

BOOK REVIEW

THE JUSTIFICATION OF THE LAW BY CLARENCE MORRIS. Philadelphia: University of Pennsylvania Press, 1971. Pp. 214. \$3.45.

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In writing of this book, in this place, it would be difficult not to say a few words of appreciation for the man and the mind behind it, and for me it is quite impossible. But I shall reserve that for the end of these comments, and first try to come to grips seriously with the book. Because it makes important statements about many large subjects, I shall have to choose a few features of the book to dwell on, and hope that they represent fairly the scope and intention of the whole. Professor Morris has provided, in a short foreword, his own "overview" of the book, in which its main themes are stated. The headings in this section indicate the range of his concerns: justice, rationality, culture. There is indeed a grandeur in Morris' conceptions that matches these high terms, but they carry the misleading suggestion that he proceeds on a high level of abstraction, inattentive to the details of the law and lawmaking. In fact the book is rich in particulars; much of its interest lies in Morris' observations on specific enactments and decisions, and his use of them to illustrate the justification of the law. The variety and penetration of these remarks, the abundant references to problems of the forum, will make this book appealing to any lawyer, and I hope not to obscure that appeal if I concentrate on its more spacious themes.

There are three wheels to Morris' chariot. (An exceptional design, perhaps, but not ungainly.) First, he draws on his readings of the Western philosophers most concerned with problems of law and justice. It has been a sympathetic study, evidently; although he does not miss nuances and discordancies, he reads for profit, and presents us more often with common truths than with picked-over errors. Second, through investigations of jurisprudence in the Chinese dynasties he has tested Western modes of validating laws and judgments on materials at once familiar and exotic. In Chinese culture, moreover, Morris finds prototypes for emerging public aspirations in our society. A third major ingredient in the book is the tradition of the common law and its amendment of which Cardozo is an exemplar. This tradition informs not only Morris' conception of how justice is done, but also the way in which he conceives the problem of justification and his style of philosophy.

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Among the philosophical antecedents, Morris acknowledges that Rousseau's theory of the "rectitude of the general will" is similar to his theory of justice. This observation naturally invites comparisons between Morris and Rawls, whose *Theory of Justice*¹ also claims the provenance of Rousseau.

Although there are wide differences between them, Morris' conception of justice and Rawls' "justice as fairness" have some notable points in common. Both of them look for verification to our considered judgments on problematical cases. Both associate justice with the application of preformulated general rules—to use Morris' phrase. (Rawls speaks of justice as regularity.) Both insist that reliable information is required for making just arrangements, and further that doing justice is dependent on there being a public well advanced toward a state of enlightenment.² We are invited by both to let rationality carry us as far as it will in determining what is just.

The list of correspondence could be enlarged. But there are notable differences, in both conception and method, and they are instructive. I think we may say, in reaching for a general statement, that Morris has a forensic concern for justice, whereas Rawls regards it with the concern of a constitution-maker. Morris gives a host of instances in which justice is done or not done. Justice is the product of singular occasions for him. "The abstract noun *justice* is best understood as denoting a congeries of justices . . ."³ Justice can therefore be added to, or created. For Rawls, by contrast, justice is the measure of congruence between basic social institutions and a short list of established principles. Morris would be uncomfortable with that conception, I daresay, even though Rawls admits a great deal of contingency in the formulation of just laws.

Morris insists that justice is not a quality immanent in laws, and not an unchanging standard by which they may be appraised.⁴ We

¹ I shall not cite systematically to Rawls. However, the point made about his insistence on reliable information may be contested. One of the features of the "original position" in which (he supposes) the essential principles of justice would be agreed upon is that the participants act behind the "veil of ignorance." This is not inconsistent with what I say here, I believe, for Rawls is clear that the principles are to be fleshed out with concrete applications as the veil of ignorance is progressively withdrawn. And he considers it proper, "at the stage of the legislature," that "the full range of general economic and social facts are brought to bear."

