

## **Prosecutorial Dominance in the Plea Process, and a Look at Alternative Principles and Practices**

*A general survey with specific commentary on New York Criminal Procedure Law, Article 220*

*Francis A. Zarro Jr.*

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### **Overview**

*“Plea Bargaining is the criminal justice system.”<sup>1</sup>*

Plea bargaining has radically altered the criminal justice system in the United States. What was once an adversarial adjudicative process controlled by judges and juries has been reduced to an administrative mechanism dominated by prosecutors through the exercise of unbridled discretion. In most jurisdictions the role of the courts is perfunctory and the defense bar is almost always overpowered.<sup>2</sup>

Ninety-seven percent of all federal criminal case dispositions and 94 percent of all state court criminal case dispositions in the U.S. in 2010 were entered as judgments of conviction by plea. In all but a very small number of these cases, the pleas involved reductions of charges from the initial accusatory instrument and attendant reduced sentences.<sup>3</sup> This has placed increased responsibilities on the defense bar, especially for indigent defense, because plea bargaining disproportionately affects indigent defendants, especially African-American and Hispanic people. Eighty percent of all criminal defendants in the U.S. are indigent, and approximately 75 percent of them use the public defense system.<sup>4</sup> Seventy-seven percent of all indigent defendants are African-American and 73 percent are Hispanic.<sup>5</sup> Only

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<sup>1</sup> Supreme Court Justice Anthony Kennedy writing for the Majority in *Cooper v. Laffler*, 132 S. Ct. (2012) p. 1407, (quoting Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale Law Journal, 1909, 1912, (1992).

<sup>2</sup> Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 Texas L. Rev. 2023 (2006), Cf., Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham Law Rev. 2463, 2495, 2508-10, (2004);

<sup>3</sup> *Bureau of Justice Statistics*, U.S. Department of Justice: At a glance 19 (2000).

<sup>4</sup> Steven Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, [cf. as, Bibas, *Regulating the Plea Bargaining Market*; see also, *Libretti v. United States*, 516 U.S. 29, (1995), “...it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forego.”

<sup>5</sup> Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, *Bureau of Justice Statistics*, November 2006, p.4.

about 25 percent of Americans accused of crimes can afford to hire a private defense attorney.<sup>6</sup>

There are over 2.3 million people incarcerated in this country. The U.S. prison population grew 700 percent from 1970 to 2005, far in excess of corresponding crime and population increases. These incarceration rates affect people of color dramatically. One out of every 15 African-American men and one in every 36 Hispanic men is incarcerated in the U.S. in comparison to one out of every 106 white men. African-American men comprise about 50 percent of the prison population in the U.S.<sup>7</sup> For African-American males in their 30s, one in every 10 is in prison or jail on any given day.<sup>8</sup>

African American youth have higher rates of juvenile incarceration and are more likely to be sentenced to adult prison. Nationwide, African-Americans represent 26 percent of juvenile arrests, 44 percent of youth who are detained, 46 percent of the youth who are judicially waived to criminal court, and 58 percent of the youth admitted to state prisons.<sup>9</sup>

African-American women are three times more likely than white women to be incarcerated, and Hispanic woman are 69 percent more likely. From 1980 to 2007, about one in three of the 2.4 million adults arrested for drugs were African-American. After entering a guilty plea, black offenders receive longer sentences than whites and are 21 percent more likely than white defendants to receive mandatory minimum sentences after plea entry. And in the federal system blacks receive 10 percent longer sentences across the board.

One particularly harmful collateral effect of conviction and incarceration is disenfranchisement from voting, resulting in 13 percent of the nation's African-Americans being denied the right to vote. And it does not stop there. Following

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<sup>6</sup> Elizabeth Renter, *In Defense of Indigent Defense, How the Broken Public Defense System Exacerbates Racial Disparities*, September 2010, [http://www.huffingtonpost.com/elizabeth-renter/how-the-broken-public-def\\_b\\_738305.html](http://www.huffingtonpost.com/elizabeth-renter/how-the-broken-public-def_b_738305.html).

<sup>7</sup> American Bar Association Justice Kennedy Commission, *Report to the House of Delegates*, May 15, 2004.

