

# Morality and Liberal Legal Culture

## Woody Allen's *Crimes and Misdemeanors*

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Writing about morality in the United States in the late twentieth century may seem about as urgent as decrying the dangers of the Bolshevik menace. The issue seems at once old, repugnant, and unfit for contemporary social theory. Yet the problems of morality and politics, or of morality and the law, remain stubbornly and irksomely present. All legitimate legal systems maintain their authority through an appeal to some shared moral vision. The alternatives are on the one hand, a legal system that makes decisions on a completely ad hoc basis, or one that maintains itself solely via the exercise of force.

And yet, having said that legal systems rest on an assumed set of shared moral values or principles does little in terms of characterizing the precise nature of such a vision. The problem was exemplified when Oliver North raised the issue at the Senate hearings on Iran-Contra by claiming that he followed a higher law in disobeying the express orders of Congress. The entire notion of morality has most often been associated with conservative politics, and it is sometimes forgotten that even classical liberal thinkers, the founders of the American system among them, assumed a common moral code. Paradoxically, it was the presence of a common moral vision that allowed them to argue for individual freedoms. That is, most liberals believed that there were some broad parameters of belief and behavior that could be assumed among all rational people. It was within those parameters that freedom must be protected. This is not an assumption that is shared by contemporary liberals or radicals, however. Indeed, the idea of a shared morality is, generally speaking, anathema to the

ideological left. Consequently, discussions of morality and law have mostly been left to those on the right.

The conceptualization of progressive politics as a moral issue has been articulated in a spate of articles by Michael Lerner that appeared in 1992 in the progressive Jewish magazine, *Tikkun*. In advocating a "politics of meaning" Lerner rejected moral relativism and took the position that, "A politics of meaning *is* committed to tolerance, but only as one of a set of values that includes love, caring, cooperation, responsibility, justice, peace and moral and spiritual sensitivity."<sup>1</sup> In calling for a language of shared ideals and suggesting that the Democratic party develop a party platform based on a politics of meaning, Lerner contended that, "Liberals have not succeeded in keeping values out of public life, they've only succeeded in keeping their values out, and have left the terrain open for right-wing values."<sup>2</sup> Hillary Clinton invoked the rhetoric of the politics of meaning in her advocacy of a national health care plan. In April 1993, the first lady delivered a speech in which she said, "We lack at some core level meaning in our individual lives and meaning collectively, that sense that our lives are part of some greater effort, that we are connected to one another."<sup>3</sup> Thus, talk of morality seems to strike a chord, and has even crept onto the liberal policy agenda. It is worth reviewing some of the debate that has taken place regarding liberalism and morality.

Today, legal systems are practically speaking the places where public issues of right and wrong get decided. Unlike early liberals who conceptualized individual freedom as taking place inside a shared moral context (most often religious), the idea of a shared moral vision has slipped away from our legal culture and has been increasingly supplanted by the idea that freedom is in and of itself a moral value.

Historically, morality has had an ambiguous relationship to legal systems, and the secularization of the state in western capitalist countries during the modern period has only compounded this issue. Law in western liberal states is continually confronted with a crucial dilemma: Is it possible to devise and sustain a legitimate system of rules that is not rooted in any particular moral vision? If there are not transcendent values or eternal truths, but only a person's individual and virtually unfettered freedom, what is the basis for law, judicial interpretation, and the just resolution of disputes? Indeed, on what grounds can we speak of justice at all? Can secular legal systems ever have the same force as they once had before they were torn from their religious and

natural law foundations? This is really to ask, as one of the other contributors to this volume has done, "Is law possible?"<sup>4</sup>

Some have argued that even liberal states and legal systems are ultimately dependent upon some grounding notion of God even when they claim they are purely secular. This argument was made, in fact, by liberalism's preeminent theorist, John Locke. In the course of making the case for religious pluralism, Locke disallowed the need to tolerate atheists as, "Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all."<sup>5</sup> In Locke's view, without an omnipotent judge or God-eye, we cannot know the difference between right and wrong, and moral action becomes impossible. It is, then, probably no accident that the concerns of one of the major architects of liberalism remain with us in liberal legal systems today.

The problem that Locke raises lurks beneath many very lively legal debates among social theorists, legal positivists, critical legal studies advocates, and rights theorists.<sup>6</sup> If the individual is by nature greedy and appetitive, as the predominant liberal capitalist ideology holds, without laws to restrain us we would surely follow our most base instincts. By extension, positive laws without transcendent foundations are merely arbitrary rules.

This contemporary problem regarding the nature of justice in a godless world is illustrated nicely in Woody Allen's film, *Crimes and Misdemeanors* (1989). The film is useful as a concrete example of a moral dilemma, and seeing it that way can serve to sharpen our analysis. The use of popular culture to illustrate debates in so-called high theory also shows the extent to which the stuff of theory exists as part of the practice of everyday life. This essay is not intended to deepen anyone's understanding of film theory. It is no more than a meditation on the issue of morality as it exists in contemporary liberal legal culture.