The stage of adjudication ensues, and at this stage "everyone has complete access to all the facts." Morris would not, I daresay, approve of this segmented conception of the legislative and judicial processes. In favor of Rawls, however, it must be noted that he is mainly concerned with the "ideal" part of the theory of justice, which assumes strict compliance, and less so with cases of imperfect compliance. On these features of justice as fairness, see J. RAWLS, *A THEORY OF JUSTICE*, §§ 31, 39 (1971).

² C. MORRIS, *THE JUSTIFICATION OF THE LAW 2* (1971).

³ *Id.*

⁴ "[J]ustice should not be thought of as connoting enduring inherent characteristics of just law, such as 'fairness,' 'equality,' 'the right reason of the Gods,' 'consonance with natural law,' and so forth." *Id.* 2. See also *id.* 46: "My theory of justice involves no search for the substance of universal and eternal justice; it is a theory of the sources of justice and the procedures by which raw materials of justice are made into the product."

may speak of just laws, of course, but always with reference to time and circumstance. With change in the milieu, laws may become unjust, so that reform is required. By well-conceived reforms in the law, new justices may be created. This is, for me, an inspiring way of presenting the tasks of officials, and indeed of everyone who has the opportunity to affect lawmaking: the *creation* of new justices. Now, there are certain conditions requisite to success in the enterprise which, as I understand it, constrain the very possibility of justice. At least three conditions seem to emerge. In addition Morris glances at a disposition of society that might subvert all its justices, although he does not place a formal qualification on his definition of justice to allow for it.

The conditions of justice are these, at the least: First, it is a public good: "In my theory there can be no justice without a public . . ."⁵ Second, that public must be humanized to the point where it can be said to have aspirations: "justice can be realized only when there exists a public capable of aspiring. . . [U]ntil the humanized public is greatly expanded our capacity for justice will remain very limited."⁶ Third, it is only the public's deep-rooted shared values that find expression in just laws: "Only genuine aspirations are the measure of justice; they alone should constrict the authority of the legislative incumbents."⁷ Possibly this enumeration leaves out one or more elements in Morris' formal conception of justice. In particular, it may omit a criterion suggested in one of his titles: the sociality of the just. I shall refer to that element below.

What seems conspicuous by its omission is something that Morris speaks of, but leaves to the place of supplement. That is, justice cannot be realized unless there is a public ideal of (aspiration toward) inclusiveness in its life. On this point he speaks accurately and emphatically, as follows:

Only in a society in which numbers of people are allowed to contribute to the formulation of significant social designs is there a public whose aspirations can set the criteria for creation of justice. When such a public exists it usually does not include all people who have potentials for contributing to the formulation of social designs. Insofar as the existing public aspires to incorporate into itself those excluded ones, and insofar as that aspiration goes unimplemented, the resulting exclusion exemplifies injustice. If, however, the limited and existing public has no such aspiration, then the source of criteria of justice is narrowed, and, as a result, the potential for justice itself is undesirably limited. In some verbal sense this is not included in my definition of justice, and a puristical logic may foreclose the possibility of calling it an in-

⁵ *Id.* 46.

⁶ *Id.* 2-3.

⁷ *Id.* 58.

justice. But a polity which dwarfs its capacity for justice by snobbery must, it seems to me, be called unjust.⁸

Just at this point one can see, peeking through an opening in the tent of Morris' system (and he perfectly well knows it) the eyeball of a pre-ordained Justice: a conception characterized (and rejected) by both Morris and Rawls as intuitive.

