People v. Selikoff: The Route to Rational Plea Bargaining

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PEOPLE v. SELIKOFF:  
THE ROUTE TO RATIONAL PLEA BARGAINING*

Whether referred to as "plea bargaining," "plea negotiations," "plea discussions," or "copping a plea," the guilty plea, and not the trial process, accounts for 90 percent of the criminal convictions in the United States. Although the process of pleading guilty in return for concessions from either the prosecutor or the presiding judge is not without its critics, a growing awareness of the guilty plea's practical importance in the effort to achieve a more equitable and expeditious judicial system has developed.

Significantly, in the recent decision People v. Selikoff, the New York Court of Appeals formally placed its imprimatur on the practice of plea bargaining, adding its prestige to the long list of courts and commentators who have recognized the value of the guilty plea. To properly assess the impact of the Selikoff decision, however, it is necessary first to examine...

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* This case comment is a student work prepared by John F. Byrne, a member of the St. John's Law Review and the St. Thomas More Institute for Legal Research.

1 THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 4 (1967). While more recent, national estimates have not been made available, in 1973 80% of all homicide indictments in New York City were disposed of by guilty pleas, usually to the reduced count of manslaughter. N.Y. Times, Jan. 27, 1975, at 39, col. 4.


RATIONAL PLEA BARGAINING

the elements, benefits, and shortcomings of plea bargaining as it presently exists.4

THE PLEA BARGAINING PROCESS

Ostensibly, the plea bargain merely consists of a defendant's entry of a plea of guilty or nolo contendere in exchange for prosecutorial or judicial concessions.7 Yet the vagaries of motivation and the variety of induc-

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4 The concept of negotiated justice is by no means a novel one. See generally Comment, The Plea Bargain in Historical Perspective, 23 Buffalo L. Rev. 499 (1973). The birth of plea bargaining can be traced to the day when an aggrieved member of a tribal society opted to accept monetary payment in lieu of his traditional right of revenge. See R. Cherry, Lectures on the Growth of Criminal Law in Ancient Communities 8-10 (1890). The author notes:

It lay entirely in the discretion of the injured person whether he would accept pecuniary satisfaction or wreak his revenge on the wrongdoer. And the latter, if he were strong enough, could safely defy his enemy and refuse to give any satisfaction. It was altogether a matter of private bargaining; the injured man . . . according to the fierceness of his anger, exacting whatever sum he could from the wrongdoer.

Id. at 10.

The earliest American decision dealing with the guilty plea exhibited a marked antipathy toward any bargaining in the criminal process. Although prior negotiation between the defendant and court officials was never mentioned, the court, in Commonwealth v. Battis, 1 Mass. 95 (1804), meticulously reviewed the attending circumstances before accepting the plea to ensure that no inducements had been offered to secure it.

In the afternoon of the same day, the prisoner was again set to the bar, and the indictment for murder was once more read to him; he again pleaded guilty. Upon which the Court examined, under oath, the sheriff, the jailer, and the justice . . . as to the sanity of the prisoner; and whether there had not been tampering with him, either by promises, persuasion, or hopes of pardon, if he would plead guilty. On a very full inquiry, nothing of that kind appearing . . . the clerk was directed to record the plea on both indictments.

Id. at 96 (emphasis in original).

Whatever the initial antipathy toward the guilty plea, it was clear that plea bargaining played an integral role in the evolution of the modern criminal justice system. Cf. Miller, The Compromise of Criminal Cases, 1 S. Cal. L. Rev. 1 (1927). It was not until the early 1920's, however, that a detailed empirical study documented precisely how integral that role had been. Moley, The Vanishing Jury, 2 S. Cal. L. Rev. 96, 115 (1928). In 1925, for example, 88% of all convictions in New York City were the result of guilty pleas, as were 85% in Chicago, 86% in Cleveland, 90% in Minneapolis, and 81% in Los Angeles. Id. at 105.

Even then, plea bargaining was criticized. One court noted:

It is a matter of common knowledge that district attorneys frequently bargain with those charged with crime, and either under promise of immunity or acceptance of a plea of lesser degree than that for which the defendant was indicted, those deserving of extreme punishment are permitted to escape with a suspended sentence or with punishment all too inadequate for the crime committed. We deplore the tendency of some district attorneys, following the course of least resistance, thus to relax the rigid enforcement of our penal statutes.

People v. Gowasky, 219 App. Div. 19, 24, 219 N.Y.S. 375, 379 (1st Dep't 1926), aff'd, 244 N.Y. 451, 155 N.E. 737 (1927). Clearly, this admonition has been ignored.

ments which prompt the plea's entry make the bargaining process considerably more complex than its rather straightforward definition.

When confronted with an indictment or information, the primary objective of any bargaining defendant is to secure relief from the possible imposition of the maximum sentence for the crime charged. Rather than risk or await disposition at trial, the accused, in return for pleading guilty, seeks a promise from the prosecutor to dismiss additional charges, permit pleading to a lesser included offense, recommend lenient sentencing, or simply not take a position on sentencing. In many instances, however, the defendant will refuse to plead to a lesser offense until his attorney directly, yet discreetly, makes inquiry of the judge himself as to the sentencing concessions arising from the guilty plea.


