CRIMINAL TRIALS, NEGOTIATED PLEAS, AND THE EFFECTIVE ASSISTANCE OF COUNSEL: NOTES ABOUT AND TOWARD A THEORY OF THE ATTORNEY'S ROLE IN CASE RESOLUTION

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INTRODUCTION

In his essay "Effective Assistance on the Assembly Line,"[1] Professor Stephen Schulhofer of the University of Pennsylvania Law School advances two themes. According to Schulhofer, these themes are inextricably entwined, but for my purposes here I will address them separately. The first theme concerns the duties that formal doctrine imposes or should impose on attorneys with respect to the representation of their clients. The second reveals Schulhofer's admiration for adversary proceedings, and results in his advocacy of a "new model"—criminal trials—as the procedure for attorneys to follow in order to effectively represent their clients' interests. In this world, according to Schulhofer, justice flourishes only in adversary contests, and is, in fact, flourishing in only one place in this country—in his own backyard, Philadelphia. A bleak picture of doctrinal requirements as contrasted to the effective representation that he believes defendants receive from adversary proceedings in Philadelphia links his two themes.

In the sections that follow, I will neither attempt an exhaustive review of Schulhofer's arguments nor undertake a systematic examination of the many and varied issues implicated by his two themes. I will not, for example, explore in detail the range of obligations attorneys assume in criminal defense work, nor attempt to contrast these in any step-by-step way for pleas and trials. Instead I will try to clarify some of the details of the arguments he advances and raise some general questions about his themes, particularly his second. In so doing, I hope to flesh out the theory that lurks not so far beneath the surface of his essay, and suggest competing theoretical propositions that are in need of the proverbial "further study."

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

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I
PREPARING FOR TRIALS AND PLEAS: LITTLE ADO ABOUT EVERYTHING

In the first section of his paper, Schulhofer explores two questions: What does case law require of attorneys in preparing for trial and pleas? What should it require? In beginning to answer these questions, Schulhofer presents an interesting, albeit sketchy, review of case law. He concludes that the formal obligations of attorneys in trials are low, and in pleas, are probably even lower.[2] Schulhofer also addresses what social scientists sometimes refer to as the issue of non-decisions.[3] He grapples in intriguing ways with the problem of assessing choices that *are not made*, and considers if these individually or collectively constitute a denial of effective assistance.[4] Overall, he begins to mine a rich vein of material here, and I am certain that as his work progresses he will include more detailed prescriptions for the courts, legislatures, and criminal code drafters about the responsibilities of attorneys in trials and pleas (if he'd allow these to exist!).

I think the general picture Schulhofer paints in this section is accurate. The case law is very open-ended and does not require much of attorneys preparing for trials; it requires even less when the defendant pleads. Nonetheless in painting this generally accurate picture, Schulhofer relies on at least two specific arguments that need to be qualified in important respects. First, in discussing "justifications" defense attorneys may make for pleading their defendants guilty early in the process, Schulhofer claims that the prosecutor's offer gets harder over time.[5] This, he argues, allows defense attorneys to explain why they counselled clients to accept a plea early in the negotiation process and thus immunizes them from defendants' claims of ineffective representation. Yet the reality of the plea process in most courts is more complex. For many reasons (for example, witnesses disappear and memories fade) deals often get better, not worse, as time passes.[6] Many experienced defense attorneys would subscribe to the notion, inconsistent with Schulhofer's claim, that "justice delayed is better for the defendant." In short, though some plea offers may get worse if a defendant does not accept them ("the deal is here today but it'll be gone tomorrow"), in other circumstances it may pay, from the defendant's perspective, to delay accepting a prosecutor's offer. Thus in scrutinizing a defense attorney's claim that it made sense to accept a plea early, Schulhofer adopts one perspective on the nature of plea bargaining, but ignores another.

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2. *Id.* at 137-43.

3. Bachrach & Baratz, *Two Faces of Power,* 56 AM. POL. SCI. REV. 947 (1962); Bachrach & Baratz, *Decisions and Nondecisions: An Analytical Framework,* 57 AM. POL. SCI. REV. 632 (1963).