I do not want to make too much of this point, for it mainly goes to show that Morris is content to form a conclusion that his system does not compel. If it requires a supplement to his general definition of justice to account for the conclusion—a gusset in the basic tent—he will add it. Very well, then: he is not hugely committed to making an all-purpose system. Still it is worth noticing that Morris and Rawls, contemporaries in expounding consensus theories of justice, both need a supplement at the point where the public, otherwise as humane as you please, identifies itself narrowly. It may be, of course, that every tent patterned upon Rousseau leaks at the same point. To close the system at this point might be thought a fairly urgent need, if we are asked—as we are by both these theorists—to make room in the legal order for natural things.⁹

“Stated in its simplest form,” Morris begins, “my theory of justice is this: the more that law implements the public's genuine and important aspirations, the more just the legal system becomes.”¹⁰ But the prospects of producing justice in a society are never exhausted, as I understand him. I interpret him to mean that justices are not simply the reciprocals of injustices, as some would say; far from it. To create just laws is therefore quite a different enterprise from eradicating injustices. When it is forming new and genuine aspirations, the public is generating materials for justices not foreknown, and not even possible, at an earlier stage. As the storehouse is inexhaustible, so the prospect of doing justice anew is limitless; it broadens down from age to age. The vision is one of irresistible appeal. Of course there is a dark side: there are failures of nerve and intelligence; there are torpid officials, and others seized by idiosyncratic notions of the public weal; there are factions obscuring the public's aspirations; and there is ignorance about the means of implementing them. All these impairments in the process of creating justices, and others, Morris describes and illustrates. He will not have it that worthy aspirations translate themselves as of course into just dispositions; that is an error of Rousseau and others. It may indeed happen that new just laws occur unaided by skill and technique. “For the most part, however, justice

⁸ *Id.* 46. See also *id.* 64: “The voice of the outsider should not be stilled”; *id.* 75; *id.* 59 on “prophetic shock minorities.” The theme is a persistent one.

⁹ As to Morris, see text accompanying notes 32-33 *infra*. As to Rawls, see J. RAWLS, *supra* note 1, at § 77.

¹⁰ C. MORRIS, *supra* note 2, at 1.

develops as the result of new doctrines promulgated by judges, legislators, administrators, and the unofficial elites that control the 'inner orders' of our important institutional associations."¹¹

On this conception it is important to account for the general functions and responsibilities of officials. Rawls can derive their role from the principles of justice and fairness—though they may not carry us very far. We may expect a theory of justice to provide a concrete ideal of official behavior, and lawyers in particular will wish for that. Happily the conception of justice as grounded in genuine public aspirations easily provides a natural and attractive account of the matter, and so Morris meets our expectation handsomely. Succeeding in this, the theory gains a special allure. (I wonder if, more than he knows, Morris is drawn to the basic conception by its value in this respect.) Lawmakers should act as *agents* of the public, to discern and give effect to its genuine aspirations, each within the authority of the office committed to him. "When law is imposed upon the public by lawmakers acting as though they were principals it is just only by accident."¹² The responsibility is laid on legislators and judges alike, and it is an exigent one. Of its bearing on legislators Morris says this:

Sometimes the public's genuine aspirations are difficult to identify, formulate, or implement. The democratic legislator is, nevertheless, obliged to try to recognize and realize the public's deep-rooted shared values.¹³

The case as to judges is more complex, but they too come under the general stricture:

[T]hey should play neither god nor philosopher-king. They serve the cause of justice steadily by working at implementing, not their own, but the public's aspirations. . . . When these aspirations are inchoate, great talent is needed for responsible formulation.¹⁴

Law revision through the judicial process is of course a particularly delicate undertaking. "A judge who revises the common law should exercise cool and demanding reason while exploring the public's aspirations, the social facts, and the social value of the particular segment of structured common law."¹⁵ And equal care is sometimes required, of course, in the interpretation of statutes. Morris covers this ground thoroughly, making connections as he goes with the visions of justice that preeminent philosophers and judges have entertained.

Two of his judgments on the judicial process seem especially

¹¹ *Id.* 61.

¹² *Id.* 21.

¹³ *Id.* 58.

¹⁴ *Id.* 45.

¹⁵ *Id.* 149

notable to me. One concerns the duty of a judge when the problem in hand is close aboard a statute, but seems not to have been considered by the legislature—the case of a “gap” in enacted law.