See text accompanying notes 35-40 infra.


See Newman, supra note 7, at 78-104; Enker, supra note 9, at 108-10; State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972) (two counts of a three-count indictment dropped); Austin v. State, 49 Wis. 2d 727, 183 N.W.2d 56 (1971) (no prosecution of a subsequent, uncharged robbery offense).

See, e.g., People v. White, 5 Ill. App. 3d 205, 282 N.E.2d 467 (3d Dist. 1972) (plea to voluntary manslaughter and aggravated battery rather than to murder and voluntary manslaughter); People v. Clairborne, 29 N.Y.2d 950, 280 N.E.2d 366, 329 N.Y.S.2d 580 (1972) (mem.) (plea to "falsely reporting an incident," an offense, rather than to the crime charged, "criminal solicitation").

In New York, judges regularly participate in plea negotiations and often suggest appropriate plea bargains. White, supra note 5, at 488. Goldfluss, a judge of the New York City Criminal Court, discusses the "practical everyday workings of the plea bargaining process" as follows:

Defense counsel approaches the Bench with the prosecutor and discussion is held concerning possible disposition. Let us assume that the judge is merely a witness to this conversation, and that the parties tentatively agree to a lesser plea. It is then that defense counsel will turn to the judge and inquire, most discreetly, of course, what His Honor has in mind for a sentence.

Certainly, counsel was not hired by the defendant to obtain the maximum sentence under the reduced plea—that result could be accomplished by the defendant without the aid of counsel. The fact of the matter is that before counsel returns to the
A guilty plea is in and of itself a conviction.\(^\text{15}\) Thus, the defendant who pleads guilty effectively waives such fundamental constitutional rights as the presumption of innocence, the right to trial by jury, the right to remain silent, and the right to confront one's accusers.\(^\text{16}\) Moreover, a prosecutor may further require that the defendant expressly waive a procedural remedy such as a suppression hearing or an appeal,\(^\text{17}\) or render information or additional assistance to the state.\(^\text{18}\)

Whatever the specific concessions and concomitant waivers involved, it is clear that plea bargaining is encouraged. Indeed, New York courts have condoned the acceptance of guilty pleas addressed both to nonexistent offenses and to crimes which the defendant concededly did not commit.\(^\text{19}\) A striking example of such condonation can be found in *People v. Foster,*\(^\text{20}\) where the court accepted a plea of guilty to the fictitious crime of "attempted manslaughter." The court of appeals has frankly admitted that after plea bargaining, "the factual basis of the crime confessed can ordinarily only be found in the language of the plea."\(^\text{21}\)

**The Bargain in Plea Bargaining**

It has been suggested that the plea bargaining process serves to relieve the defendant with the terms of the offer, he wants all eventualities spelled out. The defendant's main consideration is not the statutory classification of his plea but the time, or the scope of time, that he may be in durance vile. So, if counsel attempts to exact a commitment from the judge, there is nothing presumptuous or contemptuous about such effort. It is exactly what he should do if he is to competently represent his client.

Goldfluss, *supra* note 7, at 4, col. 3.


\(^{16}\) The Supreme Court has noted that:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth. Second, is the right to trial by jury. Third is the right to confront one's accusers.


\(^{18}\) See, e.g., *United States v. Paiva,* 294 F. Supp. 742 (D.D.C. 1969) (defendant was required to render additional information); *Commonwealth v. Todd,* 186 Pa. Super. 272, 142 A.2d 174 (1958) (defendant was required to testify as a witness for the state).


_But see Fed. R. Crim. P._ 11 (factual basis for crime charged required).
litigants of the inevitable risks of trial, hastens the offender along the road to rehabilitation, and enables the court to individualize the sentencing process. Certainly, the discretion exhibited by courts and prosecutors in accepting guilty pleas to lesser offenses may often be more equitable than a strict application of the criminal statutes. Moreover, the information gleaned from plea discussions may supply insight into mitigating circumstances concerning the defendant which might otherwise go undetected.

The advantage of plea bargaining to the individual defendant or prosecutor is overshadowed by its importance to the criminal justice system. In 1970, grand juries in New York sent approximately 32,000 felony indictments to courts of higher criminal jurisdiction; yet, under ideal circumstances, the available judges and prosecutors could only handle a maximum of 4,000 to 5,000 felony trials a year. In 1973, only 11 percent of the homicide indictments issued in New York City were resolved by trials and jury verdicts. It would be an understatement to note that guilty pleas serve to relieve court calendar congestion. Indeed, Chief Judge Breitel, writing for the court in Selikoff, remarked that, "in budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts but also to local detention facilities."

21 1972-73 REPORT OF THE NEW YORK STATE SELECT COMMITTEE ON CRIME, ITS CAUSES, CONTROL & EFFECT ON SOCIETY 14.
and personnel, the primary advantage of plea bargaining is that it does in fact exist.

Shortcomings of the Bargaining Process

Unfortunately, the plea bargaining process is often tainted by the arbitrary actions of the prosecutor and influenced by the circumstances surrounding the defendant. Since a guilty plea is a conviction, the prosecutor knows he can generate a desirably high conviction rate without risking a trial. Thus, in all likelihood the prosecutor will first determine the strength of the state's case and then proceed accordingly.