Though it can be said that moral dilemmas are a kind of personal obsession for Allen, it is in *Crimes and Misdemeanors* that morality is most starkly counterpoised to nihilism. I use Allen's film as a way to discuss the problem underlying liberal legal systems; the possibility of morality and justice in a world where God is dead. Allen's film can be used to illustrate the dilemma and to provide a coherent discussion of the issues raised by it. Ultimately, the film reflects the view that justice is not possible because there is no redeemer, and that, therefore, the key is to sustain the hope that happiness and goodness are possible even in the face of amorality. On its most basic level, *Crimes and Misdemeanors* is a film

about the perfect crime, which asks where one can draw the line between good and evil if one has no externally valid moral principles.

### The Film

*Crimes and Misdemeanors* opens at a testimonial dinner for one Judah Rosenthal (Martin Landau). Rosenthal, a cultured ophthalmologist and philanthropist, is being lauded for raising the money to build an ophthalmology wing at a local hospital. He looks modest and pensive. Yet, in a flashback we learn that earlier that day a letter had been delivered to his home. The letter was from his very distraught mistress of two years, Delores Paley (Anjelica Huston). In the letter, addressed to Judah's wife, Delores had confessed her two-year love affair with Judah and requested a meeting with his wife, Miriam (Claire Bloom).

When we return to the testimonial dinner, Judah has risen to speak. Even though he has always been a man of science and a skeptic, he explains, he must admit that the hospital wing is the result of "answered prayers." He then proceeds to tell a story about his father. It is a story that frames the rest of the film. A religious Jew, his father had told the young Judah that, "the eyes of God are on us always." Judah tells the testimonial dinner audience that he had wondered as a boy: "What were God's eyes like? Unimaginably penetrating, intense eyes, I assumed." By his own admission, it is no coincidence that he chose a specialty in ophthalmology, and by extension, no coincidence that the main character in this film is an ophthalmologist. For this is a film precisely about seeing, not seeing, and the nature of God's eyes.

At this point in the film we are allowed to see through Judah's eyes, that is, we are told a story from his perspective. As he sees it, the problem is Delores. Angrily, Judah confronts Delores with the letter she sent to Miriam. She, in turn, hysterical, accuses him of breaking his promise to leave his wife. "You've been my whole life for two years," she cries, telling him she's given up "other men" and "business opportunities" for him. Judah claims in turn that he made no promises. He charges that she gave up nothing, and begs her to understand that he cannot walk out on twenty-five years of marriage.

The Judah/Delores relationship is juxtaposed to a seemingly lighter drama. This second major story line concerns Cliff (Woody Allen). We are introduced to it in a scene in which Cliff is at the movies with his young adolescent niece, Jenny. He shares with Jenny a love of 1940s

movies, and confides in her (far too much) about his failing marriage, his faltering career as a documentary filmmaker, and his rivalry with his brother-in-law, a narcissistic but well-respected television producer, Lester (Alan Alda).<sup>7</sup>

The subtext of all of the major relationships in this film is the problem of moral decision making. Questions of morality are posed here as a series of conversations between several rival authorities. In particular, the religious and existentialist views are featured as personified by Judah's wife's second brother, Ben (Sam Waterston), a rabbi who has trouble with his eyes, and a philosopher named Louis Levy.<sup>8</sup> The third view, a nihilistic "might makes right" perspective, is articulated later by Judah's Aunt May. Allen's film can be read as a study of these three positions.

Cliff is utterly taken with the old professor Levy and is making a documentary film about him. As we watch Cliff's film, Professor Levy speaks directly into the camera, and we too are confronted with him as he seems to speak to us: "The unique thing that happened to the early Israelites was that they could see a God that cared. He cares, but at the same time, he also demands that you behave morally. But here comes the paradox: What's one of the first things that that God asks? That God asks Abraham to sacrifice his only son; his beloved son to him. In other words, in spite of millennia of efforts, we have not succeeded to create a really and entirely loving image of God. This was beyond our capacity to imagine."

In contrast to Levy, Ben, the rabbi, believes that it is precisely God's love and forgiveness that can offer redemption for the minor indiscretions one invariably commits in life. While examining Ben's eyes and looking deeply at the Rabbi, eye to eye, Judah breaks down. "I'm in such trouble, Ben. . . . May I confide in you?" He proceeds to tell Ben of his affair with Delores. He tells Ben he cannot remember if "promises were made," as Delores accuses, but that he feels the affair was a foolish adventure undertaken only for pleasure and lust. Ben tells Judah to confess the "small infidelity" to Miriam, to ask her forgiveness, and to go on to a richer life.

"Our entire adult lives you and I have been having this same conversation," Judah responds in frustration. "I know," shrugs Ben, "It's a fundamental difference in the way we view the world. You see it as harsh and empty of values and pitiless; and I couldn't go on living if I didn't feel with all my heart, a moral structure with real meaning and forgiveness and some kind of higher power; otherwise there's no basis

to know how to live." In this dialogue with Judah, Ben very clearly states the religious position.