<sup>8</sup> The Sentencing Project, Research and Advocacy for Reform, <http://www.sentencingproject.org/template/page.cfm?id=122>, retrieved Dec. 15, 2015.

<sup>9</sup> Criminal Justice Fact Sheet, NAACP (citing the Center on Juvenile and Criminal Justice), <http://www.naacp.org/pages/criminal-justice-fact-sheet>.

release from prison, wages grow at a 21 percent slower rate for former black inmates compared to whites.<sup>10</sup>

Plea bargaining is not a convenient, tidy public policy tool that enhances case disposition and relieves court congestion. It is instead an administrative apparatus driven by prosecutors to the exclusion of judges and juries who are assisted by an overwhelmed, unprepared, and often detached indigent defense bar.

Chief Judge William G. Young of the Federal District Court in Massachusetts, in a June 2004 sentencing memorandum in a major drug- and gang-related case, filed an opinion that was as startling as it was truthful about the state of the nation's criminal justice "plea system":

*"The focus of our entire criminal justice system has shifted away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen...Evidence of sentence disparity visited on those who wish to exercise their Sixth Amendment right to a trial by jury today is stark, brutal and incontrovertible...Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500%. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be twenty years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that we punish people—punish them severely—simply for going to trial. It is the sheerest sophistry to pretend otherwise."*<sup>11</sup>

In December 2007 the National Association of Criminal Defense Lawyers, in conjunction with the Sentencing Project, submitted a report to the United Nations Committee on the Elimination of Racial Discrimination, in which it concluded that "The prosecutor's ability to control sentencing and plea bargaining outcomes through charging practices threatens the viability of the American adversarial court

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<sup>10</sup> Sophia Kirby, *Racial Disparities Inherent in our National Criminal Justice System*, Center for American Progress, March, 2012.

<sup>11</sup> United States v. Richard Green, William Olivero, Edward Mills and Jane Doe, United States District Court, District of Massachusetts, Sentencing Memoranda, June 18, 2004, William G. Young, Chief Judge.

system. The United States lacks viable oversight mechanisms to hold prosecutors accountable when they engage in racially discriminatory conduct that jeopardizes the fairness of the criminal court process.”<sup>12</sup> This report reveals a system of “de facto prosecutorial administration”<sup>13</sup> commonly known as plea bargaining, which has for the last 40 years caused prison populations in the U.S. to skyrocket, with hundreds of thousands of poor people and people of color, many of whom are factually innocent, being warehoused in the nation’s jails and prisons without a trial and without the assistance of a constitutionally effective lawyer.

This article will pay particular attention to New York Criminal Procedure Law, Article 220<sup>14</sup> and its specific formalization of prosecutorial primacy in the plea bargaining process. The article will also examine the effect of the United States Supreme Court’s 2012 decisions in Laffler v. Cooper<sup>15</sup> and Missouri v. Frye<sup>16</sup> on the future of plea bargaining in the U.S.

With only three percent of the criminal cases brought by federal and state prosecutors going to trial, it is difficult to understand how our criminal trial courts can be overburdened. According to this reasoning, if, say, 10 percent of those accused of a felony in this country were to insist on their right to a trial by jury, the system would collapse of its own weight. Could it be that we arrest and overcharge too many people and then force pleas on them so that we can keep the systemic momentum going and the prisons full, mostly with poor people and people of color? Not a pretty picture.

As we look more closely at the problem, we need to consider alternatives to conventional criminal justice adjudication practices, including restorative justice.

### **The New York State system**

*“Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to a trial by jury. Although the fictional nature of that proposition has been apparent to many for*

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<sup>12</sup> Report Submitted to the United Nations Committee on the Elimination of Racial Discrimination by The Sentencing Project and the National Association of Defense Lawyers, December 2007.

<sup>13</sup> Gerald E. Lynch, *supra*, *Our Administrative System of Criminal Justice*, Fordham L. Rev., (1998).

<sup>14</sup> N.Y. C.P.L. 220.10(4) (5).

<sup>15</sup> Cooper v. Laffler, 132 S.Ct. 1376 (2012)

<sup>16</sup> Missouri v. Frye, 132 S.Ct. 1309 (2012).