Rather than risk the possibility of defeat in the courtroom, the prosecutor may offer more liberal concessions to secure a conviction when the evidence at his disposal indicates his case is “weak.” He may also decide to overcharge the defendant in an effort to induce plea bargaining. Indeed, some prosecutors have been accused of specifically drafting indictments with eventual plea arrangements in mind. When a defendant is facing a 10-count indictment, a prosecutor’s offer to accept a guilty plea to a single, lesser count may seem like a true concession rather than a routine, administrative reduction. While a prosecutor’s discretion is an integral part of the criminal justice system, his arbitrary power to induce the plea bargain can frustrate the ends of justice if used improperly.

A prosecutor’s inducements are likely to vary with the relative position of the defendant. As Professor White’s study of plea bargaining in Philadelphia and New York indicates, the prosecutor’s bargaining position is definitely enhanced when the defendant is in custody. The indigent defendant, unable to raise bail or hire private counsel, often faces lengthy

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31 One commentator has noted:

Even if the money were readily available, it would still not be clear that we could call upon sufficient numbers of competent personnel. A lowering of standards in order to man the store adequately may well result in poorer justice. It may also divert both funds and personnel from other segments of the criminal process, such as corrections work, where they are arguably needed.

Enker, supra note 9, at 112.

32 See note 22 supra. One New York attorney has remarked, “Prosecutors . . . hate to have a defeat on their record. When they have a weak case, they'll go to great lengths to avoid a trial.” White, supra note 5, at 488, quoting Interview with Martin Erdman, New York Legal Aid Society, in New York City, April 28, 1970.

33 For a discussion of the inordinate concern of prosecutors with their conviction rate and their willingness to negotiate a weak case see Alschuler, supra note 7, at 58-85. See also White, supra note 5, at 445, 448; Note, Restructuring the Plea Bargain, 82 YALE L.J. 286, 292 (1972) [hereinafter cited as Restructuring the Plea Bargain].

34 Guilty Plea Bargaining, supra note 7, at 886. See Alschuler, supra note 7, at 85-105; Restructuring the Plea Bargain, supra note 33, at 293-94.

35 Professor White has remarked that “an incarcerated defendant, frightened and demoralized by the prospect of an indefinite period of confinement, may be willing to enter a plea and accept a fixed period of imprisonment.” White, supra note 5, at 444.
delays in awaiting trial. From this defendant's viewpoint, both the safeguarding of constitutional rights and a day in court are less compelling than an offer of release from the local house of detention. Such a defendant will invariably find the prosecutor's offer to recommend a sentence commensurate with or including the time spent in prison awaiting trial an appealing one.

Conversely, a defendant free on bail is less likely to enter a plea and thereby lose his freedom without winning greater concessions from the prosecutor. The unincarcerated defendant, with sufficient resources to raise bail and hire private counsel, can literally afford to delay and command the best "price" for his guilty plea. The defendant who is well versed in the criminal process can utilize his knowledge of the pressure on prosecutors and courts to dispose of cases quickly to gain a better bargain.

Advocates of plea bargaining point to the recording of convictions, the meting out of punishment to offenders, and the easing of the burden on courts as justification, if not an apology, for the criminal justice system's heavy reliance on the guilty plea. Yet plea bargaining fails miserably when a defendant is charged with counts so vacuous that a prosecutor would have had to drop them at trial, or when a defendant agrees to a sentence identical to the penalty customarily prescribed upon a full trial conviction. In both instances, the defendant has waived his constitutional rights and has received nothing in exchange.

Neither the state nor the accused actually benefits when, through fear, inducement, or doubt, defendants are forced to plead guilty to crimes which they simply did not commit. Similarly, when an accused successfully maneuvers the plea bargaining process to his own advantage, the defendant gets the best of the bargain at the expense of the general public's safety and welfare. Plea bargaining, then, is by no means a solution to the problem of our overburdened trial courts.

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28 See text accompanying notes 27-30 supra.
29 See Restructuring the Plea Bargain, supra note 33, at 294-95. The bailed defendant can often profit by delay since, over a period of time, memories may fade, witnesses may become unavailable, and the defendant may develop a record of good behavior which can help him at sentencing. White, supra note 5, at 444-45.
30 See note 37 supra.
31 This inequity is even more reprehensible if a defendant who is likely to be acquitted on trial is subtly coerced into accepting such an arrangement. See Alschuler, supra note 7, at 60-61; Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U. CHI. L. REV. 167, 177 (1964) [hereinafter cited as Official Inducements to Plead Guilty].
32 See Gallagher, supra note 9, at 33-38. In United States v. Jasper, 481 F.2d 976 (3d Cir. 1973), the court indicated that failure to inform the defendant as to the absence of a sentencing differential upon conviction at trial constituted grounds for invalidating a guilty plea.
33 See Steel, The Losers in Plea Bargaining, N.Y. Times, Feb. 24, 1975, at 25, col. 3; Alschuler, supra note 7, at 60-61; White, supra note 5, at 451-52.
34 See Interview with Mario Merola, District Attorney, Bronx County, New York City, in N.Y. Times, Jan. 27, 1975, at 39, col. 6; Newman, supra note 7, at 46; Restructuring the Plea
PLEA BARGAINING AND THE NEW YORK COURT OF APPEALS

It is significant that in combining a trilogy of cases for single consideration, the Selikoff court chose to address itself to the goals, administration, and enforcement of the plea bargaining process instead of focusing on the disposition of the individual appeals. Most importantly, the Selikoff court stressed both the value of the court record and the role of the judge in the acceptance of guilty pleas. It is this recognition of the inviolability of the record of proceedings and the necessity of judicial participation in plea bargaining from which the Selikoff decision draws its strength—and, perhaps, its inherent weakness.