The stakes are raised for Judah when it is disclosed that he took a temporary "loan" from the money he raised for the hospital wing in order to cover his losses in the stock market. Though the money was returned, Judah is made aware by Delores's threat to disclose the "loan" that he is actually technically guilty of embezzlement. The morality of Judah's whole life is called into question by Delores's deconstructing gaze, which forces him to face his several "indiscretions" from another point of view; that of a judgmental other.

At this point it is useful to remember Judah's earlier story about the ever-watchful "eyes of God," which construct us as moral subjects. Absent those eyes, is universal moral subjectivity possible? And what of Delores's gaze? What is Judah to make of *her* judgments against him? Thus, the question posed to Judah is whether to accept the perspective of the other (whether God or Delores) and to confess his wrong, or to ignore all impulses save for his own selfish ones and to continue leading what he now discovers has been a rather immoral life.

Meanwhile, Cliff has been hired by his nemesis, Lester, to do a documentary about the latter's life. The film will be for a television program called "Creative Minds." The producer of the documentary, Halley Reed (Mia Farrow), describes Lester as "an American phenomenon." Cliff, in contrast, despises Lester and is wildly jealous of his success. Lester fancies himself something of a philosopher, though, unlike Levy, Lester's thoughts take the form of shallow maxims like, "comedy is tragedy plus time," or "if it *bends* it's funny, if it *breaks*, it's not." Lester carries with him a hand-held tape recorder into which he says things like, "Idea for TV farce: A poor loser agrees to do the story of a great man's life and in the process comes to learn deep values." In the end, Cliff is fired by Lester for inter-cutting scenes of Lester with footage of a ranting Mussolini. "God," Cliff complains to Halley, "you'd think nobody was ever compared to Mussolini before!" Besides providing some very funny moments, Lester's character raises the issue of perspective once again, since everyone else in the film greatly admires Lester, not the least of whom is Cliff's aloof wife, Wendy. Wendy shows this by continually making unfavorable comparisons between her husband, Cliff, and her much adored brother, Lester.

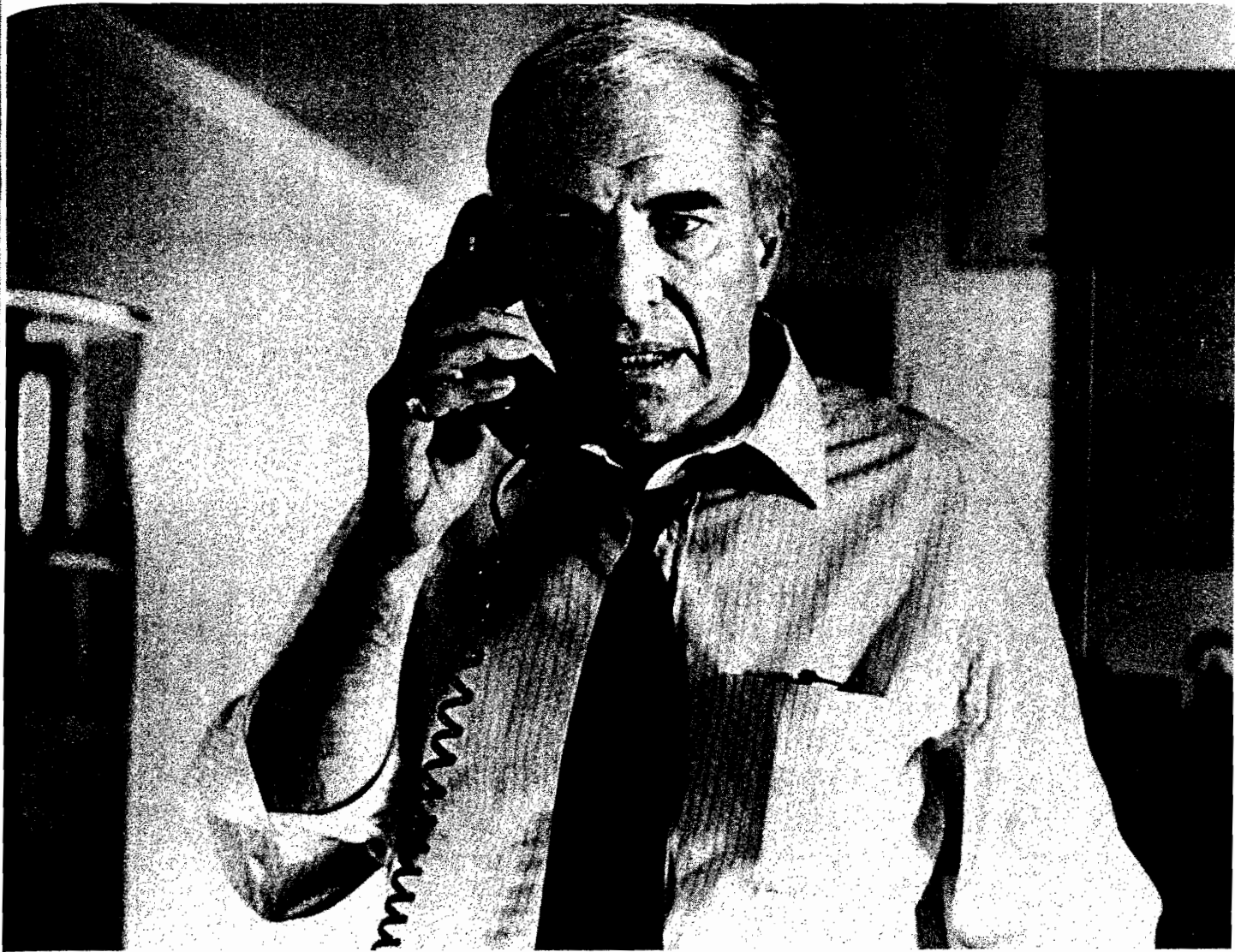
As the film progresses, Judah's situation becomes more desperate. Eventually, he is led to call his sleazy and financially insecure brother, Jack. Jack symbolizes Judah's darker side as indicated by the alliterative

