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# The Problem of Court Enforced Morality

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# THE PROBLEM OF COURT ENFORCED MORALITY

## INTRODUCTION

On July 17, 1996, TWA Flight 800 exploded shortly after take off, killing all 230 people on board.[1] Sixteen of those passengers were high-school students from Montoursville, a small town in rural Pennsylvania.[2] After some of the pain and mourning subsided, the parents who were left behind began debating what should be done to prevent a similar tragedy from befalling others.[3] Some parents wanted revenge; others wanted to make someone pay for killing their children. Once the parents decided that litigation was the best course of action, they quickly learned how painful the process would be. Each family would have to litigate its case separately. Since Boeing had admitted liability, the only issue at trial would be damages. Each family would have to prove, in dollars and cents, the worth of their child. In the words of the attorney for many of the families, "[t]he only thing on trial will be your loved ones."[4]

Boeing initially made identical offers to all sixteen families, which were summarily refused. In an attempt to avoid protracted litigation, the parties headed for mediation. After hearing from two of the parents, Boeing's attorneys came back with another offer, this one rumored to be in the neighborhood of $2.5 million per child. Bob and Irenay Weaver, who had been chosen to represent the parents at the mediation, decided it was enough. In the end, Boeing and the families agreed to a confidential settlement, but the families discovered a hard truth: the settlement did not provide accountability, nor would a trial. Steve Uzupis, one of the fathers, summed up the feelings of the families when he said:

> This is your child, and in the back of your mind, there's this feeling that you're standing up for her, that you're trying to make some meaning out of her death. To make something positive occur so it does not happen ever again. And the settlement means that the fight is over, and you know that the end result is not going to change anything. It's a horrible feeling. It's like, "Jeez, there should have been more to it than just this."[5]

The recent criminal trial of professional basketball star Kobe Bryant is just one of many examples of a criminal case that never went to a full

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1. Stephanie Williams, *A Loss Beyond Measure*, SMARTMONEY, July 2001, *available at* http://www.smartmoney.com/10/index.cfm?Story=feature-measure.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

trial before a judge and jury.[6] Bryant was accused of raping a 19-year-old woman in a hotel near Vail, Colorado.[7] Unlike many criminal cases, which never go to trial because of plea bargains, Bryant's case was dismissed because the accuser no longer wanted to proceed.[8] The alleged victim has remained silent; however, her lawyers' statements have led many to conclude that she could no longer handle the public scrutiny of a trial.[9] The Bryant case was unusual in another respect: the alleged victim received a public apology.[10]

These high-profile cases are representative of the fact that few legal disputes ever reach full-blown trial. These two examples highlight some of the reasons that many of today's legal scholars are concerned with the state of the trial court system in the United States.

In *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right*, Fordham Law School professor Thane Rosenbaum criticizes many aspects of the legal system in the United States.[11] Rosenbaum's book comments on the manner in which trial courts operate,[12] the ethics and professional responsibility of attorneys,[13] plea bargains,[14] and civil settlements.[15] In his own words, Rosenbaum's central argument is that "moral consideration and private conscience should be integrated into legal decision-making."[16] Combining recent high-profile cases with popular books and movies, Rosenbaum argues that the public expectation of law and justice differs significantly from the reality of law and justice.[17] Rosenbaum's work is a continuation of decades of growing criticism of the American legal system.

This book review focuses on two major areas in which Rosenbaum criticizes the current legal system. Part I examines Rosenbaum's criticisms of the trial court system. Part II examines Rosenbaum's criticisms of attorney conduct and his proposed changes to legal ethics and professional responsibility. Each part also suggests that Rosenbaum's ideas, while perhaps good in theory, are impractical and shortsighted.

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6. *Bryant Apologized To Accuser As Criminal Case Is Dropped*, WALL STREET JOURNAL, Sept. 2, 2004, at A1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Although Bryant issued a public apology, it was given under the condition that it could not be used against him in any subsequent civil action. The apology was also worded in such a way that denied any real responsibility on the part of Bryant: "Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did." *Id.*

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

12. *Id.* at 103-13.

13. *Id.* at 114-38.

14. *Id.* at 100-03.

15. *Id.* at 93-100.

16. *Id.* at 231.

17. *Id.* at 16-17.

## I. THE LEGAL SYSTEM

The overarching theme of *The Myth of Moral Justice* is that anyone who feels wronged should be allowed his or her day in court, in front of a judge and a jury.[18] In other words, "the story itself is and provides its own remedy."[19] While this theme is the underlying premise for all of Rosenbaum's criticisms, it is most dominating throughout his criticism of the trial court system.