In 1970, Sheldon Selikoff was facing 38 counts of larceny in 3 indictments arising out of a real estate swindle as well as a fourth indictment charging him with obscenity in the second degree. After professing his innocence for nearly two years, on May 12, 1972, in the middle of his trial, Selikoff moved to withdraw his plea of not guilty. He approached the bench with counsel to offer a plea of guilty to one count of grand larceny in the second degree and obscenity in the second degree in full satisfaction of all four indictments.

The second defendant, Campbell, was being held on a prosecutor's information charging him with misdemeanor drug offenses. At his arraignment, after a discussion between his attorney and the prosecutor, Campbell entered a plea of guilty to the reduced charge of loitering for the purpose of using or possessing a dangerous drug.

In 1971, defendant Davidson was charged with murder and an unrelated larceny for which he faced a possible sentence upon conviction of from 15 years to life imprisonment. After a detailed discussion before the arraigning court, Davidson pleaded guilty to manslaughter in the second

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Bargain, supra note 33, at 294-95. Unfortunately, the ideal solution is as illusory as it is obvious.

If we had more trial parts courtrooms [sic], the balance would then tip in favor of the district attorneys . . . . The opportunity of trial would lead to stiffer sentences and, at the same time, give an innocent defendant his rightful day in court.

Interview with Robert M. Morgenthau, District Attorney, New York County, New York City in N.Y. Times, Jan. 27, 1975, at 39, col. 6. Courtrooms and the funds to staff them, however, may not offer the solution. See note 31 supra.

a This appears to be an example of what one author has described as "horizontal overcharging," i.e., charging a defendant with several counts of the same offense in an effort to induce a plea bargain. Alschuler, supra note 7, at 87. See note 34 and accompanying text supra.

b 35 N.Y.2d at 235, 318 N.E.2d at 789, 360 N.Y.S.2d at 631.
c Campbell was initially held on charges of felony drug possession. After a preliminary hearing, however, the grand jury directed that only a misdemeanor information be filed. 35 N.Y.2d at 235, 318 N.E.2d at 790, 360 N.Y.S.2d at 632.
degree in full satisfaction of both charges. Rather than impose the maximum sentence of 15 years, the judge ordered the defendant imprisoned for no more than from 3 to 10 years. Three separate defendants; three adjudications without the need for jury trials; three convictions. Clearly, plea bargaining had been at work. Nevertheless, all three defendants were now before the New York Court of Appeals. Something had soured the “bargain.”

People v. Selikoff

Upon Selikoff’s entry of a plea of guilty to grand larceny and obscenity, both in the second degree, Judge Burchell of the Westchester County Court made the statement that incarceration would not be required of the defendant. Nonetheless, three months later when the defendant returned before Judge Burchell for sentencing, the court felt that it could not “in good conscience and in the interests of justice keep the promise here to no incarceration.” As the judge indicated, in the interim he had presided over the trial of Selikoff’s original codefendant and learned that Selikoff’s role in the larceny was more extensive than presumed at the arraignment proceeding. After refusing an offer to withdraw his plea, the defendant was sentenced to a maximum of five years imprisonment as well as a fine.

In affirming the decision of the appellate division to let stand the judgment of conviction, the court of appeals examined the record of proceedings, the sentencing power of the court, and the remedies available to the defendant. Although the record unambiguously showed that an uncon-

41 35 N.Y.2d at 237, 318 N.E.2d at 790-91, 360 N.Y.S.2d at 632.
42 People v. Selikoff, 41 App. Div. 2d 376, 377, 343 N.Y.S.2d 387, 389 (2d Dep’t 1973), aff’d, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974). Specifically, Judge Burchell stated: At this point . . . I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney’s Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises.
43 The record of the proceeding in the Westchester County Court, reprinted by the Appellate Division in their decision, makes no mention of precisely what Selikoff’s involvement was. It seems inconceivable, however, that the prosecutor was unaware of Selikoff’s role at the time the bargain was made and nonetheless acquiesced in a sentence of no incarceration. See id. at 377-78, 343 N.Y.S.2d at 389-90.
44 41 App. Div. 2d at 378, 343 N.Y.S.2d at 390.
45 Id. at 376, 343 N.Y.S.2d at 387.
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ditional promise had been made, the court of appeals found that Judge Burchell had impliedly conditioned his promise of no incarceration upon the information and disclosures which had been made known to him up to that point. Since the original recommendation was based upon the belief that the defendant was minimally involved in the real estate scheme, the sentencing judge was deemed correct in refusing to execute the promise and justified in merely permitting Selikoff to withdraw his plea.