effect of their two names. Jack tells Judah (a name too unusual and too similar to "Judas" to be overlooked) that Delores "can be gotten rid of." When Judah reacts incredulously to the hint of murder, Jack rebukes him: "you called me because you needed some dirty work done. That's all you ever call for." Complaining that Judah doesn't live in the "real world," and that he, "never liked to get his hands dirty," Jack claims that his own poverty has forced him to "face reality." The contrasts between "reality and romanticism," "reality and privilege," and "reality and morality" provide running motifs in this film. The implication is that the "real" world is unromantic, amoral, and impoverished. It is, of course, Judah whose entire life has been based on the illusion that he is a moral person and who is now thrust into complete confusion by the specter of his own amorality, and by his relationship with his brother.

Time passes. It is Judah's birthday. The birthday gift from his family, a treadmill, serves as an apt metaphor for his own indecision and frustration. Delores is calling his home. He walks the floors at night. He thinks endlessly about Ben, about Delores, about the ever-increasing urgency of his dilemma. The Ben in his dreams cautions, "It's a human life! Don't you think God sees!?" Finally reaching his decision, Judah responds to the dream-Ben, "God is a luxury I can't afford. . . . Jack lives in the real world. You live in the kingdom of heaven. . . . I will not be destroyed by this neurotic woman." Ben is appalled, "But the law, Judah! Without the law it's all darkness!" To which Judah asks in response, "What good is the law if it prevents me from receiving justice? Is this what I deserve?"

In this key scene, Judah turns away from "the luxury" of religious foundations to what he perceives as the "reality" of moral relativism and nihilistic individualism. Oddly, it is God's law that stands between him and his own definition of justice, which, it turns out, is no definition at all. Judah's notion that his own selfishness is a standard for justice would appear ironic were it not for the fact that individualism and individual judgments about moral questions are precisely the hallmarks of liberal societies. We are confronted here with the view that without a belief in something other than oneself, only the fear of punishment prevents us from doing wrong. Absent that fear, all is possible. The deeper issue is, of course, how are laws to be formulated and enforced without some implicit or explicit moral structure?

Again, time passes. One night while Judah and his family sit around the living room making plans for his daughter's wedding, Jack calls to inform Judah that, "it's over and done with so you can forget about



In Woody Allen's *Crimes and Misdemeanors*, Dr. Rosenthal (Martin Landau) faces the issue of whether or not morality is possible in a world that has abandoned God. (Courtesy of the Academy of Motion Picture Arts and Sciences.)



it. . . . It's like the whole thing never happened." Judah flees to the bathroom to wash his hands, evoking the familiar religious metaphor. Jean-Paul Sartre, too, has used the notion of "dirty hands" to suggest that man alone has responsibility for his actions, and that having that responsibility, he alone bears the guilt for evil in the world.

Indeed, at this point Judah does collapse into guilt. Memories of the warm times he once had with Delores come rushing back to him. He leaves the dinner party on a pretext about forgetting papers at his office and goes to Delores's apartment. He sees her lying dead; the camera pans to her eyes, which are open and focused directly on him. Still, Delores's gaze continues to accuse him. Here we are presented with another possibility. If the eyes of God are absent, perhaps the eyes of other people can create some moral structure. This is, in fact, the position of humanist existential philosophy, but it too is rejected by Judah.