### *A. Rosenbaum's Criticism of the Current Legal System*

Through critical analysis of several aspects of the trial court system and examples of how he believes the system should function, Rosenbaum lays out his paradigm of moral justice. Although Rosenbaum's vision of moral justice may seem simple, it would provide trials much different than those provided by the current system. Parties and witnesses would provide an unfettered and uninterrupted recounting of the facts in a public forum.[20] Settlements and plea bargains would be eliminated and replaced with open public trials.[21]

#### 1. Storytelling as Remedy

Rosenbaum suggests that courts should be a place for not only the discovery of the truth but also the healing of injuries.[22] Public trials are the only way to discover the truth.[23] One of the questions asked by Rosenbaum is:

> [W]hether, instead of limiting their role to presiding over zero-sum contests, courts can entertain broader conversations about moral outcomes that don't rely exclusively on crowning winners. Is it possible for courts to infuse and align their legal decisions with an appreciation of the moral universe? And, in doing so, can judges and lawyers find ways to humanize the law so that it does not coldly ignore the pain that resides within and around the creases of human conflict?[24]

In Rosenbaum's system of moral justice, the telling of the story would govern the process. Even "[i]f nothing else gets accomplished, if criminals go free and tortfeasors succeed in causing further negligence, the telling of the story, by itself, is still the morally correct outcome."[25] After the story telling is through, if the court grants a legal remedy,

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18. *Id.* at 58-59.
19. *Id.* at 58.
20. *See id.* at 58-59.
21. *Id.*
22. *Id.* at 22.
23. *Id.* at 90.
24. *Id.* at 22.
25. *Id.* at 58-59.

Rosenbaum feels that the remedy "must also offer moral and spiritual relief, and be directed to both body and soul."[26]

2. Courts Should Consider Morality

Describing the current legal paradigm as the "Legal—Body—Punishment/Money" system, Rosenbaum contends that this current paradigm focuses almost exclusively on finding the "legally correct" outcome and is only concerned with damages to property or physical injuries to the human body.[27] Rosenbaum proposes an alternative paradigm: "Moral—Soul—Acknowledgement/Restoration."[28] Under his new system, courts would work toward "moral outcomes," and the human spirit would be protected from "spiritual violence, indignity, and neglect."[29] The moral outcomes that Rosenbaum would have courts provide include acknowledgement of any harm done by the defendant followed by an apology.[30] The final step in Rosenbaum's system of moral justice would be the restoration of the damaged relationship between the parties.[31]

Rosenbaum provides only a vague notion of where the structure of his morality should come from.[32] He repeatedly refers to a nexus between law and religion,[33] but he does not believe morality must necessarily be connected with religion:

> [I]n an age where we are naturally suspicious of moral absolutes, and where moral relativism reigns supreme, some people are made uncomfortable by any notion that there is a universally shared standard of morality, or that there even is such a thing as doing the right thing. But what's right and what's moral doesn't have to conform to a particular religious ethos. In our fear of religious intolerance, we shouldn't ignore that morality and conscience can and should guide private lives.[34]

3. Rules of Civil Procedure and Evidence Get in the Way

Rosenbaum suggests that the rules of civil procedure and the rules of evidence are two of the biggest enemies of story telling, placing these rules and procedures at "the very core of what passes for immoral justice in America."[35] Rosenbaum believes that the rules of civil procedure and

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26. *Id.* at 34.
27. *Id.* at 30-31.
28. *Id.* at 33.
29. *Id.*
30. *Id.* at 34-35.
31. *Id.*
32. *Id.* at 14-15.
33. *Id.* at 12-15.
34. *Id.* at 14.
35. *Id.* at 93.

the rules of evidence "mercilessly trump[]" moral justice, and says that "without them, moral justice has a fighting chance."[36]

In Rosenbaum's system of moral justice, litigants would tell their stories uninterrupted and unrestrained by rules of procedure or evidence.[37] He envisions courthouses as "public grieving grounds."[38] The "true path to moral justice," he says, would be "a legal system that is as much interested in grieving, healing, and restoration as it is in compensation and punishment."[39] Parties and witnesses would dictate the flow of the trial rather than judges. Rosenbaum accuses judges and lawyers of not understanding "how little the lay person cares about the evolution of rules and precedents, and how much he simply wants to tell his story."[40] This argument stems from Rosenbaum's idea of "what it means to do justice":[41]

