EFFECTIVE ASSISTANCE ON THE ASSEMBLY LINE

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INTRODUCTION

What are the obligations of counsel in a mass production system of criminal justice? I propose to examine this question with an assumption that most will consider hopelessly unrealistic: the lawyer should prepare to take all her cases to trial. After looking at what the lawyer must do to prepare for trial, I will descend to "reality" and consider the obligations of counsel in preparing a case for a guilty plea. I will demonstrate that logically, practically, and legally the lawyer preparing for a plea need not make the effort that is required of an attorney preparing for trial.

After I sketch the paltry package of responsibilities that constitutes "effective" assistance in the guilty plea context, I will consider whether we can continue to tolerate the plea bargaining system. There are many conceivable defenses for bargaining, but I submit that ultimately tolerance for plea bargaining must rest on one of two assumptions. One assumption is that after an appropriate discount for uncertainty, bargaining approximates the results that would occur if cases went to trial. Alternatively, in conditions of heavy caseloads, plea bargaining is unavoidable, so bargaining is by definition tolerable even if theoretically "unjust."

When I have demonstrated that both of these assumptions are false, I will introduce my "new model" of effective assistance. My "new model" is the adversary criminal trial. Some may try to deflate my claim by arguing that my idea is not really new, but I think that many will readily grant that my idea is totally original—and totally silly; it is no accident that hardly anyone, even in academia, has ever made such an outlandishly impractical proposal. I will try to demonstrate that this idea can work—even in New York City.

I
PREPARATION FOR TRIAL

What are the obligations of an attorney in preparing for trial? Too often our analysis of effective assistance assumes a situation akin to the Perry Mason model. A serious charge, usually murder, is at issue and a full, unhurried trial will be conducted by vigorous adversaries who, for weeks previously, have had nothing to do but direct a large staff of assistants in an imaginative investigation that leaves no conceivable stone unturned. This model bears scant resem-

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blance to the reality of high-volume criminal practice. Yet there has been little analysis of what a responsible attorney should do to prepare the 20-30 cases she is assigned to handle on any given day.

Most attorneys have learned from bitter experience that the lofty principles proclaimed by the appellate courts are frequently ignored in the hurly-burly of practice at the trial level. In this instance, for better or worse, the case law is all too realistic. At least, we had better hope that practice in the trenches is no worse than what the appellate courts formally condone.

In principle, counsel has a duty to investigate prior to trial.[1] But in order to establish a violation of this principle, a defendant virtually must show that the defense attorney refused to make any investigation at all. There once was such a case. In *Thomas v. Wyrick*[2] the defense attorney said that he had a general policy of refusing to interview witnesses, and the Eighth Circuit indignantly set aside the conviction. However, the courts are not unrealistic. They require only a *reasonable* investigation. They recognize that "*given the finite resources* . . . available to defense counsel, fewer than all plausible lines of defense will be [investigated]."[3] The Fifth Circuit has said that the "duty to investigate and prepare is . . . far from limitless."[4] (That bit of understatement came in a capital case.)

Let us grant that even a Perry Mason, even in a capital case, cannot investigate everything. How *should* we determine the limits of reasonable investigation? One approach would be to look closely at what counsel *did* do, to see whether she at least pursued thoroughly several of the most promising lines of defense, and whether she can give persuasive tactical reasons for her choices. We might also choose to look closely at those "finite resources" that are said to be a given. What makes a narrow investigation tactically reasonable is almost always the severe constraints of time and money under which attorneys must function.

I will not attempt to work out here all the implications of such an approach, or what it would mean for the courts in terms of post-conviction litigation, because the courts are miles away from any approach of that kind. As the law stands, any investigation, anything more than no investigation at all, is likely to qualify as reasonable. Although such diverse authorities as Chief Judge David Bazelon and Chief Justice Warren Burger agree, albeit for different reasons, that huge numbers of practicing trial attorneys are not effective,[5]

1. House v. Balkcom, 725 F.2d 608 (11th Cir.), *cert. denied*, 105 U.S. 218 (1984); U.S. v. Tucker, 716 F.2d 576 (9th Cir. 1983); U.S. v. Baynes, 687 F.2d 659 (3d Cir. 1982).

2. 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976) (defendant had been convicted of first degree murder and given a life sentence).

3. Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982), *rev'd on other grounds*, 466 U.S. 668 (1984) (emphasis added).

4. Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982) (defense counsel in capital case, who failed to interview ten of eleven witnesses, including alleged accomplice and two eyewitnesses, provided effective assistance).

5. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) (counsel inadequate in a great many if not most of the D.C. cases that author had seen); Burger, *The*

the courts in sixth amendment cases hold that the competence of counsel must be presumed.[6] Even an important failure to investigate does not rebut the presumption; indeed the presumption reappears to generate a further presumption that the failure to investigate must have been a tactical choice.[7] Thus, courts have been willing to dismiss effective assistance claims on the basis of purely hypothetical tactical rationales,[8] and have refused to infer the lack of a tactical reason even when the record suggests none whatsoever.[9] To prove that counsel's failure to investigate was not strategic, the defendant usually must get the trial attorney to admit explicitly (and "credibly"!) that she had no strategic reason for her inaction.[10] In some courts an attorney can come close to this and *still* provide effective assistance; the Eleventh Circuit recently held, again in a *capital* case, that a failure to investigate was a reasonable "tactical" choice when explained only by the attorney's general sense of futility.[11] And, of course, even when a breach of duty can be shown, a defendant faces the extraordinary difficulties of proving prejudice in order to obtain reversal.

The bleak picture that I have painted largely emerges from serious cases, many of them capital cases. What would the courts say about counsel's duty to prepare for trial on a felony charge of auto theft, where the likely sentence may be probation or at most a few months of imprisonment? What duties of investigation would they require from a lawyer preparing a misdemeanor case of drunk driving, prostitution, or disorderly conduct? It is hard to be sanguine. Against that background one must wonder whether a formal adversary trial is likely to produce anything resembling justice for either the public or the accused. Luckily many attorneys exceed the minimal obligations sketched in the cases, so that trials probably will elicit the relevant facts most of the time. But when we appreciate how little a contested trial may actually deliver,

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Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227 (1973).

6. U.S. v. Zylstra, 713 F.2d 1332, 1338 (7th Cir. 1983). In Strickland v. Washington, 466 U.S. at 689, 691 (1984), the Supreme Court emphasized that this is a "strong" presumption and that counsel's judgments are entitled to a "heavy measure of deference."

7. Stanley v. Zant, 697 F.2d 955, 969-970 (11th Cir. 1983) (counsel's failure to present any mitigating evidence in penalty phase of capital case presumed to have been a strategy choice); Washington v. Strickland, 693 F.2d at 1257. *But cf.* United States v. Baynes, 687 F.2d 659 (3d Cir. 1982) (holding—more sensibly—that an attorney could not make a competent decision whether or not to use a line of defense until *after* he had carefully investigated its merits).

8. *Stanley*, 697 F.2d at 969-70; Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980).

9. *Stanley*, 697 F.2d at 969-70.

10. Washington v. Strickland, 693 F.2d at 1257-58. To its credit, the Fifth Circuit left open the possibility that the defendant could rebut the presumption by showing that "counsel's actions do not conform to a general pattern of rational trial strategy." *Id.* at 1258. Similarly, when strategic reasons *are* offered by counsel, the court might nonetheless find ineffectiveness if the assumptions underlying counsel's strategy are found unreasonable. *Id.* at 1256. In reversing the Fifth Circuit, the Supreme Court held that detailed guidelines were inappropriate and that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691.

11. Solomon v. Kemp, 735 F.2d 395, 403 (11th Cir. 1984).

the notion of adversarial litigation no longer appears to be the shining ideal of scrupulous fairness presented by the Perry Mason model. Perhaps plea bargaining makes some sense after all. Perhaps the accused actually has a better chance of getting reasonable representation and tolerably fair treatment. Of course, to compare plea bargaining to the tarnished facts of the real-world contested trial, we have to consider the real-world limitations on the fairness and effectiveness of plea bargaining. Since I have emphasized the problems of assuring adequate investigation prior to trial, I will now examine the extent of counsel's duty to investigate in the guilty plea context.

II
PREPARATION FOR A GUILTY PLEA

From one perspective, a guilty plea system seems to permit more thorough attorney preparation. The attorneys should have more time available because they spend less time in court. The duty to prepare presumably should be no less extensive, because investigation of the facts and the law is necessary to decide whether a trial is desirable and, if not, to negotiate the best possible bargain. I will return to the question of available time[12] after exploring first whether the duty to prepare for a plea is the same as the duty to prepare for trial. This seemingly simple question proves, on inspection, to be exceedingly complex.

