BENCH TRIALS, ADVERSARINESS, AND PLEA BARGAINING: A COMMENT ON SCHULHOFER'S PLAN

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The Philadelphia court is a distinctive, if not unique, example of a large urban criminal justice system which apparently operates with a minimum of plea bargaining—certainly much less than in other courts. However, one reason for Philadelphia's success is the incentive defendants have to waive their right to a jury trial. Because the city's hanging judges are primarily placed in jury parts rather than trial waiver parts,[1] defendants readily waive jury trials and accept brief bench trials and nonbargained guilty pleas. Notwithstanding this, I'm impressed with Schulhofer's findings and argument.[2] Philadelphia's system truly is different, and Schulhofer's use of it as a general model is creative, thoughtful, and pragmatic.

I would like to put Schulhofer's arguments and aspirations in a broader context and relate them to some themes addressed earlier in this Colloquium. In so doing, I want to point out the very real merits of his proposals as well as raise some serious reservations about them.

We have heard today that the resources available for public defenders are simply insufficient to provide for equal administration of justice.[3] Poor defendants do not receive the same services routinely available to defendants with well-paid attorneys.[4] This disparity makes a mockery of the aspiration of equality before the law, and of equal administration of justice. Nonetheless, I believe this predicament must be viewed as but one of the many contradictions

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1. *Cf.* Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1052, 1062-63(1984)[hereinafter cited as Schulhofer, *Plea Bargaining*].

2. *See* Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137 (1986)[hereinafter cited as Schulhofer, *Assembly Line*]; Schulhofer, *Plea Bargaining*, *supra* note 1, at 1037.

3. *See, e.g.*, Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 65-66 (1986); *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 48 (1986) (Remarks of J. Vincent Aprile II)[hereinafter cited as *Effective Assistance*]; Lefstein, *Keynote Address: Effective* Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?, 14 N.Y.U. Rev. L. & Soc. Change 5, 6-7, 9-12 [hereinafter cited as Lefstein]; Effective Assistance, *supra*, at 101-02 (Remarks of Benjamin Lerner).

4. *See, e.g.*, L. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 66-67 (1984). For a view that legal behavior is directly responsive to economic class, see D. BLACK, THE BEHAVIOR OF LAW 11-36 (1976).

of capitalism in a liberal society. The question, then, becomes how to provide equal administration of justice in a legal system which is responsive to the market.

People wrestled with this question all morning, and the best answer I heard was "more resources" for public defense services. By itself, however, this answer does not get us very far. We need criteria to determine the extent to which additional resources are necessary. We also need to examine the quality of defense services available to the people least able to afford such services—the marginally poor.

The problem of providing a meaningful right to publicly appointed counsel stems from the more general problem of the provision of social services of all sorts in a liberal capitalist society. Notwithstanding its constitutional basis, the right to appointed counsel is but one more form of welfare for poor people. Defense services, like most other forms of welfare, can only be a minimal safety net for those unable to provide for themselves.

How can we measure the adequacy of a public service? One way is to compare its quality with that of the services provided to people in the bottom segment of the private sector. Under this criterion, I think public defense services in this country fare pretty well. Almost all the studies I have seen that compare public and low-paid private defense attorneys point in the same direction: overall—and I emphasize this qualification—there are no startling differences between the outcomes obtained by publicly provided counsel and privately retained counsel.[5] To the extent that those who have private attorneys are also poor, one may infer that the marginally poor who purchase defense services fare about as well or as badly as the very poor who receive free representation. Unfortunately, I am not aware of any study which compares the services and outcomes provided by public and low-paid private defense attorneys with those provided by well-paid attorneys. The quality of representation offered by public and low-paid private defense attorneys may be much lower than that offered by well-paid attorneys. My point, however, is to stress that many defendants who retain attorneys are faced with the same problems of representation as defendants who have publicly provided counsel.[6] To provide equal justice for all, we must address the problems of both groups of poor people.

In pointing out the similarity of services available to the bottom segment of those who participate in the market and to those who receive public defense services, I do not mean to be complacent. Rather, I want to emphasize that I think it is unrealistic to expect that public sector services for the indigent—

5. *See, e.g.*, R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 153 (1977).

6. Despite these qualifications, I think the overall comparison between public and private attorneys is a valid one. We are not likely to find such favorable comparisons when we examine other public and private services such as housing, education, parks, and medical services. When one considers that the indigent defendant's constitutional right to counsel has only recently been applied to the states, even limited success is impressive.

including criminal defendants—will ever be much better than what is available in the market to those who can barely pay for services. If the quality of services for those on legal welfare is capped by what the market will provide for the marginally poor, then the way to improve defense services for the indigent is to improve representation for the marginally poor. One way to do this is to improve the entire system.[7]

There are at least two ways to improve the overall quality of defense services. One is to socialize defense services, generally, in order to equalize the allocation of defense resources in the criminal process.[8] To achieve this we might declare a market failure and create a public monopoly for all criminal defense work or perhaps all legal work. This is not as farfetched as it might first seem. The discussion about defense services this morning closely parallels the debate in England, in the early nineteenth century, regarding another sort of legal aid, namely, public subsidies for the cost of private prosecution.[9] The debate then was whether poor people wishing to bring a criminal prosecution should be reimbursed from public funds. Eventually, the public came to bear the full cost of prosecution in all cases. Perhaps we are witnessing the beginning of a similar transformation in defense services.