> Giving people an opportunity to speak about what happened to them, and to confront those who are responsible for their hurt, is an indispensable part of what it means to do justice, and to administer a legal system that is just . . . . A court of law . . . should function as a sanctuary for truth-telling, with remedies limited not just to law, but to personal healing, as well.[42]

Specifically, Rosenbaum would change or eliminate the rules of evidence that limit the introduction of a defendant's prior bad acts.[43] Rosenbaum also would alter the rules of procedure that mandate dismissal of a case when the plaintiff fails to state a claim upon which relief can be granted,[44] as well as those that bar the filing of a case due to the statute of limitations.[45] Under Rosenbaum's paradigm, plaintiffs would be given time in front of a judge and jury even if their claim was not a violation of law or was not pled in the proper manner.[46] In addition,

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36. *Id.* at 93. *But see* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence *to the end that the truth may be ascertained* and proceedings justly determined.") (emphasis added).

37. ROSENBAUM, *supra* note 11, at 108-09.

38. *Id.* at 70.

39. *Id.* at 71.

40. *Id.* at 58.

41. *Id.*

42. *Id.* at 58-59.

43. *Id.* at 112. "[A]side from the possible prejudice, isn't this exactly the kind of full disclosure that the jury should hear in deciding guilt and innocence? . . . [What] we have now is truth-seeking with many of the truths in permanent lockup." *Id.* "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b).

44. *Id.* at 116. Rosenbaum specifically attacks Federal Rule of Civil Procedure 12(b)(6) which states in part that "the following defenses may at the option of the pleader be made by motion . . . (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted . . . . " FED. R. CIV. P. 12(b)(6).

45. ROSENBAUM, *supra* note 11, at 133.

46. *Id.* at 116-17.

plaintiffs would be allowed to bring a claim no matter how much time had passed since the alleged injury.[47]

Rosenbaum goes so far as to place the blame for immoral outcomes on the constitutional rights that many hold sacred, including the presumption of innocence, the right to have illegally obtained evidence excluded from trial, and the rights to due process and equal protection under the law.[48]

4. Settlements do not Fulfill Parties' Wishes

Rosenbaum argues that out-of-court settlement of civil litigation does not fulfill the wishes of the parties.[49] He questions the morality of settlements, alleging that "in most situations they merely serve to silence the story in return for a cashier's check."[50] In seeming contradiction of his later criticism of the win-at-all-costs adversary system,[51] Rosenbaum suggests that the system should not assume that litigants are better off reaching a compromise in settlement.[52] In addition to describing civil settlements as "entirely lawful, economically efficient bribe[s],"[53] Rosenbaum argues that settlements strip the legal system of "its therapeutic, healing potential."[54] Calling settlements "spiritually unsatisfying,"[55] he views the courtroom trial as a public catharsis that brings communities together in "the search for the truth and the moral lessons that are learned from those truths."[56] He seems to believe that one of the problems of settlement is the lack of emotional outbursts and histrionics that frequently occur during trial.[57] Rosenbaum feels that settlements belittle the claims brought by the plaintiff, "pretend[ing] that the story was never important enough to tell."[58] In sum, Rosenbaum claims settlements are immoral and unjust because they deprive people of the chance to tell their stories, they involve no truth-finding, they do not allow for outside or public scrutiny of the parties involved, and they produce little or no public record of the proceedings.[59]

5. Plea Bargains Inhibit the Search for the Truth

Along with settlements in the civil arena, Rosenbaum also attacks plea bargains as being immoral because they "undermine truth and sub-

47. *Id.* at 134.
48. *Id.* at 117.
49. *Id.* at 93.
50. *Id.*
51. *Id.* at 130.
52. *Id.* at 94.
53. *Id.* at 96.
54. *Id.* at 94.
55. *Id.* at 99.
56. *Id.* at 94.
57. *Id.* at 95.
58. *Id.*
59. *Id.* at 94.

vert justice."[60] He is critical of what he sees as a lack of truth in a system where criminal defendants end up jailed for crimes that they did not commit, but plead guilty to anyway, all in the name of judicial efficiency.[61] "Truth," he says, "becomes hostage to the efficiencies gained from negotiated pleas."[62] Rosenbaum proposes that the morally correct solution would be for the legal system to rely less on plea bargains and more on trials, with prosecutors representing the interests of both the state and the victims.[63]