4. Schulhofer, *supra* note 1, at 137-43.

5. *Id.* at 141-42.

6. *See* M. MCCONVILLE & J. BALDWIN, COURTS, PROSECUTION, AND CONVICTION, ch.3 (1981).

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Second, in the first section, Schulhofer cites "meager" pretrial discovery as a barrier to effective assistance in plea bargaining.[7] The picture he paints of limited discovery and hurried conferences is accurate in some jurisdictions, but in others it is simply wrong. Though criminal discovery, under even the best of circumstances, may not be as extensive as is discovery in civil cases (replete with lengthy depositions, etc.), plea bargaining, and the discovery that precedes it, can be a comparatively deliberative process and can include a substantial amount of material. Again, Schulhofer appears to buttress his argument by selecting one perspective drawn from the plea bargaining literature, while ignoring another.

However, these two qualifications to the arguments he marshalls to build his first theme ought not detract from the general significance of the issues with which he is grappling. It is true that not much has been required of attorneys preparing for trials and pleas, and that not much thought has gone into what should be required. Attorneys appear to be held to a slightly higher set of expectations when a case is tried than when it is pled, but in neither situation is much ado made about attorney efforts. Decisions made and decisions not made can be—as Schulhofer suggests—rationalized as judgment calls.[8] We need to subject these rationalizations to careful scrutiny informed by a realistic and wide-ranging consideration of trial and plea bargaining practices in a representative sample of jurisdictions.

II
TRIALS, PLEAS, AND THE PHILADELPHIA MODEL: THE GOOD, THE BAD . . . AND THE UGLY?

After concluding that few requirements are imposed on attorneys pursuing trials, and even fewer on those negotiating pleas, Schulhofer turns to his second theme. He claims that, given the sorry state of the formal requirements placed on attorneys, it is better to have cases resolved by trial than by plea bargaining.[9] Trials are at least open proceedings, and they at least require some preparation by attorneys. Only within adversary proceeedings can effective assistance be afforded defendants. Further, he argues that the notion of a trial for all defendants is not the naive fancy of a removed-from-reality academic. Instead, the ideal of what we might call "one person, one trial" is quite feasible. In support of this assertion, Schulhofer points to the experience of Philadelphia.[10]

The core of the argument rests on Philadelphia's apparently successful substitution of trials for plea bargains as a way of resolving many of its criminal cases. These adversary proceedings are not, however, jury trials. Instead, they are Philadelphia bench trials, lasting an average of forty-five minutes.

7. Schulhofer, *supra* note 1, at 144.
8. *Id.* at 138-39.
9. *Id.* at 142-43.
10. *Id.* at 144-48.

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Notwithstanding their brevity, Schulhofer argues that they are truly adversarial, and that they are clearly superior to negotiated dispositions.[11]

The first question one might raise about these trials is whether they in fact are "real" adversarial trials or whether they are merely the "functional equivalents of guilty pleas."[12] In many places some bench trials are prearranged or "wired" proceedings designed to circumvent constraints imposed by prosecutorial inflexibility in plea bargaining policies.[13] How many of a jurisdiction's bench trials are one sort or another of "slow pleas of guilty,"[14] and how many are "real" is an open question.[15] But Schulhofer, here and elsewhere, demonstrates that in Philadelphia more bench trials are held than in

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11. *Id.* at 147-48.

12. *See* M. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS 85-86 (1977).