One of the consequences of the public funding of prosecutors is the increasingly marginal role of the victim in the criminal process. Advocates like Lucy Friedman at the Victim Services Agency and Michael Smith at the Vera Institute are now working to reassert the interests of victims.[10] However, we might still reasonably worry that a defense equivalent of the publicly funded prosecutor could drive the interests of the defendant still farther into the background in the criminal process, just as the victim has come to take a back seat to the prosecutor. The solution might be purchased at a high price.

Schulhofer's bench trial model provides a second means by which to improve public defense services for the indigent by improving defense services generally. Schulhofer's concern with overall systemic quality distinguishes his proposal from others at this colloquium. His argument is appealing for several reasons.

First, his proposal is not restricted solely to the improvement of public defense services for the indigent. It addresses all criminal cases. Thus, it meets

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7. *See also* Abel, *What is the Assistance of Counsel Effective For?*, 14 N.Y.U. REV. L. & SOC. CHANGE 165, 169-70 (1986).

8. *Id.* Two speakers touched on this issue this morning. *See Lefstein*, *supra* note 3, at 9; *cf. Effective Assistance*, *supra* note 3, at 100 (Remarks of Joseph Grano).

9. To my knowledge, there is no detailed history of the transformation from private to public prosecution in England. However, numerous reports of parliamentary committees document the rising cost to county treasuries of reimbursing private prosecutors for the costs of bringing a criminal action. *See generally* HOUSE OF COMMONS, REPORT FROM SELECT COMMITTEE ON COUNTY RATES 3, 49 (July 31, 1834); HOUSE OF LORDS AND HOUSE OF COMMONS, REPORT OF THE COMMISSIONERS FOR INQUIRING INTO COUNTY RATES 5-8, 46-47 (1836).

10. *See, e.g.*, Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982).

my criterion of raising standards for everyone, not just for the least advantaged.

Second, it is systemic. It is one of the few proposals I've heard today that makes demands on other key actors in the criminal process: prosecutors, judges, witnesses, and the police. By acknowledging the interdependencies in the criminal justice system, it recognizes that better defense advocacy is likely to require better policing, prosecuting, and judging. His proposal goes beyond the more popular solution of more resources for public defenders.

Third, Schulhofer defines his objectives in a positive rather than a negative way. He has an expansive aspiration, which stands in contrast to other "negative" approaches such as a proposal for minimum standards for defense services.[11] I prefer Schulhofer's approach, because it creates a moving target, an expanding criterion, rather than fostering a minimalist sense of duty.

Now that I have identified the very real virtues of Schulhofer's argument, let me raise some questions. As his review of the practices in Philadelphia indicates, it is both possible and desirable to have meaningful trials, in the form of bench trials, readily available for all criminal defendants. However, even though Schulhofer's discussion provides evidence which contradicts the conventional wisdom that plea bargaining is inevitable in the modern criminal justice system, we should still examine why plea bargaining has emerged as the dominant form of disposition of criminal cases in the United States. My answer is that, over the years, the criminal process has become much more, not less, adversarial, due in part to an increased solicitude towards the rights of the accused.

I take issue with Schulhofer's implicit characterization that plea bargaining is not adversarial and that trials are. The reason plea bargaining has emerged and, in many serious criminal cases, has come to displace the trial, is that, over the years, the position of the criminally accused has shifted from passive dependence on the system to active assertion of her interests. When trials of major felonies were more common in America and England, defendants were usually unrepresented by counsel and ignorant of the law that would enable them to develop their defense. Trials were brief and perfunctory (often one judge and jury heard several cases within the space of a morning), and rules of procedure and evidence were honored in the breach.[12]

The rise of plea bargaining is itself a consequence of the expansion of defendants' rights and the increased opportunity (through an expanded interpretation of the right to counsel and increased resources for prosecutors) for real adversariness in the criminal process. Rather than signaling the decline, twilight, or death of the adversary system, plea bargaining is itself a sign of its

11. Goodpaster, *supra* note 3, at 90-91.

12. For a discussion of the non-adversarial nature of trials, see Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247, 257 (1979) (United States); Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 272-316 (1978) (Eighteenth-Century England).

increase and vitality.[13] The two have emerged together—with plea bargaining intended to increase the opportunity for meaningful adversarial confrontations—and are not the antithetical practices that Schulhofer and others believe them to be.[14]

We should be cautious about Schulhofer's proposal. If implemented widely, it may unwittingly foster less, rather than more, adversariness. Such a result is a very strong possibility, insofar as his proposal clearly restricts prosecutors' discretion.[15]

We should also not rush to emulate the practices of some European countries which have simpler, more streamlined criminal justice systems.[16] The fact is that in some northern European countries the majority of all criminal defendants plead guilty by mail and never consult an attorney or see the inside of a courtroom.[17] Similarly, in England, a system not unlike Philadelphia's has long been operative. At least since the early nineteenth century, the vast majority of indictable criminal cases, triable by a jury in crown courts, have been handled through summary procedures in magistrates' courts.[18] While plea bargaining in the American court system is not as open and common as in these courts, the contests in these summary proceedings appear to be far from vigorous.[19]

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13. *See* M. FEELEY, COURT REFORM ON TRIAL 19-23 (1983)[hereinafter cited as COURT REFORM]; Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 340, 343-46 (1982).

