DISCUSSION

MICHAEL MCCONVILLE, MODERATOR*

AUDIENCE COMMENT: I am Paul Chevigny of the New York University School of Law faculty. Fifteen years ago in New York City, prior to *Baldwin v. New York*,[1] we had no jury trials for misdemeanor charges. As in Philadelphia, there were an enormous number of trials, and they were short, although not as short as the ones Professor Schulhofer described.[2] Nevertheless, the guilty plea rate was still extremely high. I think it was over ninety percent even then, though not as high as it is now. The guilty plea rate was high, because courts placed a premium on a plea. For a great many judges, a guilty plea justified a shorter sentence. That attitude is still prevalent, and it is not unconstitutional.[3] Accordingly, if the Philadelphia system is to work elsewhere, it will require folkways on the part of the bar and the judges which permit and encourage the use of bench trials as contrasted with pleas. In a system under as much bureaucratic and economic pressure as New York's is, how can that happen? How do you envision pragmatically changing a system which has pressures towards pleas that the Philadelphia system apparently doesn't have?

STEPHEN SCHULHOFER: You've put your finger on a very tough problem. The Philadelphia system grew up for reasons that are not fully understood. It simply happens to be part of the culture in Philadelphia that judges do not place pressure on defendants to choose bench trials rather than guilty pleas. There is systemic pressure to waive a jury, but as between a guilty plea and a bench trial, the judges do not attempt to establish a tacit sentencing differential that would create pressure.

The Philadelphia system arose of its own accord. How do you translate or transfer that system to a jurisdiction where the practice is different and where the judges are likely to penalize people for going to trial? Everything we know about court culture suggests that such an action would be extremely difficult to take. I'm not sure I know the answer. One of the first steps would be for us, as lawyers, to stop repeating that plea bargaining can be a just, fair, legitimate, permissible means of resolving criminal cases. We haven't yet succeeded in persuading attorneys and academics to stop legitimizing what is essentially an indefensible system. The arguments for plea bargaining are not sound. The

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1. 399 U.S. 66 (1970) (right to jury trial applies where imprisonment for more than six months could be imposed).

2. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 146 (1986).

3. *See* Brady v. United States, 397 U.S. 742, 751-53 (1970).

explanation for a system like New York's, which encourages guilty pleas rather than trials, is neither that it produces better justice nor that it's more rational to split the difference than to go to trial. The explanation is utter laziness and financial self interest—nothing else.

I don't think the public favors plea bargaining. I think the public wants cases to go to trial; it wants adjudication based on factfinding; it wants sentencing based on facts, not based on wheeling and dealing behind closed doors. It's the profession which preserves plea bargaining.

I would also like to see the courts say that it's unconstitutional to have a sentencing differential between bench trials and guilty pleas. The Supreme Court's guilty plea decisions rest on the notion that a criminal justice system cannot function without plea bargaining.[4] That's simply false, as I have shown in my paper. With sentencing reform and sentencing guidelines now taking hold around the country, it will become much more difficult for judges to have tacit differentials between sentencing after a guilty plea and sentencing after a trial. So, it's not impossible to eradicate those differentials. The first step, however, is for all of us to stop repeating rationalizations for a system which has no legitimate basis.

AUDIENCE COMMENT: I am Harold Rothwax, a judge with the New York Supreme Court. I have already resigned myself to the fact that whatever the problem is the proposed solution always seems to be abolishing plea bargaining. I disagree with that. I think plea bargaining is a fair, legitimate, necessary, and good option for the criminal justice system.

Before I became a judge, I was a public defender for twelve years. During that time I represented about 20,000 defendants. I became a defense lawyer because I loved to try cases.

I question the very concept of a plea bargaining system, because 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. Many times, a defense attorney will simply insist that a case go to trial. However, as a judge, I am aware that there is a great deal of plea bargaining.

It always fascinates me to hear the plea bargaining lawyer characterized as one who is filled with conflicts of interest, temptations to betray her oath and other defects of character which impugn any integrity that the plea bargaining system might have. However, in a trial system, this same person will immediately change and become a person of sterling character and great preparation, one who knows no self-interest and one who gives enormous devotion to her clients.

Professor Alschuler insists that institutional parameters push us in a particular direction.[5] They do, and obviously we should have institutions which

4. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) (Plea bargaining is an "essential" component of the criminal justice system.); Blackledge v. Allison, 431 U.S. 63 (1977).

5. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149 (1986).

foster quality representation. What bothers me is that some of the facts presented in defense of the Schulhofer model are not facts at all. Professor Alschuler said that it's economically unwise for most defense lawyers to go to trial.[6] That's not true. For assigned counsel, who get paid by the hour, it's much better to go to trial than to plead out initially, because they will get more money. For Legal Aid attorneys, who get paid by the year, rather than by the hour, it's still much better to go to trial. Legal Aid lawyers want to learn trial skills. Pleading clients guilty doesn't contribute to that. By going to trial, Legal Aid attorneys avoid all kinds of onerous institutional assignments, like lobster shifts, night court, and complaint rooms. Legal Aid attorneys yearn to try cases. Even most private attorneys, if they have a client with some wealth, will try to go to trial, because they can charge her more for a trial than for a plea.

The time I have does not permit a complete response to the points raised. However, I would like to believe that I could be a reasonable person, one with intellectual integrity, and still assert that the plea bargaining system is fair and just and that it works properly.

ALBERT ALSCHULER: If lawyers love to try cases, why don't they try them? One reason is that the system attaches enormous consequences to a defendant's decision to stand trial. The defendant who exercises her constitutional right to trial can't get the same break as the defendant who pleads guilty. Perhaps, as Judge Rothwax suggests, some lawyers long for an adversarial role, but for them to assume this role would be irresponsible in our current legal system.[7]

A second issue. Personal and economic conflicts of interest often lead lawyers to encourage their clients to plead guilty, but these conflicts may sometimes lead in the opposite direction. That direction can be just as bad, or worse. An appointed attorney, paid on an hourly basis, may have an economic interest in taking a case to trial. A young lawyer who wants trial experience may have a personal interest in taking a case to trial. In both cases, the

6. *Id.* at 150.

7. After delivering these remarks, I discovered evidentiary support for them in a *New York Times* profile of Judge Harold J. Rothwax. Judge Rothwax revealed how he managed to dispose of 1,535 felony cases during the previous year. In one case, the judge appointed an attorney for a defendant from a group of lawyers seated in the front row of the courtroom. When the prosecutor offered a 2 to 4 year sentence, Judge Rothwax explained to this just-appointed lawyer, "After today, it's 3 to 6, after that, it's 4 to 8." Perhaps the lawyer was one of those who "yearn to try cases," *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 189 (1986)(Remarks of Harold Rothwax) [hereinafter cited as *Effective Assistance*], for the defendant rejected the offer. The judge then declared, " We'll make it very easy. It's 4 to 8 after today. Let's play hardball." Roberts, *For One Zealous Judge, Hard Bargaining Pushes Cases through the Courts*, N.Y. Times, Apr. 29, 1985, at B4, col. 2. It is comforting to learn from Judge Rothwax that he does not "think what we have can be properly characterized as a plea bargaining system. Any defendant who wants to go to trial goes to trial." *Effective Assistance*, *supra*, at 188.

lawyer may take the case to trial, although it's not in the client's interest, and the client may find herself penalized for the lawyer's mistake in judgment.

STEPHEN SCHULHOFER: If my figures are correct, Judge Rothwax spoke for roughly four minutes. I think he gave a brilliant demonstration of how much can be done in a very short period with effective advocacy. If you multiply his statement by a factor of five or six, you have a rough idea of how much time a Philadelphia defender has to argue misdemeanors, such as disorderly conduct or prostitution, and of how much she can accomplish.

AUDIENCE COMMENT: I am Ivar Goldart, Legal Aid Society, Criminal Defense Division. I would like to take issue with the way in which the plea bargaining system has been described. First, there was an assumption that the public does not like a plea bargaining system and mistrusts a plea bargaining system. That is not true, particularly within New York State.[8]

The fact that a trial is a possibility for each and every case that goes before the court suggests that there is indeed a trial system, even if ninety percent or more of those prosecuted eventually plead guilty. The taking of a guilty plea is not a short one. It is a deliberative one. I take great issue with Professor Alschuler's observation that the defense bar's support of the plea bargaining system lies in its alleged economic gains.[9]

Lawyers go to trial when they determine it is the proper thing to do. However, the costs associated with not pleading guilty are real and must be recognized. The system presented by Professor Schulhofer creates a greater cost to all. Under Schulhofer's model, a defendant not only gives up his right to a jury, but also his right to effective cross-examination and to the presentation of a full and complete defense. Schulhofer's analysis of the implications of the Philadelphia system for misdemeanor cases is incomplete and inaccurate.[10] Misdemeanor cases can be quite complex and may require extensive testimony and cross-examination. However, Schulhofer's model does not make allowance for this; it only encourages a quick trial without a jury. The entire system has copped out.

