# DILEMMAS IN NEW MODELS FOR INDIGENT DEFENSE

MICHAEL MCCONVILLE*

## INTRODUCTION

Whenever models of criminal defense are discussed it seems inevitable that plea bargaining[1] will occupy center stage. The section of this conference that was devoted to rethinking the way in which mass justice might be fashioned anew proved to be no exception. Some speakers saw plea bargaining as an unmitigated evil. Some saw it as unavoidable, if imperfect. Others regarded it as laudable and were convinced that it brought various benefits to both the individual defendant and the criminal justice system in general. Critics divided on whether bench trials would be a marked improvement. Its supporters were unclear as to what role, if any, bench and jury trials should play in deciding issues of guilt and innocence.

There is a great danger that this debate will, if it has not done so already, get locked into false dichotomies. Failure to deal with deep, structural issues will ultimately doom any attempt to effect permanent and beneficial change in the system for providing justice for the poor. Therefore, I will first seek to identify some major contradictions underlying the demand for more trials in place of plea bargaining, and address some problems that are intrinsic to the models being advanced. I will then suggest ways in which the debate might be redefined to permit the analysis that these models demand.

## I
## INTERNAL PROBLEMS OF THE NEW MODELS

Critics expressly or implicitly assert that most, if not all, defendants suffer under the present criminal justice system, especially from plea bargaining. Some see plea bargaining as a manifestation of the weaknesses in the criminal justice system (and of the frailties of lawyers). For others, it constitutes a malignant influence on the behavior and standards of legal actors. Whether

* At the time of the Colloquium, Michael McConville was the Walter Meyer Research Professor, New York University School of Law. Along with Professor Chester Mirsky, he conducted a year-long study of criminal defense systems for the indigent in New York City, entitled "Defense of the Poor in New York City: An Evaluation." Professor McConville is currently a Senior Lecturer in Law at the University of Birmingham. He has written extensively about the English criminal justice system. His most recent book, which he co-authored with James Baldwin, is entitled COURTS, PROSECUTION AND CONVICTION (1981).

1. For the purposes of this article, I define the term "plea bargaining" as the method of disposing of criminal cases by negotiation and exchange without a formal trial. I do not accept the premise that all guilty pleas are the result of some form of bargaining or that bargaining is an apt word to describe the discussions which precede the plea. For the purposes of this article, however, these issues will not be pursued.



Imaged with the Permission of N.Y.U. Review of Law and Social Change

the critics' intentions are to relieve the suffering of defendants, to improve the behavior of lawyers, or to raise the standards of review for appeals, they seem to agree on one issue: plea bargaining should be displaced in favor of trials.

It is difficult to envision a criminal justice system in which full trials are the principal means of adjudication. However, it is still worthwhile to consider the possible consequences of an increased number of trials. There are significant problems with the use of trials for which its supporters do not have satisfactory answers. Indeed, the problem transcends a simplistic dichotomy between plea bargaining and trial systems. It is rooted in our society's attitudes towards indigent defendants and those who represent them.

### *A. More Severe Punishment for Some Defendants*

An increase in the severity of some defendants' sentences would occur, even if the differential between sentences given in exchange for a plea and sentences imposed after trial were reduced or removed.[2] This would be true for a number of reasons. First, new facts can strenghthen a case, just as they can weaken it or cause it to disintegrate. For example, the evidence that emerges as a result of trial may be more damaging than is indicated in the police report or the District Attorney's write-up, which would otherwise be the basis of a bargained plea. Second, a defendant convicted after a trial may be perceived as having put the victim through the unnecessary ordeal of testifying. The stress that the victim exhibits during her testimony when she relives the crime may increase the defendant's apparent culpability. The defendant may be thought, by the mere fact of demanding a full trial, to have displayed a lack of remorse. This may encourage the sentencer to treat the defendant more harshly than she would have had there been a plea bargain. Such harsh treatment reflects legal and cultural beliefs about the extent to which a defendant or her lawyer is entitled to go in order to raise a reasonable doubt and about the legitimacy of challenging the state to prove its case. Third, the failure of the defense attorney to create even a reasonable doubt that the defendant is not guilty strengthens the perception that she deserves full punishment, and is not someone who seems to be rehabilitated.