The leading Supreme Court precedent on the question, *Tollett v. Henderson*,[13] points in two directions. The defense attorney in that case recommended a guilty plea to a first degree murder charge without exploring a possible challenge to the composition of the indicting grand jury. The defendant received a ninety-nine year sentence. The Court appeared to assume that the failure to make the grand jury challenge would have indicated ineffective assistance of counsel if the case had gone to trial. But the Court reasoned:

> Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution or by contesting all guilt. A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.[14]

Tollett's focus on "pleas in abatement" could be read as a crucial limitation. A successful motion to dismiss the indictment would have been followed, presumably, by reindictment and conviction at a later date. If so, the defendant arguably had nothing to gain by such a motion. Indeed, the Court

12. *See infra* text accompanying note 44.
13. 411 U.S. 258 (1973).
14. *Id.* at 268 (citations omitted).

could even have reasoned that the failure to file such a motion, even if improper, was not "prejudicial" because it could not affect the outcome of the case.[15] A failure to investigate guilt-related defenses might therefore have entirely different implications and conceivably might not have been approved.

But there are several problems with a reading that attributes crucial importance to the characterization of the defendant's claim as a plea in abatement. First, a plea in abatement would provide a bargaining chip that could be invoked to advantage in sentencing negotiations, even when it could not affect the determination of guilt. Thus, even in the guilty plea context there is at most only a difference in degree between pleas in abatement and guilt-related defenses. Second, in *Tollett* the defendant himself had nothing to gain from expediting the proceedings. He could not have expected that his guilty plea would end the whole matter more quickly, because he received a sentence of ninety-nine years in prison.[16]

Thus the *Tollett* decision probably cannot be limited to pleas in abatement. If the decision is at all sound, it excuses failure of investigation in guilty plea cases even when they involve significant guilt-related claims. At first blush the considerations so far mentioned seem to establish simply that the *Tollett* result is unsound. The defendant had nothing to lose by delay and a good deal to gain by invoking his grand jury claim as a bargaining chip. But such an analysis, which is in essence that of Justice Marshall's dissent,[17] assumes that bargaining is a one-way street—that the prosecutor starts by suggesting a ninety-nine year sentence, and that each new defense argument can only reduce the potential punishment. Often, however, bargaining is analogous to a card game in which, whenever the defense plays its bargaining chip, the prosecution can up the ante. In a system that permits prosecutors' offers to go up (dramatically) as well as down,[18] an attorney might be wise not to introduce complicated new issues into the negotiations. She might even be wise, under some circumstances, not to delay matters for an investigation. When the death penalty is lurking in the background, as it was in *Tollett*, a sensible attorney might prefer to grab a ninety-nine year sentence before the prosecution changes its mind. These considerations were not made explicit in *Tollett*, and the Court should, at a minimum, have required proof that tactical concerns of this kind actually existed. But where such concerns are present, as they must be wherever prosecutors habitually raise their plea offers at each

15. The same point could not be made in the context of a case destined for trial, because in that context delay usually works to the defendant's advantage.

16. Some defendants would gain by early transfer from pretrial detention in an inadequate jail to postconviction custody in a state prison with better facilities and at least some programs. But in *Tollett* this short run advantage would be unlikely to offset the long-term gains of striking a better bargain. In any event, there was no evidence that such a choice was actually presented to the defendant or considered by counsel.

17. 411 U.S. at 269 (Marshall, J., dissenting.)

18. Bordenkircher v. Hayes, 434 U.S. 357 (1978) (Court upheld prosecutor's acting on threat to bring habitual felon charges, carrying life term, if defendant insisted on his right to trial.)

succeeding stage of the process, a failure to investigate becomes a plausible tactical choice.