Cognizant of the public desire for justice and punishment, Rosenbaum questions whether people would ever accept a system of criminal justice where historical and restorative justice would be seen as equals to retributive justice.[64] In the end, he concedes that "moral and historical justice, no matter how laudable, would lose much of its moral authority if guilty criminals went unpunished."[65]

Rosenbaum is not alone in his criticism of plea bargains. What is unique about Rosenbaum's criticism, however, is his focus on the harm caused to the alleged victim by the plea bargain; many of Rosenbaum's premises assume the guilt of the defendant.[66] His criticisms of criminal plea bargains, similar to his criticism of civil settlements, focus almost exclusively on the perceived injustice done to the alleged victim without ever really addressing any injustice done to the defendant or alleged perpetrator.[67]

Most other critics have instead focused on the violation of the defendant's constitutional rights.[68] Timothy Lynch has said that "[p]lea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial."[69] Lynch presents evidence that the sentences handed out to defendants who lose at trial are frequently as much as five times as long as what had been offered in a plea bargain.[70]

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60. *Id.* at 100.

61. *Id.* at 87.

62. *Id.*

63. *Id.* at 102-03.

64. *Id.* at 102. Rosenbaum describes historical justice as "knowing the truth of what happened," and restorative justice as a system that seeks to "heal wounds and enable some reconciliation to occur." *Id.*

65. *Id.* Rosenbaum qualifies this concession by claiming that under the current system there are many defendants who end up incarcerated because they accepted a plea bargain instead of risking stricter punishment at trial. *Id.*

66. *Id.* at 89. Rosenbaum distorts the right to confront one's accuser into the victim's right "to confront those who have harmed them." *Id.*

67. *See id.* at 85-90.

68. Timothy Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, at 26; WHITNEY NORTH SEYMOUR, JR., WHY JUSTICE FAILS 88 (1973).

69. Lynch, *supra* note 68, at 26.

70. *Id.*

Other critics of plea bargaining have equated the practice to de facto sentencing.[71] Defendants who cannot afford bail often sit in jail for several weeks or months, only to be released after agreeing to a plea of guilty and a sentence of time served. Many have argued that this is the equivalent of a conviction and a sentence without a trial.[72]

*B. Why Rosenbaum's Ideas Will Not Work*

There are numerous reasons why Rosenbaum's proposed changes will not work. Moreover, many legal scholars have commented on the benefits provided by settlements and plea bargains, two of the tools that Rosenbaum would severally restrict or even eliminate.

1. Giving Everyone His or Her Day in Court is Inefficient

Rosenbaum's system is impractical. A situation where everyone who is wronged would have his or her day in front of a judge and jury is not possible in today's clogged court system.[73] Providing more access to justice is a noble goal, but simply expanding the court system will not achieve this goal.[74] Bringing more disputes to trial would mean more hours spent by attorneys in court. While this might give clients more attention from their attorneys, it would also force attorneys to take fewer cases. Even if it may be possible to create more courtrooms, hire more judges and support staff, and train more attorneys, the increased economic costs of doing so would result in a legal system that even fewer people could afford.

2. There is No Place for Morality in the Courtroom

Among those who disagree with Rosenbaum is United States Supreme Court Justice Antonin Scalia, who has said that "[g]overnment is not meant to save souls but to protect life and property and serve the common good. Its responsibility is the here, not the hereafter."[75] Justice Scalia feels that while morality may have a place in the making of laws, it has no place in the judicial system when those laws are interpreted.[76] Others have gone further, comparing the imposition of morality on the courts as "nothing more than the will of the majority at the moment."[77]

Rosenbaum's suggestion that morality be imposed on the justice system has an even greater opponent than Justice Scalia: growing public

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71. SEYMOUR, *supra* note 68, at 88.

72. *Id.*

73. *See* ROSENBAUM, *supra* note 11, at 89 (admitting that trials are rare because courthouses are overburdened with too much litigation and criminal prosecution).

74. *See id.* at 89-90 (proposing the building of more courthouses and appointment of more judges).

75. Dale Kueter, *Scalia Lectures at Cornell—Justice, morality and the law*, GAZETTE ONLINE, May 7, 1999, *at* http://www.gazetteonline.com/news/9905/may030.htm.