It is much more difficult to refute these possibilities than it is to attack a crude sentencing differential, because they reflect culturally entrenched, be-

2. The evidence indicates fairly clearly that those who go to trial receive harsher penalties than those who plead guilty. *See* Brereton & Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55-61 (1981-82). Indeed some critics believe that the threat of extra punishment after trial is the force which drives many lawyers to compromise and participate in the "coercive" process of "reward and punishment". *See, e.g.*, Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967); Newman & NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DEN. L.J. 367 (1970); Heberling, *Conviction Without Trial*, 2 ANGLO-AM. L. REV. 428 (1973). However, it would be unfair for those who support plea bargaining to assert that an increase in the incidence of trials would result in more defendants being given more severe sentences as punishment for going to trial, because arguably any existing sentencing differential would be removed.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

havioral expectations of judges and jurors. For an anti-plea bargaining movement which is heavily defendant-oriented, these and other possible nonbenefits of trial (e.g. delay, cost, and publicity) must be squarely faced.

### *B. A Changed Pattern of Prosecutions*

The criminal justice system is highly dynamic and interdependent. If bench or jury trials begin to replace plea bargaining, the prosecution process is likely to be radically affected. Prosecutors, for example, may be more selective about the cases in which they are willing to bring charges and/or try them. Acquittals damage the reputation of prosecutors; thus, with an increased probability of a trial, charges or sentence offers may be reduced because of a concern that the case will be "lost" at trial.

For instance, prosecutors may be reluctant to try cases where victims are unwilling to testify. Cases involving alleged rape and child abuse[3] are examples of situations where prosecutors may seek a conviction on *some* charge at the expense of conviction on the *appropriate* charge. Reducing or abandoning the charge, or lowering the sentence offer because the alleged victim may not stand up to the trial ordeal, deprives the public of its right to see justice done. It also discourages prosecutors from pursuing alternative strategies for dealing with difficult trial situations.[4]

### *C. Changed Attitudes Towards Criminal Defense*

Lawyers for the poor are generally held in low esteem.[5] They are regarded as poor lawyers, and it is believed that their ineptness is exacerbated by the institution of plea bargaining. It is argued that more trials will produce pressures for self-improvement, better training, and higher quality personnel. On the other hand, it is also argued that defense attorneys for the indigent suffer low esteem because those who associate with the poor are themselves stigmatized. Consequently, if public trials become a regular social occurence, this stigmatization may become exaggerated. The public acquittal of a defendant who is believed to be guilty will increase the social stigma of those who assisted in the 'escape'. If an acquitted defendant is charged with another crime the stigma will be amplified. The more 'technical' the acquittal, the lower the respect the defense counsel will command.[6] One of the ironies of plea bargaining may be that it blunts the public's strong desire for more severe

3. It is reported that Elizabeth Holtzman, the District Attorney of Brooklyn, has proposed that young witnesses be allowed to give television testimony out of the presence of the defendant, with the intention of reducing the trauma of child sexual-abuse victims. *See* N.Y. Times, May 3, 1985, at B10, col. 2.

4. These strategies might include providing psychological counseling and support for those who cannot otherwise face the prospect of testifying.

5. *See, e.g.*, J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972).

6. A similar process has already occurred in relation to bail. The problem is compounded in jurisdictions, such as the United States, which allow extensive comment by prosecutors from the point of arrest (and often before arrest) despite the so-called presumption of innocence. *See*

Imaged with the Permission of N.Y.U. Review of Law and Social Change

sentencing. This is because a nonpublic adjudication denies the victims' movement of its strongest emotional platform. Although this may not be a public good, plea bargaining almost certainly helps to defuse the move for a more consistently punitive criminal justice system. A reliance on public trials could lead to a stigmatization not simply of lawyers for the poor, but of the defense role in general.

### *D. False Confidence in the Adjudicative Process*

Critics of plea bargaining often focus on its process, observing the contrast between the "secrecy" of plea bargaining and the "openness" of trial. Sunlight, we are reminded, is the best disinfectant. Closer examination, however, shows the contrast is not so clear.

It is said that trials are open systems. However, one of the most important stages of the trial, the determination of the verdict, is shrouded in secrecy. The jury room is inviolate, the deliberative process impenetrable, and the verdict only conclusorily informative. Indeed, the very secrecy of the deliberative process is acknowledged as a strength of the jury. Thus, the rationale behind a jury verdict is often no more obvious than the rationale for a plea bargaining agreement; in fact, a verdict may not be based upon legal principles at all.