*some time now, what is new is that more and more people are reaching the conclusion that it is intolerable.”<sup>17</sup>*

The restrictions imposed by New York Criminal Procedure Law require the express consent of the prosecutor to any plea other than as fully charged in the accusatory instrument and permits the prosecutor to negotiate a sentencing agreement and a waiver of certain, “collateral rights of a defendant” in exchange for “fact pleading” and sentence reduction.

Prior to the enactment of the new Criminal Procedure Laws and Rules in 1975,<sup>18</sup> the Code of Criminal Procedure governed the initiation and progression of criminal cases in New York.<sup>19</sup> The former code provided that the state’s 62 district attorneys could “recommend, in the interest of justice, acceptance by the court of a plea of guilty to a crime or offenses of a lesser degree for which a lesser punishment was prescribed than the offense charged.” In so doing the district attorney was required to submit a written statement to the court setting forth the reasons for recommending the acceptance of the plea by the court. The statement was to be filed as a public record in the case.

A reading of the interim and final reports of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code—including the several “study bills” submitted in 1965 and 1968 concerning revision of Chapter 11 A of the former code—sheds little light on why the commission included a specific provision in the new code requiring for the first time the consent of the prosecutor before the court could accept a guilty plea for a lesser charge or offense.<sup>20</sup> The commission reports speak in general terms of the need to restructure plea and other procedures in order to “eliminate sporadic, piecemeal string provisions” and provide background for much of the content of the proposed

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<sup>17</sup> Timothy Lynch, *The Case Against Plea Bargaining*, The Cato Institute Project on Criminal Justice (2003). The premise of his thesis is that plea bargaining as it currently exists in the United States is unconstitutional.

<sup>18</sup> N.Y. C.P.L. 220.10 (4) (5), *supra*.

<sup>19</sup> N.Y. Code of Criminal Procedure, 342-a.

<sup>20</sup> *Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Code of Criminal Procedure*, Volumes 1-3, February 1962; 1968 Study Bill, Chapter 11 A of the Criminal Procedure Law, sec. 105.70 and 115.10

revised code, but the reports offered very little concerning the basis for the content of CPL 220 (3) (4).<sup>21</sup>

In the end, the Temporary Commission's proposed revisions to sec. 342-A of the Code of Criminal Procedure created primacy in the District Attorney's Office by elevating his or her participation from the role of making a recommendation to providing consent, even though the court must still approve any plea arrangement consented to by the prosecution for a lesser charge and the sentencing power remains exclusively in the court. It has been said that in adding the consent provision in C.P.L. 220 (3) (4), the legislature sought to "prevent collusive and corrupt plea arrangements".<sup>22</sup> The mindset of the Temporary Commission and the legislature as later interpreted by the courts seems to have been to prevent judges from using "the naturally intimidating powers of the court in plea negotiations."<sup>23</sup>

Another way of ensuring the fairness of the plea process is to require a full, pre-plea colloquy evidentiary hearing prior to the court accepting the plea.<sup>24</sup> Further, it would probably be reasonable to assume that such a change will need the backing of the New York State Association of District Attorneys, which has traditionally wielded considerable influence on criminal justice matters in Albany.

The placement of the consent provision in the district attorney is not without statutory foundation. Under the provisions of the New York County Law, the district attorney of the county has the power and the duty to initiate, prosecute, and terminate prosecutions for all crimes and offenses cognizable in the courts of the county from where he or she was elected.<sup>25</sup> The district attorneys have broad discretion as to when and in what manner they perform their duties.<sup>26</sup> Moreover, the courts have no control over the discretion exercised by the district attorneys in the performance of their discretionary functions.<sup>27</sup> The New York State attorney

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<sup>21</sup> *Third Interim Report of the New York Temporary Commission on Revision of the Penal Law and Code of Criminal Procedure*, 1964.

<sup>22</sup> *People v. Selikoff*, 360 N.Y.S. 2d 853 (2000)

<sup>23</sup> *People v. Miller*, 434 N.Y.S. 2d 853, (1974)

<sup>24</sup> *People v. Hardee*, 587 N.Y. 2d 399, (2d Dep't 1992).

<sup>25</sup> *New York County Law*, 700.1; see also, *People v. LaPlante*, 137 N.Y.S. 2d, 893 (1955).