76. *Id.*

77. *Id.*

resistance to the incorporation of religion into government. One of the more famous examples of this conflict is the recent high-profile incident involving Roy Moore, the former Chief Justice of the Alabama Supreme Court.[78] Moore was removed from the bench in 2003 for his refusal to remove a two-and-a-half ton monument of the Ten Commandments from the rotunda of the Alabama Supreme Court.[79] Moore defended his refusal to remove the monument as an expression of the right to "acknowledge God as the moral foundation of our law."[80] The monument was eventually removed after a protracted legal battle that was initiated by several groups, including the American Civil Liberties Union and Americans United for Separation of Church and State; both organizations claimed the monument was an unlawful promotion of religion in a public place.[81]

3. Civil Procedure and Evidence Protect Litigants and Promote Truth-Seeking

Despite Rosenbaum's assertions to the contrary,[82] the rules of civil procedure and the rules of evidence have not been promulgated to create an excuse for courts to not hear a case.[83] The rules of evidence have been created not only to ensure that a trial proceeds in an orderly and predictable manner, but also to define the roles of all participants.[84] A further purpose of these rules is to exclude evidence that, while relevant, may be overly prejudicial, mislead the jury, confuse the legal issues, or waste time.[85]

Many of the rules of civil procedure have been implemented to dictate the flow of trials in an efficient manner, as well as to protect each party from frivolous or time-wasting maneuvers by an opposing party. Statutes of limitations have been upheld on the basis that it is contrary to the notion of justice to fail to put one's opponent on notice that he will need to defend himself within a reasonable amount of time and that "the right to be free from stale claims in time comes to prevail over the right to prosecute them."[86] These time limitations allow plaintiffs a reasonable amount of time in which to bring a claim, while at the same time protect-

78. Manuel Roig-Franzia, *Alabama Judge Is Removed; Moore Installed Monument to Commandments*, WASH. POST, Nov. 14, 2003, at A01.

79. *Id.*

80. Janita Poe & Bill Rankin, *Commandments Feud Spurs Arrests; Supreme Court Stays Out of Dispute in Alabama*, ATLANTA JOURNAL-CONSTITUTION, Aug. 21, 2003, at 1B.

81. *Id.*

82. *See* ROSENBAUM, *supra* note 11, at 133 ("When the legal system can find an excuse not to hear a case—to have it excluded or dismissed—it will do so rather than undertake the more moral, truth-seeking path where full, uninhibited, uninterrupted stories can be heard.").

83. *See, e.g.*, STEVEN I. FRIEDLAND, PAUL BERGMAN, & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE § 1.03 (2000).

84. *Id.*

85. *Id.* at 40 [§ 4.03].

86. Ry. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

ing defendants, as well as the courts, from having to determine the truth of something that happened years before.[87]

Another way that the rules of civil procedure protect the litigants is by requiring that a complaint meet a standard of legal sufficiency.[88] Rule 12(b)(6) of the Federal Rules of Civil Procedure allows the dismissal of a complaint when the plaintiff has failed to state a claim upon which relief can be granted.[89] Despite Rosenbaum's charges that this rule leads to what many view as an immoral and absurd outcome,[90] Rule 12(b)(6) protects the defendants and the court from wasting time when there is no relief or remedy that the court can provide to the plaintiff.[91]

4. Settlements Can in Fact Fulfill the Wishes of Parties

Although Rosenbaum is not the only commentator opposed to settlement of civil litigation,[92] there are some who support settlement. Geoffrey P. Miller notes that litigation "seems to stir up animosity and hatred in a particularly unpalatable way"[93] and sees settlement as a way to avoid these side effects of litigation. Miller acknowledges that settlement and litigation "accomplish the same result," however, he argues that because settlement is the less expensive alternative, social resources are put to better use.[94]

In reviewing the many criticisms of settlement, Miller notes a common theme that is very similar to Rosenbaum's argument: "trials are, or should be, more 'just' or 'fair' than the private resolution of disputes."[95] Miller notes the parties involved in litigation have a better understanding of the facts, and that judges cannot always be depended upon to act in accordance with the law.[96] He says there is no evidence to support "[t]he proposition that judges are better able than individual litigants to deter-

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87. United States v. Kubrick, 444 U.S. 111, 117 (1979) (citing United States v. Marion, 404 U.S. 307, 322, n.14 (1971)) (explaining that over time, evidence is lost, witnesses die or disappear, and memories fade, thus impairing the ability to ascertain the truth).