14. It may very well be that one of the problems of the American criminal justice system is not so much the lack of adversariness, but its superabundance—litigiousness run amok. My aim here is not to decide whether plea bargaining or trials are more adversarial but, rather, to point out that both may be adversarial. The quality and substance of representation, not the form of the judicial proceeding, are the determinants of effective assistance of counsel. For an argument that negotiation can be more flexible and equitable than adjudication, see Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 653-60 (1976). Eisenberg's thesis has been applied to plea bargaining in P. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT 129-31 (1978).

15. Since Schulhofer disapproves of the flexibility prosecutors have, he might not mind this result; *cf.* Schulhofer, *Assembly Line*, *supra* note 2, at 141-43.

16. *See, e.g.*, Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC'Y REV. 309, 310-14 (1979). Felstiner documents West Germany's use of penal orders for misdemeanors and property felonies, including embezzlement and tax fraud. Penal orders are prepared by a prosecutor and signed by a judge after cursory review of a police investigation. Penal orders do not impose prison terms; however, if the accused fails to object, in writing or in person, the order has the same effect as a conviction after trial. If the defendant objects to the penal order, the case goes to trial, and the penal order is nullified.

17. *Id.* at 310-11.

18. *See generally* D. PHILIPS, CRIME AND AUTHORITY IN VICTORIAN ENGLAND 298-300 (1977) (documenting the shift to summary procedures in indictable criminal cases in the early nineteenth century) [hereinafter cited as CRIME AND AUTHORITY].

19. *See, e.g.*, P. CARLEN, MAGISTRATES' JUSTICE 98-127 (1976); D. MCBARNET, CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE 123-53 (1981). Both Carlen's and McBarnet's studies identify a host of factors that induce defendants not to contest their cases. Carlen identifies several institutional "rules" and practices designed to make the defendant a "dummy player" by ruling him, whenever he speaks, out of time, out of place, out of order, even out of mind. McBarnet argues that the problems go much deeper and are structural. These structural factors include a policy of denying poor defendants meaningful repre-

In nineteenth century England, there was a long debate over the expansion of summary jurisdiction of magistrates' courts. Proponents justified their arguments on grounds of efficiency and fairness. But the historical record also suggests that one of the consequences of expanded summary jurisdiction was that more people were convicted of crimes.[20] Nothing about the Philadelphia experience bars a similar result, if bench trials become more common in this country. Even if Philadelphia remained an exception, other jurisdictions might follow the British pattern.

I raise these issues not to disparage Schulhofer's main argument—he certainly does not advocate mail-in guilty pleas or perfunctory bench trials—but to emphasize that plea bargaining can be adversarial and that bench trials can be perfunctory.[21] More generally, I think the most important lesson to be drawn from Schulhofer's study of Philadelphia is that vigorous advocacy is not as dependent upon the form or forum of decision making as it is upon the quality of representation and resources available to the participants. In this sense, I think Schulhofer's singular emphasis upon the bench trial as the paradigm for decision making is misplaced. Similarly, his argument that trials are preferable to guilty pleas, because appellate courts use somewhat more stringent standards for judging ineffective assistance of counsel in trials,[22] rings hollow. Given the vigor of the Philadelphia prosecutors and public defenders described by Schulhofer, my hunch is that plea bargaining in this city would also be vigorous and adversarial. Although many American jurisdictions have turned to perfunctory plea bargaining and the British have continued to rely on bench trials which, for the most part, are not vigorous adversarial proceedings, the Philadelphia experience has been singular. One only wishes that Schulhofer had reflected more upon why the criminal justice agencies in Philadelphia are more committed to vigorous prosecution and defense than their counterparts in many other communities across the country.

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sentation but, nevertheless, insisting upon a knowledge of procedure that lay defendants cannot possibly have. *Id.* at 124-38. Magistrates fail to insure basic due process by denying protections routinely available in higher courts, such as advance notice of witnesses to be called against the defendant, a record of the proceeding, or a jury trial. *Id.* at 138-39. Finally, she recognizes a prevailing "ideology of triviality," in which all participants, with the exception perhaps of the defendant, are encouraged to treat issues in the lower courts as unimportant. This in turn sanctions carelessness, insults, and errors. *Id.* at 143-47.

20. *See* CRIME AND AUTHORITY, *supra* note 18, at 170.

21. *See* COURT REFORM, *supra* note 13, at 19-23; *cf.* Friedman, *supra* note 12; Langbein, *supra* note 12.

22. Schulhofer, *Assembly Line*, *supra* note 2, at 142.