<sup>26</sup> *Whitehurst v. Kavanagh*, 640 N.Y.S. 2d 345, (3rd Dep't 1996).

<sup>27</sup> *People v. Ruggieri*, 419, N.Y.S. 2d, 869 (1979).

general does not have plenary powers to prosecute criminal matters in the sixty-two counties, except under specifically prescribed circumstances.<sup>28</sup>

The power of the district attorney to prosecute crimes includes by implication the power to recommend and consent to a plea of guilty to a lesser offense than that charged in the indictment, with the court having the power to accept or reject such a plea when recommended by the district attorney.<sup>29</sup>

In summary, the difference between the old code of criminal procedure and the new C.P.L. is as follows: Under the old code, a proposal for the plea could originate from the district attorney, defense, or the court, and the district attorney had the right to make a recommendation in writing but did not have veto power over the plea. Under the revised provision, the proposed plea may be proffered only by or after defense counsel consultation with the district attorney; without the prosecutor's consent the plea is dead at the door.<sup>30</sup>

The New York courts have consistently upheld the primacy of the role of the prosecutor in the plea process pursuant to C.P.L. 220.10 (3) (4) and have further held that the right of the district attorney to withhold consent to a plea is not a violation of a defendant's constitutional rights.<sup>31</sup> Nor does the refusal of a prosecutor to offer a reduced plea give rise to a dismissal of the charges in the interest of justice<sup>32</sup> or violate a defendant's right to equal protection.<sup>33</sup> The district attorney may also impose conditions on a plea, including those involving third parties.<sup>34</sup> Under the present statutory framework and ensuing judicial interpretations, the court is not required to conduct an "inquisition into the particulars of a plea consented to by the district attorney where the defendant is represented by counsel."<sup>35</sup> "Fixed policies" of trial courts in rejecting guilty pleas have, however, been disproved by the New York courts.<sup>36</sup>

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<sup>28</sup> N.Y. Executive Law, 63 (3); See also, People v. Romero, 675 N.Y.S. 2d 588 (1998).

<sup>29</sup> McDonald v. Sobel, 72 N.Y.S. 2d 41, (1947).

<sup>30</sup> People v. Meminger, 469 N.Y.S. 2d 323 (1983).

<sup>31</sup> People v. Tobler, 397 N.Y. 2d 325 (1977)

<sup>32</sup> People v. Molfino, 178 A.D. 2d 238, (1<sup>st</sup> Dep't 1991).

<sup>33</sup> People v. Cohen, 186 A.D. 2d 843, (3d Dep't (1992).

<sup>34</sup> People v. Antonio, 574, N.Y.S. 2d 718 (1<sup>st</sup> Dep't 1991).

<sup>35</sup> People v. Francis, 379, N.Y.S. 2d, 2 (1975).

<sup>36</sup> People v. Compton, 157 A.D. 2d 903, (3d Dep't (1990)

It is well-established New York law that the district attorney must consent to any guilty plea other than to the full offense charged and that the holding or conditioning of that consent is wholly within his or her discretion. There is no absolute federal right to have one's guilty plea accepted.<sup>37</sup> Based on existing law, a tough road lies ahead for anyone attempting to challenge the New York plea bargaining structure.

### **American Bar Association Standards for Criminal Justice on Pleas of Guilty, 3<sup>rd</sup> Ed., 1999.**

The American Bar Association standards specifically create a role for the judge, prosecutor, and defense attorney in the plea bargaining disposition process.<sup>38</sup>

#### ***Prosecutor***

The A.B.A. standard on “plea discussions and agreements” does not recommend vesting exclusive consent authority on plea bargaining in the prosecutor. Instead, the standard recommends that in considering whether to recommend or oppose a plea agreement to the court, or remain silent on such a plea, the prosecutor follow strict guidelines and establish written policies concerning such matters as the defendant's right to counsel, waivers, dismissals, and diversion and restorative justice programs. The standard further requires that prosecutors afford equal plea agreement opportunities to similarly situated defendants; stay attuned to the viewpoints of victims in the case; refrain from making false and misleading statements in the case in negotiating a plea; and refrain from threats of prosecution against third parties in order to secure agreement to a plea by a defendant. Further requirements are included in the standard for the protection of unrepresented defendants in the plea bargaining process. The standard discourages “no-plea policies” and advocates for transparency in the plea negotiation process.<sup>39</sup>

#### ***Judge***

The A.B.A. standards recommend that the court require full disclosure of all pleas. The judge is encouraged to order a pre-sentence investigation and report on all plea agreements and to give full consideration to all prospective pleas. The judge's role

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<sup>37</sup> *Santobello v. New York*, 404 U.S. 257, 262 (1971).