We are sometimes told that a judge confronted with a gap in a statute should try to guess what the legislature would have done had it tried to fill the gap. Perhaps this advice tends to put the judge in a properly objective frame of mind and helps him to control his own irrelevant predilections. It seems to me, however, that this advice is always theoretically and sometimes practically unsound. It is like confusing the pianist's permitted improvised cadenza with the composer's written music.¹⁶

Guidance, to be sure, the judge should take from enacted law when it affords an analogy, or shows a “systematic design . . . surrounding the gap he fills.” Having done that, “he gives statutes all the genuine meaning they have; when faced with problems not covered by enacted law he usually should maintain the social values promoted by the processes of the common law.”¹⁷

“The social values promoted by the processes of the common law”: in this revealing phrase Morris commits himself to an extraordinary claim of rationality. He puts forward Cardozo's model of decisionmaking, in problematical situations, as a test case for the question, “How irrational is the common law?” One of the methods described by Cardozo is that of sociology, a method that has seemed to some an exemplar of irrationality, a wild card in the deck. And what are the rational grounds of choice between this method and others, such as the method of philosophy, or the method of history?¹⁸ Morris is rightly concerned about that, and evidently believes that Cardozo's account needs supplementing, if not correcting, so as to exhibit the rationality of common law processes. Without that, its social values cannot be depended upon. Subscribing to those values as he does, Morris is led to prescribe the judicial function rather rigorously. There are realms in which the courts are forbidden to pursue their notions of social welfare. And he lays down strictures against it: he tries “to outline a little more clearly than Cardozo did the limits on courts' authority to use the method of sociology.”¹⁹ On the other hand, he makes it obligatory that they use it when authorized.

Cardozo championed only the *authority* of judges to adapt the common law to the public's aspirations; he did not

¹⁶ *Id.* 129.

¹⁷ *Id.*

¹⁸ For Cardozo's explication of these forms of reasoning, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1922).

¹⁹ C. MORRIS, *supra* note 2, at 148.

say that judges were *obliged*, in proper cases, to update the common law's justice.²⁰

. . . [I]n my view it is none too soon to recognize that whenever courts are authorized to use the method of sociology they are obliged to use it. The obligation is rational and is, from time to time, becoming better rationalized.²¹

To make this point, and embed it in a general theory, is a special merit of justice as the expression of public aspirations.

The relation between enacted and traditional law is the chief topic of Morris' excursion into Chinese law, which he entitles *The Board of Punishments' Interpretation of the Chinese Imperial Code*. Here he illustrates the common forms of reasoning in troublesome cases affected by statutes: purposive interpretation, negative implication, extrapolation by analogy. The evidences of these processes in the record of the Board are especially interesting because the setting of its work is so exotic to us. If it was generally faithful to the Code, as Morris believes, at least the Board was often pressed to use high artistry in rationalizing its rulings. "Each rule in the Ch'ing Code was calculated to link a narrow category of misconducts to a single specified punishment in such a way that every infraction of a single provision will be equal in gravity to every other infraction and merit exactly the same punishment."²²

Morris is hesitant in his comments on the Board's record, knowing that his Western preconceptions may distort his judgment, and he provides a brilliant exposition of the differing ideologies of enacted law in the West and in the East. He has a strong confidence (though it bears marks of having been painfully won) in the possibility of just dispositions under enacted law. The competing values of flexibility and rigidity can be accommodated in well-wrought legislation, though at times, as with the imperial codes, one or the other is depreciated. Morris notes many instances of new justices created this way. "Because of the necessarily confined authority of judicial law reform, most of our hopes for a more just society will be realized, if at all, through legislation."²³ Yet he is sensible also of legislative anomie, and the exhaustion that leaves outdated statutes in place: "No legislature could possibly give serious attention to all the bills that are dropped into the hopper. . . . The limit on legislative energies has a double importance: it not only restricts initial output but also hinders revision of enacted law."²⁴ It might be added—though in this his view is

²⁰ *Id.* 13.

²¹ *Id.* 149.

²² *Id.* 157.

²³ *Id.* 149.