88. GEOFFREY C. HAZARD, JR., COLIN C. TAIT, & WILLIAM A. FLETCHER, PLEADING AND PROCEDURE 645 (8th ed. 1999).

89. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

90. ROSENBAUM, *supra* note 11, at 116-17.

91. JOSEPH W. GLANNON, CIVIL PROCEDURE—EXAMPLES & EXPLANATIONS 314 (4th ed. 2001).

92. *See generally* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that the party with fewer resources is often forced, due to financial constraints, to accept a less favorable settlement than what they could have obtained at trial); Jules Coleman & Charles Silver, *Justice in Settlements*, SOC. PHIL. & POL'Y. 103 (Autumn 1986) (arguing that settlements inhibit substantive justice by replacing the judgment of a court with an agreement by the parties).

93. Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, *in* REFORMING THE CIVIL JUSTICE SYSTEM 21 (Larry Kramer ed., 1996).

94. *Id.* at 13.

95. *Id.* at 22.

96. *Id.*

mine the 'just' result."[97] Miller concludes that if dispute-resolution mechanisms other than litigation are available at little or no cost, then those mechanisms should be made available to litigants so that they may reach voluntary private settlements.[98]

5. Plea Bargains are a Viable Alternative

Plea bargains are widely accepted and commonplace in the criminal justice system. Only about ten percent of all criminal cases ever go to trial.[99] Most of the cases that do not go to trial are resolved by the defendant pleading guilty.[100] Plea bargains have received approval from the United States Supreme Court[101] and are considered by their supporters as an effective method for reducing not only court dockets, but also overcrowded prisons.[102] Plea bargains are viewed by many as a way to use the courts' and the prosecutors' limited resources on prosecuting crimes that have the most egregious effects on society, such as murders, rapes, and drug-trafficking, while allowing efficient disposition of less serious crimes such as petty theft.[103] Miller has suggested that the use of plea bargains may actually increase deterrence by allowing prosecutors to utilize their limited resources in a more effective manner.[104]

In addition to economic efficiency, the Supreme Court has asserted that plea bargains provide justice through their expediency.[105] As opposed to a full trial, the Court noted that a plea bargain provides a quick, and in most cases, final resolution to many criminal cases.[106] The Court further noted that a plea bargain "avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial . . . and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."[107]

## II. THE CONDUCT OF ATTORNEYS

Embedded throughout Rosenbaum's attacks on the legal system is the underlying notion that those who control the system, particularly attorneys, are the source of all that is wrong with the system. Rosenbaum would create a more morally correct system by reforming the current understanding of ethics and professional responsibility.

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97. *Id.*
98. *Id.* at 25.
99. Lynch, *supra* note 68, at 24.
100. *Id.*
101. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977).
102. ARTHUR ROSETT AND DONALD R. CRESSEY, JUSTICE BY CONSENT 34-35 (1976).
103. *Id.* at 35.
104. Miller, *supra* note 93, at 25.
105. Santobello v. New York, 404 U.S. 257, 261 (1971).
106. *Santobello*, 404 U.S. at 261.
107. *Id.*

*A. Rosenbaum's Criticism of Attorney Conduct*

Rosenbaum saves perhaps his harshest criticism of the legal system for attorneys. Rosenbaum attacks two pillars of the practice of law: the concepts of zealous advocacy and attorney-client privilege.

1. Zealotry as Bloodsport

Rosenbaum likens courthouses to "legally sanctioned fight clubs" that encourage "immoral, emotionally destructive contests that bring about little relief and tremendous suffering."[108] Although his comparison of the legal system to the "coliseums of Ancient Rome" or the "rings of the World Wrestling Federation"[109] may seem extreme, he is not the first to compare the practice of law to bloodsport. In other commentary, lawyers have been compared with gladiators, and their tactics likened to weapons.[110]

Rosenbaum blames zealous advocacy for the lack of civility in the courtroom.[111] He makes this argument by defining zealotry and then imputing his definition to the legal system through a clever twisting of words. Although zealotry may have many connotations, the common definition of zealotry is fairly neutral.[112] Rosenbaum's definition of zealotry, however, is not so neutral. Rosenbaum says that zealotry "is the highest fulfillment of evil" and "is for people who are out of control in their beliefs, completely locked into their own truths, and out of touch with the rest of the planet."[113] Rosenbaum uses his definition of zealotry to criticize the concept of zealous advocacy set out in the ABA Model Rules.[114] "Zealotry," Rosenbaum says, "has a way of trampling over any respect for the truth. So much of what passes for zealous advocacy in the law is all about fudging, spinning, and explaining away the unflattering elements of a client's story. And in the worst cases, the lawyer engages in outright lying."[115]

2. The Attorney-Client Privilege Encourages Lying

Rosenbaum also criticizes the attorney-client privilege. He disputes the notion that lawyers are better able to defend a client due to privilege, because without it, the client may withhold information that could be

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108. ROSENBAUM, *supra* note 11, at 50.

