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Thane Rosenbaum

Fordham University School of Law, TROSENBAUM@law.fordham.edu

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IN-PRINT SYMPOSIUM: THE MYTH OF MORAL JUSTICE

INTRODUCTION

*Thane Rosenbaum**

I wrote *The Myth of Moral Justice*,¹ primarily, as a moral critique of the legal system. In examining the rituals and practices of the law under moral criteria—its obsessive focus on zero-sum contests, its dedication to cold rules and procedural technicalities over human emotion, its failure to acknowledge the spiritual pain of those who come before it, its inability to create an atmosphere where apologies, reconciliation, and the restoring of moral balance to relationships is possible, its preference for judicial economy over truth, its privileging of secrets and indifference to lies, and its failure to promote an atmosphere of mutual caring and connection by not imposing a duty to rescue—the book is an indictment of the legal system for smugly believing that the correct legal result is necessarily consistent with the right moral outcome.

Evidence and procedural rules, attorney-client privileges, settlements and plea bargains, the hostility of adversarial proceedings, all severely undermine the storytelling, truth-seeking dimensions of what people expect when they come before the law. And this failure lies at the heart of why moral justice is merely a myth. A legal system that cares mainly about applying the law in mechanical, overly technical, and soulless ways to the exclusion of other values is not a legal system that is interested in making sure that its judgments make moral or emotional sense to those who look to the law for wisdom, guidance, and resolution.

But more broadly, despite its focus on developing a unified theory of justice, the book speaks to something that transcends the law and the legal system. What I perhaps did not realize when I first conceived of

* Thane Rosenbaum is a novelist, essayist, and the John Whelan Distinguished Lecturer in Law at Fordham University School of Law, where he also directs the Forum on Law, Culture & Society. He is the author of *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT*, which was selected by the *SAN FRANCISCO CHRONICLE* as one of the Best Books of 2004.

¹ THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* (2004).

this book was that the legal system was only one facet of a larger underlying social criticism. *The Myth of Moral Justice* challenges society to engage in a moral conversation about the legal system. That, to my mind, is its best contribution to reform. But that conversation applies equally, or at least should apply equally, to other professions, institutions, and patterns of human behavior. The audacity of the book is not that it takes on the legal system, but that it does so on moral grounds, subjecting the law to moral scrutiny.

Invoking moral issues and adopting them as part of the public discourse is not something American society—or at least a particular segment of society—is comfortable doing. Whether acknowledged or not, there is a split between the legal and the moral in the American legal system. And it is not even a conscious split. The moral issue is simply not part of the picture, and no one seems to be alarmed by its absence. That is because legal decision making and moral consciousness are not the same things, and no one is particularly troubled by the lack of integration between the two.

Distorting and manipulating the truth, perpetuating lies, confusing administrative justice with fundamental notions of what is just, subjecting legal outcomes to a hostile knock-down, drag-out sporting contest where the goal is to destroy one's adversary, silencing victims and the aggrieved from speaking to their losses, injury, and betrayal, creating an atmosphere of implacable defensiveness and unapologetic self-righteousness rather than one of true human encounter and moral repair, are not examples of a moral system of justice. Yet these practices are not only perfectly legal, they are standard practice in our legal system.

The split between the moral and the legal also plays itself out in the wider world, which perhaps explains why the legal system only mirrors the surrounding culture rather than leads it by example. Doing the "right thing," as a governing philosophy, is not part of the professional mindset, or something that professionals believe in. Indeed, most people, when it comes to their conduct at work and the fruits of their labor, do not evaluate themselves according to moral criteria. We believe, or have been led to believe, that our moral and private spheres of existence stand separate and apart from our professional and public lives. Our duties as workers, our professional tasks, and our interactions in the public sphere, are not subject to moral scrutiny. These activities are, essentially, what we do *away* from the home; they are the very essence of why we leave our homes during the workday.

For some bizarre reason, our activities outside the household, how we spend the hours between nine and five, the manner with which we win bread for our families and secure our futures, is not deemed a moral enterprise or covered by moral rules. We are expected to conduct ourselves as moral men and women only within the thresholds of our private lives, within our homes and inside our picket fences, among our families, and inside the temples, churches, and mosques of our religious communities. As long as we are faithful spouses, as long as we read to our children at night, as long as we are kind neighbors and charitable citizens, our moral rectitude and reputation remain secure.

Seemingly, it is perfectly acceptable to engage in all manner of unethical, immoral and vulgar conduct during the workweek, perpetrated remorselessly against the strangers among us—our business competitors, customers, and classmates—as long as we are good people at home. Home is the center of our moral universe. Morality and moral agency is required only when we sit inside pews and contemplate the awesomeness of the almighty, or when we seek to teach moral lessons to our children. Morality, however, is optional everywhere else. It is merely an extracurricular and discretionary impulse outside the home. In fact, taking your children to work is never a good way to impart moral lessons in America, because apparently the workplace is the last place where professionals and businessmen display their moral fiber or exert any moral muscle. Morality is deemed without material value as a consumer good. In short, morality does not apply to one's day job.