²⁴ *Id.* 126.

less explicit—that legislators should not attempt to stop off every error that a judge might make. It is not only a necessity, it is a duty, to avoid an attitude of cynicism about the propensities of courts. That attitude is corrosive; it breeds distrust; it invites error. (For monstrous overwriting of a statute in that spirit I cite the example of section 60 of the Bankruptcy Act.)²⁵ I should like to think that Morris agrees.

In any event, his comments on particular enactments often put them in a fresh perspective. He appraises a provision of the Uniform Commercial Code (section 2-302, on unconscionability) in light of eighteenth century philosophy; it is “flexible but not limp” he concludes.²⁶ On the rigidity of scheduled benefits for industrial accident victims and for road injury victims, he observes that the former is curable by the political muscle of labor, but that “motor accident victims have no lobby.”²⁷ For the courts, however, the virtue of tracking an exigent statute is often compelling, and in that connection he says, “Were the court to make an exception and break the shell of rigidity, the yolk of justice might spill out.”²⁸

I have observed above that Morris does not expect justice to be done regularly through zeal alone, unassisted by skill and technique. Elaborating this theme, he dwells on the importance of information. For doing justice systematically a high regard for facts, and for the secure possession of them, is required. He identifies three kinds of information helpful in justifying the law, including the costs of proceeding this way or that to effect the public will. “Science and technology may assist the maker of just laws by presenting data on any of these three factual areas.”²⁹ Like the best of judges, Morris knows that discounting a fact is a quick way to subvert justice, and has a horror of good will misapplied that way. (As an expert on tort and insurance law, Professor Morris took some pains to nose out facts essential for evaluating no-fault insurance long before Congress got into the act.) It is not his view, however, that justice can be created by the procedures used to establish scientific truth. That view he stigmatizes as *scientism*: it is “too austere, too unsocial, too disengaged from the public’s aspirations.”³⁰ He associates it with the mistake of expert law-

²⁵ 11 U.S.C. § 96 (1970).

²⁶ C. MORRIS, *supra* note 2, at 127.

²⁷ *Id.* 126.

²⁸ *Id.* 148.

²⁹ “Three kinds of information justify the law: (1) knowledge of the public’s aspirations; (2) acquaintance with possible means for implementation; (3) data on cost, both in dollars and side effects, of alternative ways of proceeding. Science and technology may assist the maker of just laws by presenting data on any of these three factual areas.” *Id.* 3.

³⁰ *Id.* 60.

makers who, forgetful of their role as agents, presume to advance the common good "as they think best."³¹

Now the conditions of justice that I have listed above, including especially the existence of a humanized, aspiring public, are also those conducive to the work of scientists and artists. Their work, however, is autonomous in a way that lawmaking is not. In pointing this out, Morris uses the expression mentioned above: "the sociality of the just." Possibly he means by it to refer to a component of justice in addition to those already listed; possibly it only summarizes what has gone before. The phrase is a bit obscure, but it evidently connotes for him the dependence of lawmakers on community impulses, and a certain revulsion against those who set themselves up as technocrats.

Under the influence of technology, Western thought has exhibited a certain condescension toward alien cultures, and an attitude of exploitation toward the natural order—certainly two of its uglier traits. Morris is wonderfully free of both. In a brief, concluding chapter on *The Rights and Duties of Beasts and Trees*, he describes a cosmos that Westerners have almost lost sight of, one in which man and nature move in consonance. In classical Chinese thought, law expressed an "on-going, flowing, natural order" embracing man and his surroundings. As the dynastic Chinese conceived the world, men and beasts and trees dwell in a benign continuum; for them it takes no Blakeian apocalypse to reconcile creation. "They opined, instead, that heaven constantly intones a cosmic harmony; this intonation vibrantly orders the animate and inanimate world."³² This conspectus Morris depicts with special grace and wit, and it suggests to him a new public aspiration.

Nature should no longer be dislocated on whim or without forethought about the harm that may ensue; he who proposes dislocation should justify it before he starts.