109. *Id.*

110. Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1039 (1975).

111. *See* ROSENBAUM, *supra* note 11, at 129-30.

112. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1455 (11th ed. 2003). Zealotry is defined as "excess of zeal; fanatical devotion." *Id.* Zeal is defined as "eagerness and ardent interest in pursuit of something." *Id.*

113. ROSENBAUM, *supra* note 11, at 129.

114. MODEL RULES OF PROF'L CONDUCT pmbl. 2 (2003). "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.*

115. ROSENBAUM, *supra* note 11, at 130.

critical to an effective defense.[116] Rosenbaum argues that when conversations between attorneys and their clients remain privileged, there can be no moral justice:

> The safeguarding of secrets ultimately compromises truths . . . . Moral justice becomes impossible to achieve when attorneys fail to reveal what they know when it is morally wrong not to. The attorney-client privilege serves the interest of clients who wish to speak frankly with their attorneys, but it also has the social and moral consequence of perpetuating secrets and lies.[117]

There has been some support for modifying the rules regarding the attorney-client privilege. Marvin Frankel has proposed that truth should be made "a paramount objective" and that there should be an affirmative duty upon everyone involved to work towards the achievement of that objective.[118] Frankel further notes that while the litigation attorney has often relished the role of "hired gun," lawyers should consider that "'selling' our stories rather than striving for the truth cannot always seem, because it is not, such noble work as befits the practitioner of a learned profession."[119] He proposes that the rules of professional responsibility for attorneys should not only require the disclosure of material facts but also should "forbid material omissions rather than merely proscribe positive frauds."[120] As a way to implement such changes, he submits a draft for new disciplinary rule based on SEC's Rule 10b-5.[121] He concludes that the ethical and moral standards that have been created for businesses can also be applied to the legal profession.[122]

### *B. Why Rosenbaum's Arguments Fall Short*

Rosenbaum's criticisms of professional responsibility are based on anecdotal evidence, pop cultural, and his own personal experience. Several legal scholars, as well as the American Bar Association, have taken a different view.

#### 1. Zealotry is Neutral

Although some attorneys may be guilty of the behavior Rosenbaum describes, his argument is fallacious because it fails to include much of what the ABA Model Rules have to say about zealous advocacy. The Model Rules acknowledge that lawyers face many difficult decisions in

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116. *Id.* at 126.
117. *Id.* at 122.
118. Frankel, *supra* note 110, at 1052.
119. *Id.* at 1055.
120. *Id.* at 1057.
121. *Id.* at 1057-58. SEC Rule 10b-5 states in part: "It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." *See* 17 C.F.R. § 240.10b-5 (1974).
122. Frankel, *supra* note 110, at 1058.

the practice of law.[123] Yet the Rules do not call for, and in fact outright prohibit, much of the conduct that Rosenbaum ascribes to zealous advocacy:

> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living . . . . Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, *within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.*[124]

Rosenbaum's proposals raise a very interesting contradiction. He is opposed to the Rules of Evidence interfering with the story-telling that he feels is necessary to any trial, but he is also opposed to lawyers adding any "spin" to a client's story or attempting to explain away "unflattering elements," one of the very things that the Rule of Evidence attempt to limit.[125] His ideal justice system, it seems, would be one in which all parties tell the truth in as neutral a way as possible. While this is a noble ideal, it will be difficult, if not impossible, to fully achieve. Many parties and witnesses are going to tell their stories in a light that is most favorable to achieving their desired result. One important point that Rosenbaum appears to miss is that usually the reason that a law suit is filed in the first place is because someone is not telling the truth or is refusing to take responsibility for his or her own actions.

2. The Attorney-Client Privilege Puts Clients in Control

Another commentator takes a critical look at the role-differentiated behavior of lawyers and when it might be justified.[126] Richard Wasserstrom agrees that such behavior is proper in the criminal defense context.[127] He concludes, however, that even if such behavior is justified in other situations, we still pay a social price.[128]

Wasserstrom says there is a specific role of the lawyer at trial.[129] Trial, he says, is a "well-established institutional mechanism" for resolv-

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123. MODEL RULES OF PROF'L CONDUCT pmbl. 9 (2003).

124. *Id.* (emphasis added).

125. ROSENBAUM, *supra* note 11, at 130.

126. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3 (Fall 1975) (describing "role-differentiated behavior" as the ability "for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive").