Furthermore, the "openness" of a trial will not make it easier for a defendant to prove reversible error on appeal. Those who advocate moving away from plea bargaining do not insist that bench or jury trials will prevent mistaken decisions. On the contrary, they insist that mistakes are much more correctable when made in the context of trial. As Stephen Schulhofer puts it: "Sometimes shortcomings are evident. But at least they *are* evident."[7] Professor Schulhofer's emphasis, however, is misplaced. The "advantage" of open trial occurs only in the most egregious cases. In jury trials, verdicts without recorded histories are practically unchallengeable. In bench trials, potentially appealable judicial reasoning may not be disclosed. Often, the reasoning provided will be that which yields a legitimate basis for decisions actually reached on other grounds. The limited capacity and willingness of the system to undo major, transparent errors in trials is only likely to encourage an exaggerated trust in the adjudicative process.

## II

## MISLEADING ASSUMPTIONS UNDERLYING THE NEW MODELS

The arguments advanced by critics of the current system are inherently problematic because they make adjustments within the system rather than questioning its underlying purpose or rationale. Some of these adjustments are defendant-oriented, some are defense counsel-oriented, some are rule-based,

N.Y. Times, May 3, 1985, at A30, col. 4 (letter of Professor Robert McKay, President of the New York City Bar Association).

7. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 147 (1986).

Imaged with the Permission of N.Y.U. Review of Law and Social Change

and others are targeted to fiscal crises. But these solutions are hermetic in that they fail to ask more basic questions about the criminal justice system as a whole and its treatment of defendants. Is the system able to process a high volume of defendants efficiently? Is there a real concern within the criminal defense community regarding the treatment of defendants? Do defense attorneys represent their clients' interests or their own? Is there public outrage or concern over the ill-treatment of defendants or alleged breaches of their rights? Are the outcomes systematically wrong or are the sentences systematically excessive? These questions identify the important difference between solving specific problems and changing an entire system. In other words, the critics' proposals focus on individual shortcomings of the criminal justice system rather than evaluating the adequacy of the system as a whole in protecting the rights of defendants. In order to refocus the debate about the criminal justice process, it is useful to consider the consequences of the critics' limited approach.

### *A. Individual and Systemwide Analyses*

Concentration on in-court processes inevitably detracts attention from the defendant population as a whole and implicitly legitimates the current system. By not questioning the system itself we are induced to count as mistakes only those things which the system defines as such. Correcting individual miscarriages of justice is a noble aim, but it may not be the worthiest. One consequence of looking only at individuals is that we are led away from the low-visibility decisions of the system: decisions not to investigate, arrest, charge, or prosecute. In this way, white-collar crimes and those of the powerful are passively accepted because the relevant decisions are unknown to the public and, therefore, unchallengeable.

The critics' analysis also fails to focus on the volume of cases or on questions about systematic bias. By failing to take volume into account, we more easily overlook structural biases in the system against the working class, minorities, and the poor.

The focus on individual solutions also reinforces the belief that the system is receptive to self-correction and self-discipline. Finally, it diverts attention away from understanding how cases are managed to conform to publicly acceptable notions of evidence and procedure.

Even if these systematic biases could be identified by an internal analysis of a court's operation, it would not be possible to correct them internally. As William Hellerstein noted in his closing address, courts are presently not very receptive to claims based on defendants' rights.[8]

8. Hellerstein, *Closing Address: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 271, 272 (1986) (citing lack of success in litigation challenging prison conditions).

Imaged with the Permission of N.Y.U. Review of Law and Social Change

### B. *Truth-seeking v. Truth-suppression*

Critics of plea bargaining also claim that it undermines what they perceive to be the essence of the adversarial system: the search for truth. Plea bargaining is chided for subverting that goal. The alleged contrast between the trial model and the plea bargaining model is put by Professor Schulhofer in the following passage:

> However troubled one may be after observing an awkward trial performance by a poorly prepared prosecutor or a novice defender, one must consider whether plea bargaining would produce a better result, *all other things being equal.* A poorly prepared prosecutor or a novice defender would create an even more troubling situation in attempting to negotiate a plea agreement. The fact is that one has got to feel better informed, better able to guess at the "truth," after hearing the live testimony and observing the witnesses explain the details of what they did or saw. Thus even under conditions of assembly line justice, a system of public trials is bound to produce more accurate, better informed determinations of guilt than a system of plea bargaining.[9]