Judah leaves the apartment in a rush, racked with guilt, and lies awake all night. Significantly, though he had at first interpreted Delores's eyes as accusing, he now begins to redescribe them to himself and to Jack in other terms. This redescription is the beginning of Judah's escape from guilt and responsibility. He describes Delores's dead eyes to Jack; "there was nothing behind her eyes if you looked into them. A black void." There is no soul behind the eyes, and there is no life behind them. Put in the terms of existentialism, Judah confronted nothingness, and the implications of this are considerable. In a flashback, we see Delores and Judah early in their relationship. He is giving her an eye examination. She asks, "do you agree the eyes are the windows of the soul. . . . My mother taught me that I have a soul that will live on after me when I'm gone." The film asks who is correct, Judah, who says that nothing is behind the eyes, or Delores, for whom the eyes are windows to an eternal soul.

In search of some kind of answer, Judah embarks on a journey into the past. He goes to the house where he grew up. When the woman who now owns the house allows him to have some time alone in the dining room, he reminisces about the seders of his childhood. He remembers, in particular, a debate among his adult relatives about the existence of God. For his Aunt May, a teacher, the fact of the Holocaust proves that "might makes right" and that there are no external standards. History is written by the winners, she argues, and if the Germans had won the war, everyone would understand that period of history very differently. "For those who want morality," she contends loudly, "there's morality; nothing's handed down in stone." Judah's father, in contrast, has

no doubt but that evil people will be punished. What if all religion is “mumbo jumbo,” another relative asks him? “Then I’ll still have a better life than all of those that doubt,” he responds defiantly. And what if it could be shown logically that God does not exist, they demand? “I will always choose God over truth,” he answers. And here is the new dilemma Judah faces—on the one hand, a religious tradition that demands faith in God even in the face of rationalist proofs to the contrary; and on the other, the possibility as articulated by Judah’s Aunt May, that might makes right. For Aunt May, the “might makes right” view is merely the realist one. The acknowledgment that there is no God is a type of freedom enabling man to take charge of his own destiny. While for Judah’s father, May’s position can only lead to spiritual desolation and decadence.

For Cliff, whose very name suggests a man poised on the precipice of evil, the ethical dilemma is, at this stage, a more innocent one. Yet it is the same one Judah once faced earlier in his life; namely, whether or not to cheat on his wife. In the context of the film, the actions of Cliff and Judah are on a continuum. Cliff desperately wants to have an affair with Halley (the TV producer), but is aware that irrational sexual desires may be leading him astray. “It’s very hard to get your heart and head together,” he quips to his niece, “In my case they’re not even friendly.”<sup>9</sup>

Up to this point, Cliff had been comforted by the theories of Louis Levy. But Cliff is thrown into a crisis when Levy commits suicide, leaving behind an unlikely and amusing suicide note that says simply, “I’ve gone out the window.” As told by the note, Levy’s philosophy has also been metaphorically thrown out the window. “The world is a cold place,” Levy had said in an earlier interview, “it’s we who invest it with our feelings.” What does it mean, then, for Levy to commit suicide? Cliff laments, exasperated, “for seventy years he says ‘yes’ to life, now all of a sudden today he says ‘no.’”

Some resolution to these questions comes during the final scenes of the movie, which take place at a wedding. By this point, Ben has gone completely blind from the illness Judah had diagnosed many months before. Cliff and Wendy are divorcing. But Judah; Judah is very happy and relaxed. Cliff, still in a crisis over the death of Levy and his own divorce, wanders about the wedding party lonely and unhappy. Across the room Cliff sees Halley enter with Lester, to whom, as it turns out, she is now engaged to be married. Further devastated by this news, Cliff slips into an empty room away from the main party. Symbolically, it is

a room into which Judah also happens to stray. The subsequent scene provides the final discussion on the issue of moral decision making.

Judah remarks, "You look very deep in thought." And Cliff responds, playing to the knowing movie audience, "I was plotting the perfect murder." Judah asks whether it is for a movie plot, then says thoughtfully, "I have a great murder story; great plot. . . . My murder story has a very strange twist. . . . Let's say there's man who is very successful. He has everything . . ." And with that Judah proceeds to tell Cliff his own story.

"He finds that after the awful deed is done he's plagued by deep-rooted guilt—little sparks of his religious background which he'd rejected are suddenly stirred up. He hears his father's voice, he imagines that God is watching his every move. Suddenly, it's not an empty universe at all, but a just and moral one, and he's violated it. He's panic stricken. He's on the verge of a mental collapse; an inch away from confessing the whole thing to the police. And then, one morning he awakens. The sun is shining and his family is around him, and mysteriously—the crisis has lifted. He takes his family on a vacation to Europe and as the months pass he finds—he's *not* punished. In fact, he prospers. The killing gets attributed to another person—a drifter who has a number of other murders to his credit, so, what the hell, one more doesn't even matter. Now he's scott free. His life is completely back to normal, back to his protected world of wealth and privilege."

"Yes," Cliff breaks in, "but can he ever really go back? . . . His worst beliefs are realized. It would be tough to live with that."

"What do you expect him to do; turn himself in!? This is reality! In reality, we rationalize, we deny or we don't go on living," says Judah.