13. Loftin, Heumann & McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control,* 17 LAW & SOC'Y REV. 301 (1983).

14. L. MATHER, PLEA BARGAINING OR TRIAL? 20, 55-56, 69-70 (1979).

15. For a discussion of a variety of slow plea practices in a number of jurisdictions, see, e.g., M. Levin, *supra* note 12; L. Mather, *supra* note 14; J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute,* 13 LAW & SOC'Y REV. 393 (1979). An interesting critique of some of these studies can be found in Schulhofer, *Is Plea Bargaining Inevitable?,* 97 HARV. L. REV. 1037, 1046-50, 1100-02 (1984). Schulhofer correctly notes that bench trials in Detroit increased as a result of the combination of a restrictive prosecutorial plea bargaining policy and the enactment by the legislature of a mandatory sentencing statute for selected firearm offenses. *Id.* at 1049 n.47. In an effort to circumvent these restrictions on the exercise of prosecutorial and judicial discretion, some judges, working with defense attorneys, became far more inclined to agree to bench trials for cases in which they felt that the mandatory sentence required too severe a punishment, or forced too dramatic a departure from the court's standard "going rates". Often these particular bench trials were the equivalent of slow pleas of guilty, in that the trial option was being used simply to free the judge of the mandatory sentencing constraint on his discretion. For further discussion of the context within which these trials arise, see Heumann & Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases,* 20 AM. CRIM. L. REV. 343, 347-52 (1983).

Of course, not all bench trials, both before and after the new law and the new prosecutorial policy, were "wired" in this fashion. Presumably some of the bench trials which existed before these changes as well as some of those which resulted from the double restriction in discretion, were "real" adversary contests. Schulhofer ignores the nuances of this argument and mistakenly contends that Heumann and Loftin promote a sort of iron law of bench trials, a law which maintains that all bench trials are necessarily slow pleas of guilty. Schulhofer, *supra* at 1101-02. No such claim was made.

Interestingly, the use of bench trials in Philadelphia may also have increased at least in part as a response to restrictions on plea bargaining imposed by the prosecutor. *See* Uhlman & Walker, *A Plea is No Bargain: The Impact of Case Disposition on Sentencing,* 60 SOC. SCI. Q. 218, 221-22 (1979). Though Uhlman and Walker do not identify their city, Schulhofer convincingly demonstrates that it is Philadelphia about which they are writing. *See* Schulhofer, *supra* note 15, at 1060 n.87. Further support for the argument that the Philadelphia bench trial arose in part as an effort to "wire" cases in response to prosecutorial plea bargaining restrictions, and as an alternative to pleading guilty in the face of these restrictions, was obtained from a conversation with Benjamin Lerner of the Defender Association of Philadelphia at the N.Y.U. Review of Law and Social Change Colloquium, "Effective Assistance of Counsel for the Indigent Criminal Defendant," March 23, 1985. Lerner, consistent with both the Uhlman and Walker, and Schulhofer arguments, also noted that over time these bench trials, or at least a greater percentage of them, became "real" adversary contests.

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other jurisdictions, and provides some evidence that a substantial percentage of these are "real" adversary proceedings, not just "wired" slow pleas.[16]

This is an interesting finding. It raises questions about why Philadelphia defendants who opt out of jury trials choose bench trials rather than guilty pleas more frequently than defendants in other jurisdictions. What is it about what we might call the legal culture of Philadelphia that makes bench trials preferable to guilty pleas? But this finding is not as interesting or significant as Schulhofer believes. Contrary to his argument, bench trials are not necessarily the desirable and attractive alternative to plea bargaining that he argues they are. The strengths of full-fledged jury trials and the disadvantages of plea bargaining at its worst need not be addressed here. It suffices for our purposes to simply look at the Philadelphia bench trial, because this serves as the adversary model which Schulhofer believes possible and advocates as the feasible forum within which defendants can receive effective assistance of counsel. Schulhofer seems to believe that once he establishes that these bench trials are truly adversarial, and that plea bargaining is not inevitable, he has also gone a long way toward showing that bench trials allow for effective representation and that plea bargaining does not. But more careful scrutiny of his arguments, and of the Philadelphia bench trials themselves, indicates that the matter is not as clearcut as he suggests.