The lower court decisions, though not closely reasoned and not all of a piece, generally support the observation that duties to investigate, however slender in the context of trial preparation, become thinner still in the context of plea bargaining. A few courts have stated explicitly that the duty is lower in guilty plea cases.[19] In principle there is still some duty to investigate.[20] But in guilty plea cases there are several doctrinal limitations in addition to those in the trial cases. Some courts hold that the lack of an investigation becomes irrelevant if there has been a knowing and intelligent plea.[21] One might think that the plea cannot be intelligent in the absence of an adequate investigation, and technically, this is correct.[22] Yet some of the courts that emphasize this point go on to hold, almost in the same breath, that the defendant was not prejudiced if, knowing the legal elements of the offense, he was willing to admit guilt.[23] There is another reason why the required showing of prejudice is even more difficult after a guilty plea than after a trial: a creative court can almost always find in the plea bargain some *quid pro quo* for the defense attorney's refusal to press an available defense. One might suppose that a decision not to press a plausible defense could have elicited an even larger *quid pro quo* if that defense had been fully investigated and supported. The courts usually assume, however, that an investigation would not affect the ultimate terms of the bargain, or even that the very act of raising a defense claim "might jepardize plea negotiations."[24]

Such decisions, nearly all involving factual, guilt-related defenses, rest on rather hollow doctrinal justifications. But the saddest point is that they may not be reaching the wrong results. In the context of a guilty plea system, which institutionalizes open-ended wheeling and dealing of all kinds, the prosecutors' rational bargaining strategy often will be to raise their settlement offers systematically over time.[25] Accordingly, information will become very costly for the defense to acquire. While resource limitations add to this prob-

19. House v. Balkcom, 725 F.2d 608 (11th Cir.), *cert. denied*, 105 S. Ct. 218 (1984); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

20. Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984); Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981); Dufresne v. Moran, 572 F. Supp. 334 (D.R.I. 1983), *rev'd on other grounds*, 729 F.2d 18 (1st Cir. 1984).

21. Diaz v. Martin, 718 F.2d 1372 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2358 (1984); Rhodes v. Estelle, 582 F.2d 972 (5th Cir. 1978).

22. Diaz v. Martin, 718 F.2d at 1378; McDonald v. Hutto, 414 F. Supp. 532, 536 (E.D. Ark. 1976).

23. Diaz v. Martin, 718 F.2d at 1379.

24. McDonald v. Hutto, 414 F. Supp. at 537. The claim at issue was not a "plea in abatement," but rather one involving the admissibility of a confession. Nonetheless, the court relied on *Tollett* for the proposition that the interests of the accused would not necessarily have been furthered by raising this claim. In *McDonald*, as in *Tollett*, the plea avoided the possibility of a death sentence.

25. Certain circumstances, however, could sometimes cause prosecutors to lower their settlement offers: the case might get weaker; with respect to defendants in custody, the prosecutor's bargaining leverage might diminish as the trial date approached; or the prosecutor might

lem, information would still be costly in terms of lost settlement opportunities, even if investigators were provided free of charge. Under these conditions, the defense has a difficult calculus to make,[26] and the competent attorney might decide to try to find out the facts. But an attorney would seldom be irresponsible to settle quickly on the basis of some set of assumptions about what an investigation might reveal.

The Supreme Court could have mitigated this problem by taking a different route in *Bordenkircher v. Hayes*.[27] There, a prosecutor had threatened to bring a habitual felon charge (carrying a mandatory life sentence) if the defendant refused to plead guilty to a non-violent felony charge carrying a much lower sentence. When the defendant insisted on trial, the prosecutor carried out the threat, and the Court upheld the resulting life sentence. In *Bordenkircher* all of the Justices seemed to agree that the case would have little practical impact, however it might be decided.[28] Nevertheless, the Court could have taken a major step toward reducing the unfairness of mass-production plea bargaining. If the Court had barred prosecutors from upping the ante once an initial offer is made, it could have reduced substantially the pressures for premature settlement. But the Court was unwilling to impose any such restriction on the free play of negotiation.

The situation that can result is vividly illustrated by an episode recently reported in the *New York Times*.[29] When a burglary case came before a New York City criminal court judge, one of the two defendants did not have a lawyer. Rather than continue the case, the judge appointed an attorney from those waiting in court. The District Attorney then offered a plea, with a two to four year sentence. The presiding judge, Harold J. Rothwax, added, "After today, it's 3 to 6, after that it's 4 to 8. If they're ever going to plead, today is the time to do it." When the defendants rejected the offer (after all, one of the lawyers had been appointed only moments before), Judge Rothwax declared, "We'll make it very easy. It's 4 to 8 after today. Let's play hardball."[30] It is no wonder that so many New York defendants plead guilty within three days of their arrest, on the very first day that they are assigned an attorney.

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start with a high settlement offer and work downward in order to test the defendant's receptivity to settlement.

