose between two or more highly prized but inconsistent alternatives, attempts will be made to think and believe in ways designed to reduce the resulting dissonance, typically by altering the original perception of the stakes and thereby making the choice seem less difficult and more inevitable than it actually was. Armed with this thesis, Cover examines the opinions of four antislavery judges and

19. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 227 (1975).

identifies three types of argumentation consistent with the cognitive dissonance theory: a tendency to "elevate the formal stakes," by arguing implausibly, for example, that the continuation of the social system was contingent on the enforcement of the "law"; a tendency to "retreat to mechanistic formalism," by pretending that the "law" was fixed and did not permit any result other than that reached; and a tendency to "ascribe responsibility elsewhere," by asserting that those morally accountable for the resulting injustices were not the judges themselves but rather the Congress, or the "people."²⁰

All of this, here only sketched, is highly valuable to our understanding of the phenomenon of judicial complicity in injustice. Cover provides us with comprehensive documentation of the complicity that exists where the "law" imposes on the judge, as well as the parties, an unjust or immoral outcome. This is not, of course, an illustration of only historical interest; the same dilemma exists in many contemporary, although perhaps less dramatic, situations, such as the early prosecutions during the Vietnam War of nonreligious conscientious objectors. In this respect, therefore, Cover's book supplements those of Black and Frankel. But because Cover focuses directly on the effects of judicial complicity, his book provides us with more developed ideas about the subject. Particularly important is his developed thesis of a link between complicity and a form of judicial posturing. Like Don Benito, the antislavery judges were loath to acknowledge their own involvement and responsibility in the world's evil.

In the end, however, Cover only hints at the most disturbing aspect of judicial complicity, although it lurks within the events he depicts. In the book's latter portions, there is a certain ambiguity in the discussion of judicial posturing. Cover clearly argues that complicity gives rise to pretense; but at times the narrative suggests that the posturing itself may have played a role in the initial decision-making process.²¹ Judges may actually have chosen a proslavery result in part because it offered the greater opportunity for an image of noninvolvement. To have ruled in favor of the alleged slave would have constituted not only a breach of the judge's official duty, itself raising issues of moral obligation, but also a course of conduct for which quite clearly the judge alone would have to bear responsibility. Thus, faced with the specter of a breach of obligation whichever way he turned, the judge naturally chose the "law," in part be-

20. *Id.* at 229-36.

21. *Id.* at 7, 228-29, 199.

cause it offered the greater opportunity of disassociation from the result.

Viewed from an institutional perspective, we would probably not find this tendency disturbing in itself. For obvious reasons we generally think it desirable that the judge implement the law even when he finds it personally disagreeable to do so. But the problem is in fact much more complex. We know that the choice typically confronting the judge is not simply one of enforcing or not enforcing the law, but rather, within certain bounds, how to "create the law." Generally the judge finds the "law" somewhat open-textured, admitting of movement in tone and emphasis, if not entirely in result. This was, Cover says, in fact the situation with many of the cases arising under the Fugitive Slave Act.²² Yet, offered an opportunity to ameliorate the harshness of the law and still remain faithful to his official responsibilities, the judges nevertheless tended to embrace the most rigid proslavery result.

In some instances, apparently the judge's behavior was quite bizarre. For example, both Cover and Chief Justice Shaw's biographer, Leonard Levy, observe that Shaw's performance in the fugitive rendition cases "differed markedly from [his] accustomed vigor and surefootedness."²³ In deciding for the slave owner, Chief Justice Shaw behaved in extraordinarily simplistic and uncraftsmanlike ways; he seemed "obsessed" with "the fiction that (the Constitution) would never have come into being had it not provided for the return of runaways"²⁴ and his use of precedent was "unjustifiable" and "dogmatic."²⁵ These observations are extremely curious: it is as if the judge desired to avoid even the slightest realization of complicity, which might result from applying his imagination to the positive law in order to reach a more humane, less harsh result; it is as if the judge believed that by withdrawing his intellect from the issue and mechanically applying the law in its most rigid form he would be less answerable for what he was about to do. In this respect, we are faced with intriguing questions about the reactions of judges when confronted with evil, not just hard choices in general.²⁶

22. *Id.* at 198-99, 232-33.

23. *Id.* at 251.

24. *Id.* (quoting L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 99 (1957)).

25. *Id.* at 251.

26. In a review of Professor Cover's book, Professor Ronald Dworkin argues that the antislavery judges may have refused to mold the law in an antislavery direction because of a fear that such a construction would be perceived by the populace as being merely the implementation of the judges' personal value choices, something that they felt ought to be avoided during this inflammatory period. In this respect,

But there is even more here to consider. As the opportunity for posturing may affect a judge's decision, so the resulting posturing may in fact reinforce his commitment to reach similar results in future cases. He may become, in a sense, locked into his earlier rhetoric and self-delusion. Not surprisingly, therefore, there is evidence in the rendition cases that Shaw became increasingly dogmatic and rigid in his decisions; there is a sense of escalation, of increasing inability to see through the original smoke screen.²⁷

My point here is not to suggest that these consequences for the decisionmaking process are the only possibilities. Nor do I mean to be so naive as to suggest that they in fact explain the mental processes of Chief Justice Shaw. Rather, my purpose here is limited to moving impressionistically toward a perspective on the judicial process that includes a sensitivity to the reality and role of injustice. As Cover notes at the outset of his book, the subject of complicity in injustice has been little studied; we are still feeling our way, using Melville as a guide.

I have already described what I perceive in Black's and Frankel's books to be the leitmotiv of inevitable injustice. Both authors lift the veil over injustice but then replace it when they move to proposing reforms. In doing so, they overlook important aspects of the judicial condition. They each see posturing with regard to their issues, but they do not fully appreciate its sources or explore its force and consequences. The problem, as Cover's book suggests, is that in the world of inevitable injustice this posturing may lead to ever-widening injustice. So the sentencing judge, a participant himself in injustice and a person forced by the circumstances to confront his own complicity, may parade as the self-righteous innocent and inflict the harshest punishments.²⁸ And all the pretense covering the caprice and mistake of the criminal law may defeat Black's sensible effort to eradicate the death penalty. Herein, perhaps, lies the ultimate tragedy of the role of the judge, symbolized by the crest on the stern of the San Dominick: he is the victim victimizing other victims.

Dworkin argues, a failure in jurisprudence contributed to the judges' dilemma because under more modern theories of jurisprudence the judges could have ameliorated the harsh effects of the slavery laws and still have acted, and have been perceived as acting, within the proper bounds of judicial discretion. Dworkin, *The Law of the Slave-Catchers*, THE TIMES (London) (Literary Supplement), Dec. 5, 1975, at 1437.

27. R. COVER, *supra* note 19, at 249-52.

28. See M. FRANKEL, *supra* note 8, at 16-17.