First, as Schulhofer himself notes, the Philadelphia bench trials often do not take much longer than a careful guilty plea hearing. If one considers what an attorney can accomplish at the guilty plea stage,[17] and couples it with what potentially can be achieved in a separate sentencing hearing, then for many defendants without contestable factual and legal issues in their cases (and we need not debate the percentage of these here), pleading may make sense. Indeed, throughout Schulhofer's assessment of attorney performance he fails to consider that defendants themselves—to reduce uncertainty, to take advantage of what they perceive to be better offers, to get the matter over with, or for some other reason—may want to plead and may want their attorneys to arrange pleas for them.[18] The point here, again, is not to debate the larger issue of the relative costs and benefits of pleas and trials. Instead, I wish to make the more specific point that Schulhofer's propensity to equate trials with effec-

16. Schulhofer, *supra* note 1, at 145-47; Schulhofer, *supra* note 15, at 1062-82.

17. At a minimum, more time for meaningful and honest discussion is now available at the guilty plea hearing, given the demise in most jurisdictions of the guilty plea charade and its accompanying ritual of *pro forma* and usually untrue denials about promises made to the defendant in return for the plea.

18. Often, idealistic new attorneys are surprised by their clients' interest in pursuing plea bargains. *See* M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 69-71, 90 (1978). Having recognized the input the client may have, let me hasten to add that I am well aware of the subtle interplay between defense attorney cues and defendant desires. Attorneys can certainly structure dispositional choices in ways that can substantially affect the defendants' choices. Nevertheless, defendants do bring an independent voice to the decision-making process, and Schulhofer's analysis fails to take it into account.

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tive assistance of counsel, and negotiated dispositions with ineffective assistance, suffers from at least one glaring omission—consideration of what defendants themselves may want to do with their cases.

Second, by Schulhofer's own admission, attorneys do only "a bit of investigation and preparation" in these bench trials.[19] He asserts, but presents no evidence, that this "bit" is more than the amount done in pleas. Further, it may be that a "bit" of effort constitutes "effective" assistance only if one accepts the almost non-existent standard for effectiveness which he assailed in reviewing the case law in the first section of his paper.

Schulhofer's claim that the Philadelphia bench trial provides a forum within which counsel may effectively assist defendants implies a curiously narrow conception of what constitutes effective assistance. Schulhofer can endorse Philadelphia's bench trials as "real" adversary proceedings and call attorney participation in them effective assistance only by ignoring the very conditions within Philadelphia which drive many defendants to elect a bench trial instead of a jury trial. The bench trial, as indicated above, occurs in Philadelphia with greater frequency than in any other jurisdiction. But it is also noteworthy that this pattern has traditionally arisen out of a distasteful and coercive pattern of judicial assignments.[20] Quite simply, harsher judges generally are assigned to jury trials while more lenient judges are assigned to the bench trials. More than in many plea bargaining systems, which may depend on plea/trial differentials, or on a perception that these differences in sentencing exist, Philadelphia openly admits that the consequence of going to jury is more severe punishment.[21]

Schulhofer is quick to condemn counsel for negotiating dispositions[22] even though, as we have noted, the decision to plead may be the defendant's own. Yet, he fails to ask whether counsel are acting effectively (*i.e.*, serving their clients' best interests) when they cooperate in the coercive bench trial system. He also fails to explore the issue of whether it is this very cooperation

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19. Schulhofer, *supra* note 1, at 19-25.

The phrase "a bit of investigation and preparation" was part of an earlier draft of the paper, which Professor Schulhofer delivered at the Colloquium.

20. For a discussion of the practice of assigning the more lenient judges to the court parts where bench trials are held, see M. Lichtenstein, A Study of Social Interaction in the Philadelphia Court of Common Pleas 153-54 (1982) (unpublished Ph.D. dissertation, Univ. of Penn., Dep't of Criminology). *See also* Schulhofer, *supra* note 15, at 1051-52. In fact, Schulhofer goes beyond describing the Philadelphia bench trial/jury trial sentencing practice by advocating it as a reasonable way to encourage bench trials. *Id.* at 1087-89.

A second factor that induces a number of incarcerated defendants to eschew the jury trial is the long wait they would face for such a trial compared to the relatively short wait for a bench trial. Conversation with Benjamin Lerner, *supra* note 15.

21. An extensive study comparing jury and bench trial sentences in Philadelphia during the 1968-74 period found that sentences after jury trials were nearly three times longer than those meted out after bench trials. Uhlman & Walker, *"He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases*, 14 LAW & SOC'Y REV. 332 (1980).