. . . .
 . . . When legal rights are, by statute, conferred on feral beasts, green forests, outcroppings of stone, and sweet air, and when these legal rights are taken more seriously, men will respect these duties in much the same way as they respect their other legal obligations. A camper who thinks of his legal duty to clear up his mess as an obligation, not to the government, but to the campsite itself, is less likely to neglect his duty.³³

Morris wrote along this line as early as 1964, when the public aspiration for an unsullied environment was only nascent. He does not claim,

³¹ *Id.* 50.

³² *Id.* 192.

³³ *Id.* 198-99.

for himself or anyone else, authority to speak for the world of wordless things, but he does advance a presumption "in favor of the natural," and against disruptions of nature's order. In this matter, as in others, he is inspired by the model of forensic proceedings: it is characteristic of him to think of a presumption as a first step toward legal recognition of ecological interests.

With Morris' *Justification* in hand, every week's advance sheet sets up a new reverberation of his thought. I have mentioned already the current concern with problems of sentencing. Two other illustrations of the currency of his ideas may be found in a recent *Supreme Court Reporter*. One of the decisions reported there concerned the proposed "development" of Mineral King Valley, and the effort of the Sierra Club for its preservation.³⁴ The Court concluded that the interests of users of the valley were not properly represented in the litigation before it. Mr. Justice Douglas, dissenting, called for recognition of the valley itself as a party in interest. Although Morris does not speak to the technical problem of the case, he does suggest a method, traditional in the courtroom setting, for undergirding protection of the natural order.

Nonhuman aspects of that order should be thought of as at least presumptively valuable in themselves. [If] we all tended to hold a general presumption in favor of the natural we would move more unquestioningly and surely toward an ecologically sound world.³⁵

Another set of opinions in the same volume is a graphic demonstration of the difficulties in identifying the public's genuine aspirations—those in the death penalty cases.³⁶ Is it blood-lust that has sustained capital punishment? Confidence in the mercy of our juries? Hardened apathy? Widespread ignorance of the incidence of executions? How may a judge, strongly gripped by personal revulsion, defer to a public conscience that is in crisis, or hesitant, or indecipherable? The extraordinary soulbarings on these questions in the Court show that a noble standard of just decision can be excruciating for the judges. Morris tells us that this is so not only in cases of high constitutional import, but also in cases of ejection and product liability. He recalls judges and legislators time and again to a sense of their duty as agents, authorized to create justice in circumstances altered by time and peculiar to place. "Law-making is a response to felt needs, and legislators and judges are tenants-in-common, along with the rest of their society, in the culture of their time and place."³⁷ So runs the shimmering thought (and prose) of this book.

³⁴ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

³⁵ C. MORRIS, *supra* note 2, at 18.

³⁶ *Furman v. Georgia*, 408 U.S. 238 (1972).

³⁷ C. MORRIS, *supra* note 2, at 14.

I was once in Clarence Morris' office when a student came to see him—one better known for *bonhomie* than for studiousness. He asked Morris to exercise charitable judgment on his exam paper, making some excuse or other, and what Morris said to him was this: "Peppy, I will do everything for you that the angels could do." Over the years since I heard him deliver that line—arm around Peppy's shoulder—it has suggested to me a part of the character of a great teacher. It is tinged with a pleasant irony: the angels themselves could not have made Morris rejoice in that exam paper. But they were kindly words, full of good will, and they hinted at the wings of mercy.

In his teaching and all his works—certainly in *The Justification of the Law*—Morris draws on a deep wellspring of good will. To that he joins a commanding intelligence. These two faculties mark a man's power of appreciation. I have not known anyone who surpasses Clarence Morris in that power, or who applies it over a wider range. It is a rule that we cannot respond finely to all fine things; here or there we fail in zest or wit (and a dullard fails in both) before some wonders. But the rule seems not to hold for the two Morrisises, Clarence and Bill. Nothing winsome or excellent passes their way—an elegant concert, a mummers' parade, an appeal to justice, whatever—without being seized by their affection and sure appreciation. I think I have (thanks to Ibsen) an exact understatement of the case for them: they are bright buttons on the world's waistcoat.

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