This view misconceives the fundamental nature of the criminal justice system, and the advantages that a trial offers. It is not clear that a trial system provides a better means for discovering the truth than a system which involves negotiation. Of course, it may make the participants feel better informed about what happened, but this does not guarantee correct information. The adversarial system is really one in which proof instead of truth is at issue. Cases are constructions, not faithful representations of reality, and we need to know more clearly what links exist between evidence presented at trial and actual events, before making a judgment that trials are more likely to reach the truth than plea bargaining.

Ironically, plea bargaining may inadvertently be more realistic in its expectations than the trial model. In routinizing cases, in denying uniqueness to each defendant and each event, in approaching the "facts" in a cursory fashion, the process incorporates the chimerical quality of "truth" in the adversary system. It recognizes, albeit not always for good reasons, that the truth is structurally unknowable. Thus, bench and jury trials are mechanisms which obfuscate the message and are therefore part of the problem, not the solution.

### C. *Rules and Behavior*

The final problematic assumption is made by those who seek to reform the criminal justice system as it currently exists, either through plea bargaining or through trials. The assumption is that the current system of rules is legitimate.

9. Schulhofer, *supra* note 7, at 147-48.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

The relationship between rules and behavior is very important. Critics of the criminal justice system tend to focus on one or the other. Sometimes critics attack individuals for departing from established, acceptable rules; their concern is that the underlying purpose of these rules can never be achieved. Sometimes the rules themselves are attacked as being wrongly conceived.[10] These positions are not inconsistent, but the former rests on the assumption that there is a departure, and the latter measures the rules against an idealized and unstated standard. In this respect, Stephen Schulhofer does not follow the logic of his own argument. He demonstrates, in analyzing the duties of the defense to investigate, that courts have laid down standards so meager that "one really must wonder whether a formal adversary trial is likely to produce anything resembling justice for either the public or the accused." Nevertheless, he goes on to advocate (admittedly on the basis that it would be an improvement on plea bargaining) that bench trials should be used in the hope that attorneys will do "a bit of investigation" as a result of peer pressure and the like. The logical conclusion to his own devastating critique of such rules is surely that the limited protection offered by the law will not guarantee a fair hearing whatever the mode of the trial.

But the major point that should be addressed in this debate about rules is that the real problem is that so often practice is in conformity to the law. Thus, what is done to the poor is perfectly lawful. Attorneys who do not investigate are not, as Stephen Schulhofer shows, in breach of the law and "effective assistance" has become after *Strickland*, as Albert Alschuler demonstrates, little more than doing one's incompetent best.[11] Against this background, attacks on the behavior of attorneys, through not unwarranted, pale into insignificance and deflect debate away from more fundamental issues.

## CONCLUSION

In conclusion, I want to emphasize that the purpose of my remarks is not to choose between the competing adjudicative models discussed by the conference participants. Each of the models has strengths and weaknesses. It is understandable that plea bargaining should raise so much controversy. It is equally understandable that criminal justice reform should be sought through dialogue between the competing schools of thought. However, it is critical to move away from a focus on individual cases of injustice towards a system-wide view.

As part of this process, I believe that three issues are of special importance. The first is the apparent disenfranchisement of lawyers for the poor.

10. This approach could be used differently by those who suggest that legal change is intended to have a symbolic rather than an instrumental effect. According to this view, legal "progress" is concerned only with presenting a legitimate, representational ideology of rights. However, such an ideology might not include the rights of the poor. This is of special concern in the context of effective assistance of counsel, where the rights of the poor are paramount.

11. *See* Schulhofer, *supra* note 7, at 139.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

Does this serve the criminal justice system or just the elite of the legal profession? Second, the precise role of appellate courts in establishing constitutional standards should be determined. Do the courts act in a constitutionally neutral fashion, or do they act in a politically biased manner? Third, given the way in which ineffective assistance has now become acceptable behavior in a criminal lawyer, how can mass justice be achieved without empowerment of the poor?

Imaged with the Permission of N.Y.U. Review of Law and Social Change