Ironically, both the court of appeals and the defendant relied upon Santobello v. New York to support their respective positions. The Santobello decision concerned the plight of a defendant who had plea bargained with the prosecutor's office and was promised that if he would plead guilty to a lesser included offense, no recommendation as to sentence would be made. Upon sentencing, however, a prosecutor other than the one with whom the negotiations had been conducted appeared and recommended that the maximum sentence be imposed. Insisting that a promise had been broken, Santobello sought to withdraw his plea. In reversing the state courts' denial of the request, the Supreme Court of the United States noted that

[i]his phase of the process of criminal justice, [plea bargaining] and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

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52 See note 48 supra. As the lone dissenter in the Appellate Division remarked, "the record incontrovertibly shows an unconditional promise by the Judge that no jail sentence would be imposed." 41 App. Div. 2d at 380, 343 N.Y.S.2d at 392 (Gulotta, J., dissenting).
53 35 N.Y.2d at 238, 318 N.E.2d at 791, 360 N.Y.S.2d at 633.
54 Id. The court partially relied upon the requirements of N.Y. CRIM. PRo. LAW § 390.20 (McKinney 1971). This statute "makes it explicit that the court cannot impose sentence until it has a written report on a presentence investigation." People v. Aiss, 29 N.Y.2d 403, 405, 278 N.E.2d 647, 328 N.Y.S.2d 438, 439 (1972).
56 Originally indicted on two felony counts, promoting gambling and possession of gambling records in the first degree, Santobello finally pleaded guilty to the misdemeanor charge of possession of gambling records in the second degree. Id. at 258.
57 Id. at 259. Furthermore, the sentencing judge was apparently unconcerned with the weight to be given to any prosecutorial recommendation:

Mr. Aronstein [defense counsel], I am not at all influenced by what the District Attorney says. . . . It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do.

I have here, Mr. Aronstein, a probation report. I have here a history of a long, long serious criminal record.

Id. at 259.
58 Id. at 262.
Thus, the prosecutor's failure to execute his promise invalidated the guilty plea induced by such promise. The Supreme Court then remanded the case to the state court to decide whether to allow the defendant to withdraw his plea, or, in the alternative, to fulfill the aborted bargain by remanding the proceedings for resentencing before a different judge without a prosecutor's sentence recommendation.\(^{59}\) The New York Appellate Division chose the latter alternative.\(^{60}\)

Selikoff's position appeared analogous to Santobello's. Selikoff pleaded guilty in return for a promise of no incarceration; Santobello, for a promise of no sentence recommendation. One relied upon the word of the judge; the other upon the representations of the prosecutor. Both had been given their promises before judicial receipt of a presentence report. Moreover, prior to the acceptance of his plea and the making of the promise, Selikoff had fully discussed his participation in the crimes charged and admitted all the facts pointing to his culpability.\(^{61}\) Since mere withdrawal of his plea would not return him to the status quo ante,\(^{41}\) Selikoff demanded that which Santobello ultimately received—specific performance of his promise.\(^{62}\)

While conceding the analogy, the Selikoff court pointed out that the Santobello decision, requiring either withdrawal of the plea or specific performance of the promise, indicated no preference for one course over the other.\(^{64}\) Since the option rested within the discretion of the sentencing court, the court reasoned that Judge Burchell was justified in recanting the

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59 Id. at 263.
61 See note 48 supra and note 62 infra.
41 The Court of Appeals remarked that Selikoff had not changed his position, 35 N.Y.2d at 239, 318 N.E.2d at 792, 360 N.Y.S.2d at 634; nonetheless, Judge Gulotta had more fully explained that returning to the status quo ante is impossible in this case where codefendants of this defendant have been tried and acquitted in the interim and the defendant himself has waived his constitutional right against self incrimination and has made a full disclosure of his involvement in the crime to the prosecuting authorities . . . .
The record shows that immediately prior to acceptance of the plea and the making of the promise there was a full discussion of the defendant's participation in the crimes charged . . . .
[H]e at that time and subsequently laid bare all the facts pointing to his culpability.
41 App. Div. 2d 376, 381, 343 N.Y.S.2d 387, 393 (Gulotta, J., dissenting).
62 35 N.Y.2d at 235, 318 N.E.2d at 790, 360 N.Y.S.2d at 631. The Selikoff court rejected out of hand the defendant's alternative theory that specific performance of the bargain should be granted on the basis of commercial contract law. Id. at 238, 318 N.E.2d at 791-92, 360 N.Y.S.2d at 633-34. For a discussion of the contract theory as applied to plea bargaining see Gallagher, supra note 9, at 45-48.
44 35 N.Y.2d at 239, 318 N.E.2d at 792, 360 N.Y.S.2d at 634. The court itself noted, however, that specific performance of a plea bargain has been granted in New York when a prosecutor's case was prejudiced by disclosure or delay. Id. at 239-40, 318 N.E.2d at 792, 360 N.Y.S.2d at 634-35. See, e.g., People v. Esposito, 32 N.Y.2d 921, 347 N.E.2d 438, 347 N.Y.S.2d 70 (1973) (mem.);
promise and allowing Selikoff to choose either withdrawal of the plea or
the imposition of the five-year prison sentence. Since the required sentenc-
ing report did not appear to reveal the extent of Selikoff's involvement in
the larceny⁴⁵ and the information gathered by Judge Burchell between
arraignment and sentencing was purely fortuitous,⁴⁶ it can be argued that
Selikoff would never have entered a guilty plea had he known of the possi-
bility of his eventual sentence. Nevertheless, the court of appeals firmly
upheld the trial judge's discretion to condition a promise on information
then known, and later elect a remedy should additional information render
the promise undeliverable.