26. For discussion of the conditions under which a rational decisionmaker will seek or forego information under conditions of uncertainty, see H. RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 27-33, 39-50, 157-80 (1968).

27. 434 U.S. 357 (1978).

28. *Id.* at 364; *id.* at 368-9 (Powell, J., dissenting). Justice Powell notes at 368-69 n.2 some benefits of requiring the prosecutor to stick to his initial charging decision.

29. N.Y. Times, Apr. 29, 1985, at 13, col. 1.

30. Commenting from the audience at the time of the oral presentation of my paper (about four weeks before the New York Times report was published), Judge Rothwax asserted, "I don't think what we have can be properly characterized as a plea bargaining system. Any defendant who wants to go to trial goes to trial." *See Effective Assistance of Counsel for the Indigent Criminal Defendent: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 188 (1986) (Remarks of Harold Rothwax).

III
PLEA BARGAINING AS COMPROMISE JUSTICE

We need to assess the justice and fairness of plea bargaining against this background. As portrayed by many of its defenders, plea bargaining involves a process of compromise by fully informed advocates confronting the imponderables of an inevitably elusive reality. The "truth" is, in any ultimate sense, unknowable. Hence, it is no less rational to split the difference than to insist on an all-or-nothing resolution in formal adjudication.[31] This viewpoint gains some plausibility from our experience with civil litigation, where the stakes are somewhat bounded (one party seldom holds unilateral power to threaten the complete destruction of the other) and broad discovery mechanisms make it possible to find out all the material facts before trial.

In criminal proceedings, however, pretrial discovery is meagre. Investigation will be inhibited by the strategic considerations I have outlined, and even when an investigation is attempted, the opportunities to obtain information before trial are limited. Documents such as police reports may or may not be available to the defense. Opposing witnesses cannot be required to answer interrogatories or give depositions.[32] Informal interviews can be attempted, but witnesses need not, and often do not, agree to talk to attorneys representing the other side. In felony cases the defense may get to hear and cross-examine one or two of the prosecution's witnesses at the preliminary hearing, but even this limited form of discovery is lost in cases initiated by grand jury indictment and in misdemeanor cases, which generally do not require a preliminary hearing at all. Thus, in the typical case, both the prosecution and the defense must form an impression of the facts from a cold file, a sketchy (and sometimes illegible) police report, and a hurried conference with the complainant or the accused. We can hardly view a bargain made in these circumstances as a plausible compromise by fully-informed decision makers confronting the "unknowable". Under these circumstances, and these *are* the circumstances of mass-production justice, plea bargaining can be little more than a shot in the dark.

IV
THE NEW MODEL: THE ADVERSARY TRIAL

We have known all along that plea bargaining is not perfect. But you can't beat something with nothing. My proposal, my "new model," is the adversary criminal trial. Yet I have just shown that the adversary trial model is heavily flawed in actual practice and even in the legal standards that we

31. Enker, *Perspectives on Plea Bargaining*, in U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, U.S. TASK FORCE REPORT: THE COURTS 108, 113 (1967). *See generally* Coons, *Compromise as Precise Justice*, XXI NOMOS: COMPROMISE IN ETHICS, LAW AND POLITICS (1979).

32. For discussion, and limited exceptions to the general rule, see Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1153-70 (5th ed. 1980).

apply to it as a matter of sixth amendment principle. Why would an adversarial trial system offer us, under heavy caseload conditions, anything other than the rough-and-tumble justice that we already have in plea bargaining?

The adversary trial model I have in mind actually exists and has functioned successfully in Philadelphia for many years.[33] There are relatively few significant guilty plea inducements, either tacit or express.[34] Defendants respond to this as one would expect. The guilty plea rate is low; only forty-five percent in felony cases and roughly forty-eight percent in misdemeanor cases.[35] Defendants who exercise their right to trial are, however, offered an inducement to waive their right to a jury.[36] Most of them do so and elect a

33. For a fuller description, see Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter cited as Schulhofer, *Plea Bargaining*]; Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, AM. BAR FOUNDATION RESEARCH J. (1986) (forthcoming) [hereinafter cited as Schulhofer, *Justice Without Bargaining*].

34. Schulhofer, *Plea Bargaining, supra* note 33, at 1057-61; Schulhofer, *Justice Without Bargaining, supra* note 33, at 20-25, 45-48.