<sup>38</sup> *American Bar Association Standards for Criminal Justice on Pleas of Guilty*, 3<sup>rd</sup> Ed., 1999, p.14, sec. 3.1-3.3.

<sup>39</sup> *Id.* at 14-3.1.



is defined as final arbiter of the plea and sentencing process. The A.B.A. standard strongly discourages judges from participating in the plea negotiations and advocates allowing defendants the flexibility of withdrawing a plea at any time prior to sentencing.<sup>40</sup>

### ***Defense Counsel***

The A.B.A. standards recommend that defense counsel keep clients fully advised as to the status of the plea negotiation process and urges counsel to conduct a full investigation of the case prior to making a recommendation to the client on the plea. The standards further urge counsel to advise the client of all possible alternatives to pleading, refrain from making false and misleading statements to the client about the plea during the course of plea negotiations, and obtain the client's express permission before communicating acceptance of the plea to the prosecutor and the court. Finally, the standards emphasize the critical importance of counsel fully advising the client as to all collateral consequences of the plea.<sup>41</sup>

The A.B.A. standards address at least three of the major deficiencies in the New York plea bargaining process and clearly recognize the need to create a more collaborative, less prosecutorial-centric plea bargaining scenario.

### **Model Penal Code**

Section 701 of the Model Penal Code deals with sentencing, and touches on the subject of plea bargaining. The idea of a universally accepted model penal code has been awaiting its time for decades. As it currently exists, the code is premised on a "simple consequentialist model"—prevent crime through deterrence, and if deterrence fails, through "treatment and correction." The code no longer has the broad concurrence it had in the 1950s and has been on the shelf to a significant degree as federal and state jurisdictions have passed laws and implemented their penal policies in the contemporary law enforcement model.<sup>42</sup>

The American Law Institute (ALI) Sentencing Project in Philadelphia has recently prepared a report recommending revisions to the Model Penal Code in the area of

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<sup>40</sup> Id at 14-3.3

<sup>41</sup> Id at 14-3.2

<sup>42</sup> Markus Dirk Dubber, *Penal Panopticon, The Idea of a Model Penal Code*, 43 Buff. L. Rev. 689, (1995).

sentencing and, tangentially, pleas. “Discussion drafts” of the proposed report are available for purchase online from the ALI.

## **Federal Law**

There is no absolute federal right to have one’s plea bargain accepted.<sup>43</sup>

Until the 2012 Supreme Court decisions in Laffler v. Cooper and Missouri v. Frye, the Supreme Court had approached the issue of plea bargaining cautiously. Using broad statements and *dicta*, the Court endorsed the general practice of plea bargaining. However, in several other decisions of note in the years preceding Laffler and Frye, the Court laid the foundations for a Fifth, Sixth, Eighth, and Fourteenth Amendment application to the rights of criminal defendants who challenged their pleas on post-conviction and to direct review proceedings at the state and federal level.<sup>44</sup>

In its 1977 decision in Blackledge v. Allison,<sup>45</sup> the Supreme Court vacated a guilty plea based upon the defendant’s “plausible” allegations that he had been promised a much shorter sentence of 10 years instead of the 17-21 years imposed. This occurred after a full on-record guilty plea containing the usual impenetrable defendant language exacted during plea allocution. In vacating the plea, the Court recognized the extreme difficulty of invalidating a guilty plea by collateral attack.