People v. Campbell

When defendant Campbell entered his guilty plea before Judge Tyler
in the New York City Criminal Court, the prosecutor, as promised, recom-
mended that no prison sentence be imposed upon Campbell's conviction
for loitering. The pleading court then addressed the defendant and asked
whether there were any additional promises made which may have induced
the plea. Both Campbell and the prosecutor answered in the negative.
Campbell also indicated his full awareness that the prosecutor's recom-
mendation of no incarceration was purely advisory and not binding on the
court.

Neither the defendant nor the prosecutor revealed to the court their
private agreement that should sentence be imposed, the defendant would
be permitted to withdraw his plea. On sentencing, Campbell was advised
that he would have to serve a three-month prison term. Although the
prosecutor and the defendant immediately informed the court of the hith-
terto undisclosed promise, their protestations went unheeded. Interestingly,
Campbell, like Selikoff, unsuccessfully turned to the Santobello decision
for support. The court of appeals, however, failed to see the analogy and
distinguished the two cases by pointing out that the prosecutor in
Campbell lacked the requisite power, possessed by the Santobello prosecu-
tor, to offer the promise made.

There was no doubt that the prosecutor had in fact made the promise,
and little doubt that Campbell had relied upon it. Hence, defendant

⁴⁵ See note 54 supra. Judge Burchell simply alluded to the fact that Selikoff had insisted on
his innocence: "Furthermore, it appears from your pre-sentence report filed by the Probation
Department that you deny any participation in any fraud by which sums of money were
extracted from money lenders." 41 App. Div. 2d 376, 378, 343 N.Y.S.2d 387, 390 (2d Dep't
1973).

⁴⁶ Presumably, the judge would never have learned of the nature of Selikoff's involvement
had he not presided at the trial of Selikoff's codefendant since neither the prosecution nor
the pre-sentence report had informed him of such involvement. Furthermore, the "knowl-
edge" gleaned by the judge at such trial may be suspect in that Selikoff was unable to
confront or cross-examine his accusers. Id. at 380, 343 N.Y.S.2d at 392 (Gulotta, J., dissent-
ing).
argued that he was entitled to withdraw his guilty plea since the promise went unfulfilled. The Selikoff court rejected this line of reasoning, holding that "the prosecutor, without authority, promised that which he could not legally perform and the defendant, therefore, could not as a matter of law, rely on that promise."  

By refusing to recognize the private agreement between the prosecutor and the defendant, the court of appeals clearly established the importance of the record of proceedings to the plea bargaining process and unmistakably emphasized the integral role played by the judge in these proceedings. No subterfuge, however slight, was to be tolerated when a defendant entered a plea of guilty before the court as a result of negotiations with the prosecutor. Advising Campbell to seek relief in a different proceeding for any injustice caused by the prosecutor, the Selikoff court would not per-

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67 A further distinction between the two cases can be drawn. While Campbell's prosecutor attempted to fulfill his promise by informing the court of the agreement on withdrawal of the plea, Santobello's second prosecutor clearly ignored the original promise that no sentence recommendation would be offered. See 404 U.S. at 259, 262.

68 35 N.Y.2d at 241, 318 N.E.2d at 793, 360 N.Y.S.2d at 636. Nonetheless, other courts, apparently more concerned with the issue of reliance than with the authority of the promisor, have ordered specific performance of promises found to have been relied upon by the defendant in entering his guilty plea. See, e.g., White v. Gaffney, 435 F.2d 1241 (10th Cir. 1970); People v. Wadkins, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965).

69 The court used biting language in discussing the actions of the defendant and the prosecutor:

A defendant . . . who has misled, or lied to the court, should not, at least on this record, be heard to contend that his plea was induced by an off-the-record promise. That defendant may have acted upon the advice of counsel, or with the connivance of a prosecutor, should not alter the result. . . . That the prosecutor also misled or perhaps even lied to the court is to be deplored, but, on this record, should be of no help to defendant if only because it permits a connivance which is not tolerable. 35 N.Y.2d at 242, 318 N.E.2d at 794, 360 N.Y.S.2d at 637.

70 The court remarked that:

On oral argument in this court, the District Attorney urged that the underlying evidence for the charge made it extremely doubtful that defendant could have been convicted on trial. Indeed, defendant, despite his record, may have been innocent of any wrongdoing on this charge. Postconviction procedures are, however, available to correct any injustice, without undoing what is good in plea-taking practice, and in any such proceeding defendant would not be barred from showing, among other possibilities, that in the off-the-record plea negotiations he was misled into not protesting his innocence. At such stage of the matter defendant may be entitled to go free for innocence and not because of a shared deception on the court at plea taking. Id. at 243, 318 N.E.2d at 794, 360 N.Y.S.2d at 637 (emphasis added).