35. Schulhofer *Plea Bargaining, supra* note 33, at 1051; Schulhofer, *Justice Without Bargaining, supra* note 33, at 58. These figures indicate guilty pleas as a percentage of all dispositions on the merits (guilty pleas plus trials). As a percentage of total dispositions (including dismissals), the guilty plea rate would, of course, be much lower still. A useful gauge of the importance of guilty pleas in a particular jurisdiction is the ratio of guilty pleas to trials. A recent study reports that for 14 large and medium-sized cities, this ratio ranges from a high of 37:1 to a low of 4:1 (i.e. four guilty pleas for every trial). Boland & Forst, *Prosecutors Don't Always Aim To Pleas*, 49 FED. PROBATION 10, 11 (1985). For Philadelphia, however, the published statistics reports indicate that the corresponding ratio is only 0.8:1 for felony cases only 0.4:1 for misdemeanor cases. When the guilty plea rate is adjusted to allow for "slow pleas" (uncontested trials that are the functional equivalent of guilty pleas), the Philadelphia guilty plea rate remains at 45% (a plea:trial ratio of 0.8:1) for felonies and rises to about 48% (a plea:trial ratio of 0.9:1) for misdemeanors. Schulhofer, *Plea Bargaining, supra* note 33, at 1083-84; Schulhofer, *Justice Without Bargaining, supra* note 33, at 69-71.

36. The jury waivers occur in two different ways, depending upon whether the initial charge is a felony or a misdemeanor. In felony cases defendants must decide after the preliminary hearing whether to accept trial before a "list room" judge, who hears only non-jury cases. Because the list room judges tend to be more lenient sentencers than those who sit in the jury trial rooms, the defendant has an incentive, in many types of cases, to waive a jury and accept the bench trial. For a detailed account, see Schulhofer, *Plea Bargaining, supra* note 33, at 1062-63. In misdemeanor cases, there is no right to a jury in the initial trial before the Municipal Court judge. If convicted, however, the defendant has the right to a trial *de novo* in the Court of Common Pleas, where a jury is available. In practice, very few convicted defendants claim a trial *de novo*, largely because sentencing is lighter in the Municipal Court than it would be in the Court of Common Pleas. *Id.* at 1050 & n.54. Among defendants who do claim a trial *de novo*, moreover, many waive a jury and accept a Common Pleas bench trial, for the same reasons that lead felony defendants to make the same choice. Thus, though the mechanics differ for felony and misdemeanor defendants, the situation is essentially the same for both: there is a right to a jury, but because of sentencing inducements, that right is seldom exercised in practice.

Because the mechanics described in the preceding paragraph were not detailed as part of the oral presentation of my paper, a member of the audience suggested a trial *de novo* system as an *alternative* to the Philadelphia model. As indicated above, Philadelphia does have such a system for misdemeanors. Relatively few trials *de novo* are held, but the right to a trial *de novo* (like the general right to a jury) conditions the behavior of judges within the system. For the individual defendant, a trial *de novo* system is usually preferable to a system (such as Philadelphia's felony system) in which the jury must be waived before the verdict and sentence are known. A trial *de novo* system is probably more costly to maintain, however. In other respects the overall effect of these two systems is roughly comparable, at least where (as in virtually all

trial before a judge. The background right to claim a jury, though seldom invoked, constrains the behavior of the bench trial judges; if they stray too far from a jury's conception of reasonable doubt or the equities, the flow of jury waivers will quickly slacken.[37] Consequently, the bench trial judges tend to be fair, and those whom the defense bar considers unreasonable seldom last long in the bench trial courtrooms.

To expedite the handling of such a large number of trials, court administrators separate the complex cases from the more straightforward cases. Homicide cases are handled by a designated set of judges, and bench trials in such cases can take a full day or longer.[38] Other complex felony cases (rape, "career criminal" defendants, or other multi-witness cases) are assigned to the "Calendar" program, where most trials consume one to three hours or more.[39] The remaining felony cases are assigned to the "List" program, where courtroom schedules permit the trial of up to six or eight cases per day. Although the list room cases are typically simple and may involve only one or two witnesses (for such felony charges as burglary, strong-arm robbery or assault), many of these cases (thirty-one percent in one sample) last an hour or more, and the average bench trial for these straightforward "List" program cases consumes forty-five minutes of actual trial time, excluding recesses.[40]

In misdemeanor cases a similar sorting system is used, so that cases identified as likely to require a protracted hearing are diverted to courtrooms prepared to handle them. Among the remaining misdemeanors, most cases involve uncomplicated incidents, and often the arresting officer and the defendant are the only witnesses. Excluding the most protracted cases, the average misdemeanor trial consumes only about twenty-five minutes, excluding recesses.[41] Although the proceedings are expeditious, they do, in most instances, afford adequate opportunity for presenting the facts of these straightforward cases. In sharp contrast to a guilty plea disposition, the witnesses testify, in court and under oath, and are thoroughly cross-examined. The judges decide the cases on the basis of the relevant law as applied to facts proved in open court.