But Cliff doesn't like Judah's story. If it were going to be his movie, he says, he would have the protagonist turn himself in, "because then your story assumes tragic proportions. In the absence of a God, people are forced to assume that responsibility for themselves." Here, Cliff articulates the existentialist position.

"That's fiction!" Judah bellows. "That's movies! I'm talking about *reality*. If you want a happy ending, you should go see a Hollywood movie." Thus, Judah's transformation has been one in which both God and the possibility of morality have been rejected. For Cliff, though God is dead, moral decisions are still possible, but only if humans are willing to take on those formerly God-like responsibilities themselves.

The irony cannot possibly be lost on the audience; the scene concludes with a long shot on Judah walking out of the room in a classic Hollywood ending. Judah's wife, Miriam, gazes up at him lovingly and says, "You look very handsome tonight." "And you look beautiful," he replies, just before they kiss and walk around a corner arm in arm. The happy Hollywood ending is ironic, of course, since great evil has been done and gone unpunished, and there is no redemption. Meanwhile, Lester gets Halley, Levy is dead, and Cliff's wife is divorcing him. On these levels, the ending is not happy at all.

The closing scene of the film is a shot of the blind rabbi dancing with his daughter, a lovely and happy bride. As the music comes up, the old World War II standard "I'll Be Seeing You," we are again reminded of the importance of the gaze of an other. The voice-over is of Professor Levy: "We're all faced with agonizing moral choices. On a grand scale, most of these choices are on lesser points—*but*—we define ourselves by the choices we have made. We are, in fact, the sum total of our choices. . . . It is only we with our capacity to love that give meaning to the indifferent universe. . . . Most human beings seem to have the ability to keep trying. And even to find joy from simple things—like the family, their work, and from the hope that future generations might understand more." At that moment, the dance between the rabbi and his daughter ends to applause. Black out.

### **A Context for Analysis: The Problem of Morality in Legal and Social Theory**

Woody Allen's *Crimes and Misdemeanors* can be read as a text that serves to illustrate a problem in late twentieth-century social theory and jurisprudence: The privileging of individual freedom in liberal societies, and the concomitant rejection of universal morality traditionally associated with religious or natural law systems, seems to leave no basis for moral decision making whether on an individual or systemic level. The worst case scenario is presented in *Crimes*. In the film we see a hypothesis presented in the form of a story. The hypothesis is that individuals (that is, Judah and his brother) who realize there is no punishment either in this life or the next will make decisions based only on naked self interest. The same issue recurs in legal theory in the form of the argument that the absence of absolute and universal rules about right and wrong, and the contention that all rules are human-made,

means that the rules in legal systems are arbitrary and meaningless. In a sense, then, Allen's film reflects the view that a universal standard must be in place in constitutional interpretation lest the legitimacy of the court be damaged for the simple reason that its judgments are arbitrary, biased, politically motivated, or rest on force.<sup>10</sup>

In addition to the point about moral relativism, *Crimes* restates important issues regarding perspective and interpretation. In the film, competing individual interpretations call into question the very possibility of one *single* and *true* reality. This has been articulated in recent social theory as the condition of postmodernity.<sup>11</sup> If individual humans are the only true judges of their own behavior, we will be left with irresolvable, adversarial perspectives about everything. For example, in *Crimes* we are shown several perspectives about many events for which no one true answer is provided—did Judah make promises to Delores as she contends, or is she merely a neurotic woman; a case of “fatal attraction”? Is Lester really the insufferable boor that Cliff presents or is he the “creative mind” that Halley sees? Is Cliff a tortured genius, as he seems to think, or the “poor loser” that Lester sees?

The two problems illustrated in *Crimes*—the lack of a universal moral foundation and the postmodern problem of competing truths—are among the most significant issues in contemporary social theory and jurisprudence. It would seem that the problem of morality remains present even in an age of radically social-constructionist social theory. In evaluating some recent debates, it is worth considering how much recent social and legal theory has been able to move us beyond the choice faced by Judah—between religious determinism and nihilistic moral relativism.

One view that the film seems to portray seriously is a kind of existentialist viewpoint (a perspective half-heartedly represented in *Crimes* by Levy). In Jean-Paul Sartre's version of existentialism, the death of God is transformed into a liberating force. In explaining his philosophy, Sartre wrote, “God does not exist,” and “it is necessary to draw the consequences of his absence right to the end.” For Sartre, the existentialist “finds it extremely embarrassing that God does not exist, for there disappears with Him all possibility of finding values in an intelligible heaven. There can no longer be any good *a priori*, since there is no infinite and perfect consciousness to think it. . . . Dostoyevsky once wrote, ‘If God did not exist, everything would be permitted’; and that, for existentialism, is the starting point. Everything is indeed permitted

if God does not exist, and man is in consequence forlorn for he cannot find anything to depend upon either within or outside himself."<sup>12</sup>

For Sartre, the recognition of the death of God, which first appears to us as loneliness, can be reinterpreted by us as a most profound freedom. Although life is meaningless in and of itself and there is no human essence that precedes existence, this can be interpreted by us to mean that the main project of each human being must be to create meaning from the nothingness of life. For Sartre, all there *is* is human freedom and choice, and we are obligated to derive from them the meaning of our lives. Sartre's view, while compelling on many levels, does not relate directly to the problem as it pertains to states and legal systems. His is an individualist solution. One of the failures of *Crimes* then, is its inability to present a moral vision that is not tied either to God or to the individual. That is, the film presents no social or political vision of morality.