So in a very real sense, *The Myth of Moral Justice*, in challenging the legal system to evaluate its practices according to moral criteria, might as well have been asking all professions to do the same thing—all in the spirit of doing the “right thing.” Is the split between the legal and the moral, and between the moral and professional, inevitable and immutable? Is it not possible to introduce moral concerns into our professional and public lives, not unlike the way in which we insist that morality guide our private and religious selves? What if we were to no longer tolerate any separation, no further excuses for immoral behavior outside of the home? What would happen if we expected the same conduct everywhere, all the time?

Now, as I pointed out in the book, moral justice is neither dependent on, nor dictated by, religious guidance. Moral justice does not take its direction from religious authorities or divine law. The fact that people make this assumption is part of what is wrong with the quality of

public debate in America. We have capitulated the moral ground entirely to religious institutions, as if morality is the province only of the religious world rather than something that is innately human and ultimately an expression of our humanity. One does not have to be religious, or even believe in God, in order to be moral and to engage in moral acts. And morality does not only have to be defined in religious terms. Atheists are quite capable of being moral, and vegetarians who refuse to eat animals on moral grounds do not have to identify themselves as religious in order to have developed this moral mindset. In fact, most religions impose no prohibition on the eating of animals. Does that mean that atheists cannot have a moral basis for declining to eat meat since religions apparently have no moral qualms about doing so?

Doing the “right thing” is a democratic impulse, and an infectious one, as well. It can be done by everyone, without regard to religious conviction or commandment. We should not, and we must not, confuse religious morality with something that is much more basic and commonly understood: the simple distinctions between right and wrong. These distinctions are not necessarily connected to religious teachings, but have far more to do with human agency—the interior spark of our moral impulses.

The problem is we have banished moral conversations from our public discourse, and consigned them to the margins of the religious realm. Many people mistakenly believe that morality is the language of religious people, and therefore has no application in the secular world. Moreover, we have treated morality not only as if it has no real-world, practical implications, but that it also cannot be supported by a concrete, absolute truth.

Morality, we are told, is what inflexible, narrow-minded religious zealots believe in, those who are too comfortable with their blind faith and who are unwilling to subject their ideas to the rigor of scientific analysis. These are people too set in their ways, obsessed with the certainty of absolute judgment and eternal damnation, and who wield their morality like a weapon. The problem with them, we are reminded, is that they do not seem to realize that there is no one truth, and that nothing is absolute.

Given this bias against religious people and the consignment of morality into their presumably anti-intellectual hands, no wonder morality has a bad name in America, having been demonized as the creepy

thinking of fringe fanatics, those who are implacably judgmental, intolerant, and too intoxicated with God for their own good. But this banishment and disavowal of morality is completely unfair and intellectually dishonest. We live in a society where we are taught to respect the differences among us, to realize that morality is subject to great diversity within cultures, and that morality sometimes has its own inner logic.

Moral relativism stands for the principle that morality is, indeed, relative, and therefore it cannot be imposed against those who have a different conception of what is moral. But somewhere along the way we have relativized morality to the point where it has no meaning. If everything is relative, then nothing can be deemed principled. All we do is account for difference, and tolerate all kinds of bad behavior.

But the fact is, the world of moral relativism shares at least equal space with moral realism. There are some truths that are absolute, virtues that we know to be obvious: kindness, compassion, mutual respect and dignity, telling the truth, accepting responsibility for one's actions and undertaking meaningful gestures of repair, acknowledging the pain of our fellow citizens as well as the pain that we either inflict on others or allow to take place through our indifference and neglect.

These are golden rules. It is hard to argue with them, because they make emotional and moral sense. Internally they feel right. There is no issue of moral relativism here. If there is, then morality is pointless, and there is even less hope for humanity than first imagined. Even religious authorities agree on these same principles—moral concepts that are easily accepted as basic truths and common courtesies. Moral justice does not only exist on the polar extremes of human complexity. Yes, abortion is a tough call, because both sides can make a moral argument on behalf of their stated and impassioned positions. Each side can justifiably claim to be doing the “right thing.”

But most everything in life takes place in the middle, and not at the margins. Most moral questions are not as red hot and inflammatory as is abortion. Most areas of conflict have the potential for a moral resolution because the truth is not elusive, but rather known.

Excusing bad behavior on the pretense that what constitutes good behavior is either relative or unknowable is the most pathetic example of moral laziness and intellectual dishonesty. Why insist on having our children tell the truth or apologize when they are wrong if adults will not live up to these same standards? What if children cynically invoked

relativized thinking every time they sought to talk their way out of a timeout? Parents would clamor for the return of corporeal punishment.