It is conceivable that the court was more concerned with the integrity of the process than with the disposition of Campbell's appeal. Arguably, had the Court of Appeals granted the various defendants' requests, it would have defeated the primary purpose of plea bargaining, viz., easing the overburdened court calendars. By limiting review of guilty pleas to appeals of final judgments of conviction, the court appears to be safeguarding against the burden imposed by a series of collateral attacks on every plea bargain.
mit a contradiction of the unambiguous record to enter into this individual appeal of a plea bargain.

**People v. Davidson**

The issue of the inviolability of the record also arose in the disposition of Davidson's appeal. Although the record of proceedings in the lower court clearly indicated that he was to receive a sentence of from 3 to 10 years, defendant Davidson alleged that, off-the-record, the judge had promised him a 4-year maximum sentence. Curiously, the defendant did not raise the issue of the broken "promise" until well after the sentence as recorded was imposed—and after the sentencing judge had died.

Since the pleading, as recorded, indicated that Davidson denied the existence of any promises, the court of appeals refused to give credence to the defendant's claim. Furthermore, the Selikoff court explained that even if Davidson's allegation of an off-the-record promise by a now deceased judge had "some scintilla of credibility," they would refuse to give it judicial cognizance. The desirability of placing the entire plea negotiation process on the record, the court continued, far outweighed the negative effect of honoring a "promise" not found on that record. 7

**A Critical Evaluation**

With Selikoff has come the awareness that the courts must assume an important role in protecting both the rights of plea bargaining defendants and the integrity of the criminal justice system. As a result of Selikoff, all pleading courts in New York are now required to make a detailed record of the pleadings and the judicial role in plea bargaining, often maligned, has been reaffirmed. Nonetheless, not all the questions surrounding plea bargaining have been resolved by the Selikoff opinion.

While encouraging a recorded interrogation of the defendant and the prosecutor as to the nature, basis, understanding, and voluntariness of the plea, the Selikoff opinion offers no assurances of a truthful response to such an inquiry. In fact, in People v. Nixon, Judge Breitel, the author of the Selikoff opinion, had earlier indicated that "there is reason to suspect that many pleading defendants are prepared to give the categorical answers only because they know that this is the route to eligibility for the

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71 *Id.* at 244, 318 N.E.2d at 795, 360 N.Y.S.2d at 638.
72 *Id.*
73 *See* Goldfluss, *supra* note 7, at 4, col. 6 n.2.
74 *See* note 87 *infra.*
lesser plea." A New York legislative study of prisoners convicted as a result of guilty pleas significantly revealed that 91 percent of those surveyed answered "no" when the sentencing judge asked if they were induced by any promise or commitments—even though this was precisely the reason for their plea. Additionally, the record alone would never reflect the motives of either the prosecutor or the accused when entering into plea discussions, let alone reveal the steps taken to secure the final bargain.

Of further concern is the court's apparent modification of the Santobello decision's emphasis on the issue of reliance. While Santobello recognized the importance of an accused's reliance upon a promise, Selikoff seems to indicate that reliance would be virtually impossible since every promise is either expressly or impliedly conditional. Defendants are already faced with a series of uncertainties and pressures when they begin to negotiate a plea. Fear of the unreliability of a promise should not be added to their concerns.

As one commentator has already noted, "complete reform of the plea bargaining process must inevitably await the complete abolition of plea bargaining." Yet, in the absence of any other viable alternative to unmanageable court calendars and already overcrowded detention facilities, it appears that improvement rather than rejection of the plea bargaining process should be the immediate objective of the criminal justice system.

Because it failed to recognize that meaningful reform must proceed from legitimized judicial participation in the actual negotiation of the guilty plea itself, it is submitted that Selikoff simply did not go far enough in its attempt to regulate plea bargaining. Plea bargaining is not a test of strength between opposing forces. It is a vital component of criminal adjudication and, as such, should be supervised by the bench in all its phases. As discussed earlier, prosecutors have long enjoyed comparatively unfettered discretion in the plea bargaining process. The disparity in effectiveness among criminal defense attorneys, coupled with prosecutorial discretion, may all too often subvert the criminal justice system's search for truth and justice. Rather than permit the accused and the prosecutor to begin negotiations outside of his presence, the judge should be included in

77 Id. at 355, 234 N.E.2d at 697, 287 N.Y.S.2d at 672.
78 1972-73 REPORT OF THE NEW YORK STATE SELECT COMM. ON CRIME, ITS CAUSES, CONTROL & EFFECT ON SOCIETY 18.
79 See notes 32-42 and accompanying text supra.
80 See text accompanying note 58 and note 68 supra.
81 See text accompanying note 53 supra.
82 See notes 36-41 and accompanying text supra.
83 Restructuring the Plea Bargain, supra note 33, at 312.
84 See notes 32-35 and accompanying text supra.
85 See Alschuler, supra note 7, at 56-57 (prosecutorial tactics vary with experience of defense counsel); Restructuring the Plea Bargain, supra note 33, at 295 (public defenders often more concerned with administrative burden of total caseload than individual defendant, whereas private counsel free to use wider array of bargaining tactics).
any and all discussions concerning the disposition of the charges against a defendant. Not only would prosecutors thereby be deterred from overcharging, but judicial involvement in the negotiation stage would serve to eliminate their advantage as the sole arbiter of their case.