22. Schulhofer, *supra* note 1, at 144.

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which ensures the effectiveness of this system. The success of the system depends upon the defendants' inability to choose jury trials freely, and upon the existence of incentives to choose either a truncated bench trial or a plea. Indeed, in a system in which defendants can choose a truncated adversary proceeding—the bench trial in Philadelphia—the cost for those who instead choose a full-fledged jury trial may be much higher than in a system in which the more typical choice is between plea and trial.

I am certainly not suggesting that the choice of a bench trial in Philadelphia necessarily reflects negatively on counsel's effectiveness in a particular case. I am simply suggesting that Schulhofer, who argues so persuasively in the first section of his paper that effective assistance must be broadly conceived, fails to explore the consequences of such a broader conception in the second section. He might, for example, have explored the implications of defense attorney cooperation in the coercively designed system found in Philadelphia. He might have asked about the desirability of a system in which the benefits obtained for one client at a bench trial may well increase the costs another will pay for a jury trial. Had he begun to work through these more complicated issues, he might have made an important contribution to the evolving theories of effective assistance of counsel.[23]

CONCLUSION

It is plain that the problem of effective assistance requires further exploration on the doctrinal and behavioral levels. Formal requirements outlining the duties to investigate and pursue alternative defenses in contemplation of both trials and pleas must be formulated and implemented. These efforts at redrafting guidelines should be informed by an appreciation of the real constraints facing attorneys engaged in the practice of criminal law.

The problems inherent in a plea bargaining system are well known, but they are not beyond solution. Attorneys *can* effectively represent defendants while still pleading them guilty.[24] Trials do have some attractiveness in an adversary system, and many lawyers and law professors hold a well-known attachment to them. But trials, as Jerome Frank told us many years ago,[25] are not without their own difficulties. It is simply wrong to assert that effective representation cannot take place without trials.

More comprehensive theories of effective assistance must therefore go be-

23. *See, e.g.*, Ogletree & Hertz, *The Ethical Dilemma of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23 (1986); Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986); Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986); Mirsky, *Systemic Reform: Some Thoughts on Taking the Horse Before the Cart*, 14 N.Y.U. REV. L. & SOC. CHANGE 243 (1986).

24. For a thoughtful discussion of how effective assistance can be afforded defendants who plead guilty, see Church, *In Defense of Bargain Justice*, 13 LAW & SOC'Y REV. 509 (1979).

25. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

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yond a simplistic advocacy of trials in place of plea bargaining. They must consider and explore in detail the delicate relationship between client input and attorney decision making,[26] as well as examine the trade-offs for an attorney between representing *a client* and representing *clients* generally. Many other issues (*e.g.* the matter of fees and fee structures for attorneys representing indigents) that have not been addressed here, or in Schulhofer's essay, also need to be woven into a larger theory of effective assistance.

As a place to begin, Philadelphia is as good as some cities and arguably better than many. It is interesting that bench trials are used in lieu of guilty pleas at a higher rate there than in other jurisdictions, and that these bench trials, though brief, appear to be adversarial in nature. But it does not follow that the attorney who takes her client to one of these bench trials is more effectively representing her client than the attorney who pleads her client guilty. Nor is it clear that a system which discourages jury trials by countenancing substantial differentials between jury and bench-trial sentences can be held up as one in which counsel are effectively assisting clients. Effective assistance is a more robust and complex concept than is suggested by Schulhofer's embrace of the Philadelphia bench trial system. These bench trials may have their place, and attorneys may effectively represent particular defendants at these trials; but this admission is a far cry from a convincing argument that bench trials are both realistic and desirable alternatives to the possibility of thoughtful and deliberative plea bargaining on one side, and more unfettered choices about jury trials on the other.

All in all then, to recall an old sage, were I a criminal defendant seeking effective representation, I remain unpersuaded that I would rather be in Philadelphia.

26. For a useful study of lawyer and client interaction in civil cases, see D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

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