In felony cases, Philadelphia defenders prepare very thoroughly. They rely on a client interview and the transcript of the preliminary hearing to determine what investigation is required, and then ensure that it is carried out by the office's effective support staff. In the felony courtrooms defenders almost never appear unprepared; they litigate effectively and with considerable

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trial *de novo* systems) there are inducements to waive the trial *de novo* right. For detailed discussion, see Administrative Office of the [Massachusetts] District Court Department, Report of the Committee on Juries of Six: Elimination of the Trial De Novo System in Criminal Cases (Jan. 1984).

37. See Schulhofer, *Plea Bargaining, supra* note 33, at 1052.

38. *Id.* at 1051.

39. *Id.* at 1066. The time consumed refers to actual trial time, excluding recesses.

40. *Id.*

41. Schulhofer, *Justice Without Bargaining, supra* note 33, at 54.

success.[42]

Preparation for misdemeanor cases is similar, with a few qualifications. Defenders sometimes have inadequate preparation time, and since attorneys assigned to these cases are often novices, their difficulties are compounded by lack of experience. Misdemeanor prosecutors sometimes suffer the same problems of unpreparedness and inexperience. Judges occasionally add to the difficulties by their impatience. As a result, some misdemeanor trials (the minority, to be sure) are only flawed approximations of the adversary ideal.[43]

In comparing such a system to a system of plea bargaining, there are three crucial points to consider. First, the Philadelphia court system shows that formal adversary justice is perfectly feasible for a large, urban jurisdiction. Contested trials add only slightly to the court time required to process cases by guilty plea.[44] Although there is probably no significant difference in the judicial resources required, contested trials could well require a staff of prosecutors and defenders. This is not because the attorneys are in court any longer (court time is little greater than that required for a plea), nor because they need to spend extended periods rehearsing testimony with witnesses. Some added time is required because, with a trial in prospect, attorneys on both sides feel impelled, by peer pressure if not by law, to investigate and prepare for trial. Plea bargaining, of course, makes it possible to save resources here. The normative question is whether we want to devote resources to determining the facts before imposing criminal punishment.

Second, a jury-waiver system does not in any way dilute the quality of the trial process. As in other cities, five to ten percent of the cases receive very thorough treatment in carefully conducted jury trials. The bench trials are usually thorough and fair. In any event, one cannot compare them to an imaginary jury trial that other cities simply do not hold. Bench trials must be compared to guilty pleas.

Finally, and central to that comparison, in Philadelphia the cases are tried in open court. Sometimes shortcomings are evident. But at least they *are* evident. 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 the decisionmaker will always be better informed,

42. In the felony "list" program, outright acquittals occur in 20% of the trials and acquittal on the principal charges (with conviction only on significantly less serious counts) occurs in another 25% of the trials. Schulhofer, *Plea Bargaining, supra* note 33, at 1077.

43. *See* Schulhofer, *Justice Without Bargaining, supra* note 33, at 59-63.

44. Based on Philadelphia data, a reduction in the felony guilty plea rate from 90% to 80% would require only a 2.8% increase in court resources devoted to the disposition stage, and a much smaller increase in the total resources devoted to criminal case processing. Schulhofer, *Plea Bargaining, supra* note 33, at 1085-86 & n.160. In misdemeanor cases, the move from a 90% to an 80% guilty plea rate would require only a 6% increase in resources devoted to the disposition stage. Schulhofer, *Justice Wtihout Bargaining, supra* note 33, at 74.

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. Equally important, a system of public trials generates steady pressure to sustain adequate levels of resources, training, preparedness, personnel quality, and individual dedication. As a result, these factors, which are crucial to the quality of any system of justice, are likely to be far superior over the long run in a trial system than in a system of plea bargaining. In the face of a feasible alternative of this kind, how can we continue to tolerate plea bargaining?