Doing the “right thing” is usually not so complicated; it is not brain surgery or physics. People can do it, and should be expected to do it. But the impulse toward relativizing truth and morality is great, and castigating morality as a byproduct of religious mediocrity is even greater.

This is not helped by the fact that with all of the recent blue and red state geographic alignments, liberal intellectuals see red as the enemy and regard morality as the language of religion. Liberals and progressives treat morality like a foreign language, spoken fluently only among red state inhabitants. So the polar divide truly is one that transcends the Electoral College, and merges into the syntax of our national vocabulary. One segment of our population is comfortable framing issues in moral terms, while the rest of America, over-represented at universities and inside magazines, believe that invoking morality in any setting—particularly as the inspiration for public policy—lacks intellectual rigor and panders to the dumbing down of America.

Of course, a majority of Americans thought otherwise, and the reelection of President George W. Bush was, curiously, not just a presidential election, but also a referendum on morality in America. Obviously, a majority of Americans desire having moral conversations and wish for their elected officials to exercise moral leadership—whether they are capable of doing so or not.

The question is: Have liberals and progressives, democrats and relativists, professionals and public servants, heard this mandate? Because, at least in my view, doing the “right thing,” whether in actuality or merely as an aspiration, should not only be a Republican strategy. Democrats, too, are capable of conceptualizing ideas and justifying public policy without surrendering the moral ground. And religious leaders should not permit their congregants the easy escape hatch of engaging in a split morality—the sugar pill of virtue that is maintained in one’s private life, with the blind eye to all the immorality that exists in the business world.

The moral issue is always the elephant in the room, but Americans somehow believe it is possible to ignore it, largely because nothing can be done about it. But indifference is the worst moral insult of all. We have an obligation to ourselves and to each other to apply moral reasoning and moral action to all phases of our lives. We know this to be true,

but we have either forgotten, or we have grown complacent, or the people with whom we surround ourselves represent such poor role models for moral behavior.

As a law professor, novelist, and someone who teaches law and literature, I have been told, anecdotally, that when it comes to law school applications, there are a surprising number of essays that cite *To Kill a Mockingbird*²—both the novel and film—as having influenced the decision to apply to law school and to become a lawyer. I have taught this novel for years, and I suppose the reason for its affection among prospective lawyers is mostly traceable to the character of Atticus Finch.

Atticus Finch is the model of the moral attorney. Here is one lawyer who, surprisingly, doubles as a human being. He is someone dedicated to doing the “right thing” even though he is well aware that the decision to represent Tom Robinson will expose him and his family to considerable risk. The performance of his job is not without personal consequence. And beyond that, he knows from the outset that he will lose the case. And yet he takes it on anyway. He could do the simple and expedient thing and bow out. But instead, he chooses to do the “right thing,” because as he repeats throughout the novel, if he does not represent Tom Robinson, he will not be able to parent his children, or represent the town in the legislature, or walk the streets with his head held high and his dignity intact.

So what happened to all these lawyers who read the novel or watched the movie and became inspired to one day practice law? Did they somehow lose their inner Atticus Finch? I do not think that the answer is that they forgot the novel. I think that other values and principles simply intervened and obliterated whatever inspiration they once drew from the story.

One final thought. When *The Myth of Moral Justice* was published, it received considerable critical attention in major newspapers, magazines, radio, and television. Not all of it was laudable. Many thoughtful people had severe reservations about its underlying premises. But the one thing that never happened, the one thing that completely surprised me, is that no one chose to defend the legal system on moral grounds. No one challenged the central premise of the book: that when the legal system pursues justice legally, it is not necessarily succeeding morally. Moral justice is a myth largely because our legal system does

² HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

not feel burdened in any way to provide moral relief. Yet no one attacked my premise, no one proclaimed that justice *is* moral, and that moral justice is *not* a myth.

Instead, everyone seemed to buy into the book's premise. They surrendered the one point that I felt no one would or could accept—that the legal system is not moral. Rather than challenging the thesis, my critics seemingly defaulted to a secondary defensive position—claiming that my ideas were impractical, or that morality itself is so illusory and relativistic that it cannot be applied to conflict resolution, or that I was seeking to impose religious law on an otherwise secular society.

But no one defended the legal system on moral grounds. Why? I do not know. Either they felt that such a defense was indefensible given the severe moral deficiencies of the legal system, or, that those who generally review books are the same type of people who disdain having moral conversations. Ironically, they were not about to attack my book by resorting to the very language they refuse to speak.

But that too was a mistake. Even my critics missed an opportunity to take the book on its own terms, and address the challenge that the book raises without surrendering the moral ground that *The Myth of Moral Justice* so, dishearteningly, mythologizes.