We might look to the Marxist tradition to find a way to conceptualize morality that is neither religious nor liberal nihilism. In that search we would be disappointed, however. Though Marxists have addressed moral questions, they have done so mostly obliquely.<sup>13</sup> The Marxist left has had a difficult time with moral questions, as the very language of "morality" has seemed to smack of religiosity, essentialism, and transcendentalism—all things the left has vigorously opposed as anathema to the ideas of historical change and the power of human agency.

Still, the problem of morality has begun to surface even in radical and social democratic circles. Steven Lukes has written convincingly about the paradox in Marx and Marxism regarding morality. On the one hand, Marx dismissed concepts like "justice" and "morality" as mere bourgeois ideology, but on the other, much of the Marxist critique of capitalist social relations has been offered in moral terms.<sup>14</sup> As Engels wrote, "According to the laws of bourgeois economics, the greatest part of the product does *not* belong to the workers who have produced it. . . . We are merely saying that this economic fact is in contradiction to our sense of morality."<sup>15</sup> Lukes concludes that the paradox regarding morality in Marxism can be resolved by realizing that Marx was critical of *bourgeois* and *idealist* concepts of morality, but not of liberatory ones rooted in concrete democracy.<sup>16</sup>

Perhaps the most interesting discussion of morality from a progressive perspective came in the work of the contemporary legal philosopher, Roberto Unger (who is credited with having later founded the

Critical Legal Studies Movement).<sup>17</sup> In his early work, Unger specifically addressed the problem later posed in Allen's film, terming it a problem of the liberal "privatization of ideals." The problem for individual judicial interpretation is related and no less formidable. Since meaning is not given and obvious, and there is no transcendent truth for jurists to find, doctrine appears arbitrary, ideological, and biased. Indeed, this is exactly what Unger and the Critical Legal Studies Movement subsequently argued that legal doctrines are. Unger writes,

If we admit that words lack self-evident reference, that meaning must ultimately be determined by purpose and context, and that the intent of prior lawmakers is always more or less incomplete, it becomes doubtful whether a truly impartial method of judging could ever be fashioned within the conditions of liberal society. The sense of the precariousness and of the illegitimacy of consensus makes it difficult for the judge to find a stable authoritative set of shared understandings and values upon which to base his interpretations of the law. Hence, every case forces him to decide, at least implicitly, which of the competing sets of belief in a given society should be given priority. And it requires him to rely on an accepted morality that, even if it can be identified, is increasingly revealed as the product of a social situation itself lacking in sanctity. To this extent adjudication aggravates, rather than resolves, the problem of unjustifiable power.<sup>18</sup>

Unger's unusual solution suggests that universal values must be retained, but they must not be conceptualized as transhistorical. He sees this as a return to some notion of human nature, albeit one that is never fixed but always attuned to the shifting particularities of various cultures, time periods, and individual desires. For Unger, human life will always be a struggle between a human's individualistic, desiring self and his or her aspirations toward the ideal, the good, and community.

Unfortunately, Unger believes that this ideal can never be fully achieved in history except by God. Thus, he ends *Knowledge and Politics* with a prayer, "But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God."<sup>19</sup> This, of course, is a profoundly disturbing conclusion as it, in effect, offers the return to a pre-bourgeois past as the solution to the contradictions in liberalism. As Stanley Fish has pointed out, Unger's solution is no solution at all, as it leaves us with the initial question it sought to resolve.<sup>20</sup>

Unger's claim is that we are often in tremendous agony about the decisions we make and that the conflict we feel can be conceptualized as an internal conflict that is figured in a liberal context as one between individualistic desire, on the one hand, and an impulse toward community, on the other. Despite its ultimate religiosity, Unger's early view has some advantages. It allows for confusion (in the best possible sense), for a wavering between possibilities, for "negativity" and for what has been called in some Marxist circles, a "subjective moment." That is, people are not *wholly* determined by their circumstances. They retain the ability to speculate and to choose among competing possibilities that are presumably neither wholly determined by their contexts, nor fixed a priori (a la religion). This moment of choice can be described as the moral potential of humankind—a potential that exists, to be sure, within a given social context. But it is a context we have created, and one that is changeable. As Marx wrote,

The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the mental intercourse of men, appear at this stage as the direct efflux of their material behavior. The same applies to mental production as expressed in the language of politics, laws, morality, religion, metaphysics, etc., of a people. Men are the producers of their conceptions, ideas, etc.—real, active men, *as they are conditioned by a definite development of their productive forces and of the intercourse corresponding to these, up to its furthest forms.* (emphasis added)<sup>21</sup>

In this moment of indecision we are, in effect, not completely contextualized, not completely committed to any one particular identity, yet we remain partly contextualized within the larger liberal context. The character of Judah illustrates the way in which we redescribe reality and change our own identities in the course of moral decision making. The question remains, can we conceive of an interpretive guide that is not deterministic and transcendental (like religion), not nihilistic (like liberalism), not apolitical (like existentialism), and not evasive (like most of Marxism)? Is it possible that there is a need for some kind of an ethic rooted in a critique of liberalism and based on a democratic, multicultural, humane ideal?