I don't think that's something we want to emulate. There are other sys-

8. The closest thing New York has had to a system of no plea bargaining evolved under the Rockefeller drug laws. Crimes routinely dealt with as misdemeanors became crimes punishable with sentences of life imprisonment, having minimums from one to eight years and, in certain cases, twenty-five years to life. Those of us within the Legal Aid Society, at the time the Rockefeller laws came into effect, were removed from the yoke of plea bargaining. Because substantial reductions in sentences could not be negotiated, there was virtually no plea bargaining. We did not have to engage in the deliberative process of plea bargaining after thoroughly investigating a case.

Under the Rockefeller laws, the Legal Aid Society had an 85% trial rate and a 15% plea bargaining rate, according to statistics kept by in-house lawyers assigned to the centralized narcotics unit of the Legal Aid Society. Public pressure resulted in the repeal of the Rockefeller drug laws shortly after they were put into effect. The public simply did not wish to support a full trial system.

9. Alschuler, *supra* note 5, at 150.

10. Schulhofer, *supra* note 2, at 146.

tems which are worthy of consideration. For example, under the *de novo* trial system, a defendant's first trial is before a single judge. If the defendant is not satisfied with the result, a second trial is convened before a jury. The *de novo* trial system is used in the state of Massachusetts, as well as in several other jurisdictions. That is the model which we should aspire to, rather than Professor Schulhofer's "quickie" system, built on the notion that anything is better than a guilty plea.[11]

AUDIENCE COMMENT: I am Benjamin Lerner of the Philadelphia Defender's Association. I have tried several hundred cases in the Philadelphia trial waiver system, and people might be interested in knowing how it works in practice.

First, we do have the *de novo* trial system for our misdemeanors. In felony cases, Philadelphia has a system of preliminary hearings. So, before going to trial, lawyers have already had the opportunity to cross-examine the complainant and any other major witnesses the commonwealth may have.

Second, lawyers take advantage of the opportunity to investigate felony cases, usually for a couple of months, prior to going to trial. Trained investigators are sent to talk to commonwealth witnesses, as well as defense witnesses. Appropriate motions are filed and argued for the abbreviated trial, just as in a full trial. I'm not suggesting that judges and juries are equivalent as finders of fact. It may well be that if the choice in a jurisdiction were between trying all cases to a jury or a judge, the decision would be to try them all to a jury. But, there is no such choice, at least in any large jurisdiction. The decision to waive a jury trial is not the result of judges' sentencing pressure. In fact the sentencing argument made by Malcolm Feeley,[12] if it was ever true, is certainly not true now. Since Philadelphia has moved to an individual judge calendar and wheel assignment system in its major trial system, many of the judges presiding in the major trial system are at least as lenient in their sentencing philosophies as the judges in the waiver system.

In light of these considerations, a discussion which assumes that plea bargaining systems and trial waiver systems are mutually exclusive cannot be very fruitful. No one who has ever practiced criminal law feels that guilty pleas are always inappropriate. In many circumstances, a guilty plea is the fairest and most appropriate disposition of a case. However, I don't think anyone, even Judge Rothwax, would claim that a guilty plea entered a couple of hours or even a day after an arrest, without adequate opportunity to interview the defendant, investigate her case, or do some basic legal research, is an appropriate guilty plea. The choice here is not between a trial system and a guilty plea system.

The main problem of Philadelphia, or any other large jurisdiction, is that

11. For a discussion of the *de novo* trial system in Philadelphia, see *id.* at 145 n.36.

12. Feeley, *Bench Trials, Adversariness, and Plea Bargaining: A Comment on Schulhofer's Plan*, 14 N.Y.U. REV. L. & SOC. CHANGE 173, 173 (1986).

jury trials take longer because they take longer to schedule and to complete. As a result, defendants have to wait much longer for a jury trial than a bench trial. Therefore, very few defendants choose jury trials. Philadelphia, like many other jurisdictions, has no enforceable speedy trial provision, and defendants with triable cases would rather be tried sooner than later. The preference for bench trials doesn't mean that judges presiding over bench trials cannot be held accountable for their actions. Our office, which does most of the trial work for indigent criminal defendants, has had several judges removed from the trial waiver system; we accomplished this simply by telling the president judge[13] that Judge X has no standard of reasonable doubt or Judge Y has never granted a motion to suppress in her life and that we advise our clients not to waive the trial for Judge X or Judge Y. This Philadelphia bench trial system is like any other system. In the end, it depends on well-prepared counsel to make individual decisions as to what is in the best interest of each of their clients.

13. In Pennsylvania, the president judge is responsible for assigning judges to the various trial programs.