127. *Id.* at 12.

128. *Id.*

129. *Id.* at 9.

ing disputes.[130] "Each side is represented by a lawyer whose job it is both to present his or her client's case in the most attractive, forceful light and to seek to expose the weaknesses and defects in the case of the opponent."[131] While Wasserstrom believes that this mechanism "helps to guarantee that every criminal defendant will have his or her day in court,"[132] he agrees with Rosenbaum's assessment that attorney-client privilege in the civil context is unnecessary and "almost certainly excessive."[133] Wasserstrom submits that justice might be better served if lawyers did not subscribe to the theory of role-differentiated behavior: "In this sense it may be that we need a good deal less rather than more professionalism in our society generally and among lawyers in particular."[134]

Wasserstrom offers the argument that "[i]f lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers."[135] He leaves unanswered the question of whether such behavior by lawyers can be justified within the legal system but concludes that society will pay a high price for such behavior.[136]

While Rosenbaum addresses many areas of legal ethics that are viewed negatively by the non-legal community, his proposals create many questions that he leaves largely unanswered. Who is to decide what is morally right and wrong? Should morality be codified similar to the ABA Model Rules of Professional Conduct? Should we have a legal system in which it is up to each individual attorney to decide for himself or herself what is morally right and what is morally wrong?

Rosenbaum criticizes the current system because there is "no duty to disclose contemplated acts of spiritual violence, such as emotional harm, or the causing of humiliation or indignity."[137] Many of these acts, however, are not considered to be crimes or illegal activities. Under Rosenbaum's system of moral justice, the attorney-client privilege seemingly would be sacrificed not just to prevent future harm to other people, but also to prevent another person's feelings from being hurt. Furthermore, the realm of what lawyers should or must disclose would become even murkier as lawyers struggled to determine what actions by their clients may lead to emotional harm or spiritual violence.

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130. *Id.*
131. *Id.*
132. *Id.* at 10.
133. *Id.* at 12.
134. *Id.*
135. *Id.* at 10-11.
136. *Id.* at 11-12.
137. ROSENBAUM, *supra* note 11, at 123.

Rosenbaum perhaps best sums up his ideal system of legal ethics by referring to the popular television show *The Practice*:[138]

> Clearly the assistant district attorney on *The Practice* is right: there is a great difference between legal ethics and private morality. When legal ethics starts to resemble moral behavior, it will go a long way toward restoring confidence in a legal system that unsparingly perpetuates immoral justice under the guise of law.[139]

## III. CONCLUSION

In a system of moral justice as envisioned by Rosenbaum, each family from Mountorsville would have paraded into court to tell the stories of the children they had lost and how much they meant to them. Representatives and attorneys from TWA and Boeing would have been required to spend weeks, if not months, listening to the tales of the grieving parents. At the end of it all, however, the available remedies in Rosenbaum's system would differ little from what the parents were given under the current system: money and maybe an apology.

According to Rosenbaum, the best remedy for an alleged victim of a crime is the opportunity to confront the accused in an open courtroom and explain how much harm the actions of the defendant have caused.[140] His system would allow the alleged victim to speak without any restraint. He is silent, however, with respect to the rights of the accused to do the same. Under his system, Kobe Bryant's accuser would have sat on the witness stand and told her version of the events unchecked by any rules or procedural mechanisms. This appears to be exactly the opposite of what the alleged victim actually wanted to do, especially when Bryant and his attorneys attempted to exercise for themselves the very rights that Rosenbaum would grant to his accuser.

In *The Myth of Moral Justice*, Rosenbaum suggests that the current legal system should be changed to more closely comport with the general public's notion of fairness and justice. Some of his changes may be feasible, if not desirable. When taken as a whole, however, Rosenbaum's ideas would render a system of justice that would provide less justice than the one it would replace. Rosenbaum's system would drive up legal fees and court costs while simultaneously increasing the time needed to resolve disputes. Rosenbaum's system also would be extremely vulnerable to shifts in public opinion. In sum, while Rosenbaum's ideas set a

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138. *Id.* at 127-28.

139. *Id.* at 128-29.

140. *Id.* at 59 ("[T]hat's why the community is brought in as witnesses, to serve as jurors and to listen not just to the proceedings, but, more important, to the pain . . . . The aggrieved have the right to shout their pain out to the world, and the courthouse must be their megaphone.").

noble standard for the way all people should interact, they are not entirely suitable for a system of laws.

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