Judicial participation would encourage an early determination of the factual basis for the accusatory instruments as well as the criminal culpability of the defendant. Thus, upon entry of a guilty plea, the defendant's fear that he has bargained away his rights for unsupportable charges would be mollified. Moreover, the prosecutor would no longer be permitted to wave the carrot of concessions without first establishing a rational starting point for any eventual "bargain." Mandating that all negotiations be conducted on the record and in the presence of a judge would severely limit the possibilities of collateral attacks on the plea bargain. The existence of an off-the-record promise, inducement, or implied condition must be made literally impossible. As a result, promises would never be broken since all promises would be either expressly conditional or clearly capable of being fulfilled.

Admittedly, active judicial participation in plea bargaining has been vehemently opposed on the ground that it would add to the inherent coercion already present in the plea bargaining process. Such critics, however, fail to recognize that judicial involvement, like plea bargaining, exists. Prior to the Selikoff decision, New York judges regularly participated in plea bargaining. Indeed, it is conceivable that Judge Burchell himself played a role in the entry of Selikoff's plea. The issue is not whether a judge should be involved in plea bargaining, but rather, where in the process should his presence be first felt? It is submitted, then, that judicial involvement in a plea conference would mitigate rather than aggravate coercion by severely limiting the prosecutor's tactics.

The participating judge can conscientiously and openly protect a defendant's rights rather than rely upon an ex post facto examination of the negotiation process. Admittedly, judicial participation can be a source of abuse if criminal court judges do not remain neutral and use their position to unduly influence plea negotiations. The use of the record, however, would make any such intrusion into the plea conference both identifiable and controllable. Such legitimized participation by the bench may

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8 The presence of a judge at the initial plea conference would prevent the prosecution from inducing a plea by confronting the defendant with suppressible evidence, and offering as a "concession" the dropping of unsupportable charges.

87 See Gallagher, supra note 9; ABA PROJECT ON MINIMUM STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1 (1972); Official Inducements to Plead Guilty, supra note 39, at 187.

88 See White, supra note 5, at 448; note 14 supra.

89 See note 48 supra. It would appear that as a participant in numerous conferences Judge Burchell either offered or approved the recommended sentence of no incarceration and a possible fine.
also help ease the burden on the courts since, as one judge has noted,

the logjam is largely prompted by the sense of uncertainty as to the ultimate disposition which preoccupies an accused and his counsel. . . . Judicial involvement in plea discussions tends to remove this cloak of uncertainty and in turn, prompts the timely entering of a plea of guilty.\(^9\)

In short, it is submitted that Selikoff's goal of regulating the plea bargaining process through judicial review and use of the record will not be effectively realized until the judge becomes a regular part of the plea discussion, with the record reflecting the negotiations as well as the results of the plea conference.

**CONCLUSION**

No sympathy need be extended to Selikoff, Campbell, and Davidson in their individual capacities as defendants. Campbell, a man well-versed in the criminal process,\(^1\) should have realized or did realize that the prosecutor had no power to authorize withdrawal of a guilty plea. Perhaps Selikoff did in fact withhold information at his arraignment and was subsequently "found out." Davidson's allegation of an off-the-record promise by the judge did not contain a "scintilla of credibility" and was simply not to be believed.\(^2\)

Legitimizing the role of the court in all stages of the plea bargaining process, however, would help to insure that defendants less well-versed than Campbell would receive a promise from one upon whom he could rely—a judge—and would not be penalized for any lack of experience. An accused in Selikoff's position would at the outset receive a clear and unambiguous promise from a judge in return for whatever information was freely communicated and verified. Not only would a defendant with a less incredible story than Davidson find any formal promise clearly on the record, but every element of the negotiation, any utterance which could be construed as a promise, would appear on the record as well. More importantly, perhaps, plea bargaining would more closely resemble a rational adjudication rather than an object of scorn and distrust.

The Selikoff decision is only an initial step in the right direction. Judicial participation in the negotiation process is no panacea; yet, coupled with procedural safeguards and administrative commitment, it is a beginning.\(^3\) Continued efforts must be made to forge a rational link be-

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\(^1\) When imposing the three-month sentence on Campbell, the court took notice of his "extensive criminal narcotics record, consisting of 27 arrests or convictions." 35 N.Y.2d at 236, 318 N.E.2d at 790, 360 N.Y.S.2d at 632.
\(^2\) *Id.* at 244, 318 N.E.2d at 795, 360 N.Y.S.2d at 638.
\(^3\) For one commentator's detailed example of a proper balance between judicial involvement and procedural safeguards see *Restructuring the Plea Bargain*, supra note 33, at 299-312.
tween the sentencing discretion of the judge and the interests of expediency, the rights of the defendant and the ends of justice. In this way, the negotiated entry of a guilty plea, so prevalent in our current system of justice, can resemble a "bargain" for all participants.