## Notes

Thanks to John Denvir, Bill Halthom, Melissa Wye, and the audience and my co-panelists for the panel, "Law and Popular Culture" at the 1994 Western Political Science Association meetings for comments on this essay.

1. Michael Lerner, "Politics of Meaning," *Tikkun* (July-Aug. 1992): 10.

2. Ibid.

3. Quoted in Kathryn Robinson, "Hillary Gets Religion," *Seattle Weekly*, June 9, 1993, p. 7.

4. Richard Sherwin, *Framed*, in this volume.

5. John Locke, *A Letter concerning Toleration*, with an introduction by Patrick Romanell (Indianapolis: Bobbs-Merrill, 1955), 52.

6. The debate between H. L. A. Hart and Ronald Dworkin, for instance, was at bottom a debate about why we should obey laws and which kinds of rules should govern interpretation and obedience. The positivist position, that laws are things passed by legislators, contrasts with the Dworkin position that "rights" are privileged. Critical Legal Studies, of course, disputes both of these positions in holding that law is basically reflective of the ideology of the dominant culture, and that its foundation is power. My point is that these debates are only possible (and necessary) in the context of secular legal systems. See H. L. A. Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1981); Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1978); Dworkin, ed., *Philosophy of Law* (Oxford: Oxford University Press, 1979); and Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986).

7. After the Woody Allen/Mia Farrow break-up and custody debacle, one cannot help but notice the parallels between the incestuous overtones of the Jenny/Cliff relationship and Allen's real-life indulgences with his stepdaughter/lover, Soon-Yi Farrow Previn. Allen's real-life moral drama is undoubtedly all too related to his preoccupation with the same in this film. Thus, the central question of the film—is betrayal on a moral slippery slope with murder?—achieves a kind of personal immediacy. Note also the covert references to incest, both in Wendy's relationship to her brother Lester, and again in Cliff's relationship to his niece, Jenny.

8. Apparently, this character is based on the psychoanalyst/writer Martin S. Bergmann. See his book, *In the Shadow of Moloch: The Sacrifice of Children and Its Impact on Western Religions* (New York: Columbia University Press, 1992), and the review of it by Wendy Doniger, "Why God Changed His Mind about Isaac," *New York Times Book Review*, August 1, 1993, p. 17. Interestingly, the book is about the transition from religions in which children are sacrificed to the nonsacrificing religions of Judaism and Christianity. Bergmann interprets this as a move toward the creation of a loving God.

9. Again, we might be reminded of Woody Allen's oft-quoted remarks to the press after the disclosure of his affair with his ersatz stepdaughter Soon-Yi Farrow Previn to the effect that, "the heart doesn't know from logic." We might wonder whether he pondered his own indiscretions in terms of the competing viewpoints we see in this film.

10. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990).

11. See David Harvey, *The Condition of Postmodernity* (Oxford: Basil Blackwell, 1989).

12. Jean-Paul Sartre, *Existentialism and Humanism* (New York: Methuen, 1965), 32-34.

13. Marxism is often misunderstood as an amoral or even an anti-moral philosophy. In fact, the dream of creating and sustaining moral men in a moral society is one of the major underlying problematics of Marxism. Moreover, explicit attempts to link Marx and religion are found also, of course, in "liberation theology." See Alfred T. Hennelly, ed., *Liberation Theology: A Documentary History* (Mary Knoll, N.Y.: Orbis Books, 1990).

14. Steven Lukes, *Marxism and Morality* (Oxford: Oxford University Press, 1987), 3.

15. Quoted in Lukes, *Marxism and Morality*, 13.

16. *Ibid.*, 59.

17. See Unger, *Critical Legal Studies Movement*.

18. Roberto Mangabeira Unger, *Law in Modern Society* (New York: Free Press, 1976), 180.

19. Note also that Unger is saying not only that we have abandoned God, but that God seems to have abandoned us. Thus, the situation he points to is not unlike that lamented by Heidegger as a withdrawal of Being. Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975), 295.

20. For an interesting critique of Unger's argument, see Stanley Fish, "Unger and Milton," in *Doing What Comes Naturally* (Durham: Duke University Press, 1989), 399-436.

21. Karl Marx, *The German Ideology*, ed. and with an introduction by C. J. Arthur (New York: International Publishers, 1947), 47.