Within a year of Blacklegde, the Court upheld a New Jersey statute that provided the possibility for less than a life sentence for a person who pleaded guilty to a charge of first-degree murder but mandated the life sentence for persons who went to trial and were convicted of the crime.<sup>46</sup>

In Padilla v. Kentucky,<sup>47</sup> decided in 2010, the Court set a new standard for reviewing and vacating guilty pleas by indigent defendants who were not given proper guidance by court-appointed attorneys on the collateral consequences of

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<sup>43</sup> Santobello v. New York, supra, 404 U.S. 257, 262 (1971).

<sup>44</sup> In these two cases the Supreme Court built on its prior decisions and formalized certain of its previous non-binding statements to establish as a matter of federal law that state court criminal defendants are entitled to direct review of their cases as well as other post-conviction remedies, in federal court, to nullify their pleas based upon federal Constitutional grounds.

<sup>45</sup> Blackledge v. Allison, 97 S. Ct. 1621 (1977).

<sup>46</sup> Corbitt v. New Jersey, 99 S.Ct. 493 (1977).

<sup>47</sup> Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

deportation involved with the plea. In two other cases some years earlier, the Court remanded for resentencing indigent-defendant pleas based upon ineffective assistance of court-appointed counsel in failing to properly investigate the case prior to sentencing.<sup>48</sup>

In Laffler v. Cooper and Missouri v. Frye,<sup>49</sup> decided just around the time of the 50<sup>th</sup> anniversary of Gideon,<sup>50</sup> the Supreme Court squarely took on the guilty plea issue and set into motion a new paradigm for the federal courts to police the quality of guilty pleas and sentences and require real pre-plea investigation of the underlying offense to protect an innocent defendant from succumbing to administrative pressures to accept guilty pleas.

Back in 1963, equalization at sentencing by plea was not the goal of the Gideon Court, and Strickland, for all its promise, imposed more burdens on underrepresented defendants rather than creating remedies for the situation.<sup>51</sup>

Add to this scenario the enactment of the “Antiterrorism and Effective Death Penalty Act of 1996,” in which President Clinton, together with the “contract” Republicans in the House—capitalizing on the intense pro law enforcement mood of the country after the Oklahoma City bombing—literally eviscerated federal habeas corpus for state court prisoners.

In Frye v. Missouri<sup>52</sup> the Court held that counsel’s failure to communicate the prosecutor’s plea bargain offer to the defendant constituted deficient performance under the first prong of Strickland. In Laffler v. Cooper the Court remanded for resentencing on a plea where defense counsel misrepresented to his client that he would serve less time on the plea deal than if he went to trial.<sup>53</sup>

## **Recommendations for reform of the plea bargaining process**

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<sup>48</sup> Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003).

<sup>49</sup> Laffler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1309 (2012).

<sup>50</sup> In its landmark decision in Gideon v. Wainwright, 372, U.S. 335 (1963), the Supreme Court established the right of indigent criminal defendants to be represented by counsel and imposed the duty upon the government to pay for it when the defendant is without the means to do so.

<sup>51</sup> Gideon v. Wainwright, supra; Strickland v. Washington, 466, U.S. 668 (1984). Strickland v. Washington establishes a two-pronged federal standard in establishing ineffective assistance by counsel, a factual predicate and a prejudice component.

<sup>52</sup> Frye v. Missouri, supra at p. 1309.

<sup>53</sup> Laffler v. Cooper, supra at p. 1391.

Laffler and Frye, together with cases like Rompilla and Wiggins<sup>54</sup> before them, may very well set the stage for federal law challenges and alternative scenarios to federal and state plea bargaining and sentencing statutes.<sup>55</sup>

Professor Susan R. Klein of the University of Texas School of Law has written extensively on the need for reform in the plea bargaining process in American criminal justice. Professor Klein has recommended two means of correcting the “information and resource disparity that skews the [plea bargaining] system”<sup>56</sup>

Her first proposal is to amend the federal rules of criminal procedure and their state equivalents (such as New York C.P.L., Article 220) regarding coercive pleas and lack of disclosure to defendants, especially where wrongful conviction looms large. Implementing legislation with public support and the Supreme Court’s recent decisions in Laffler and Frye make it possible for the public to demand closer judicial monitoring of the plea process. According to Professor Klein, in order to accomplish this, the dominant role of prosecutors in the plea bargaining process must be demonstrably curtailed and the trial judge restored as the primary source of guidance and authority in the pleas bargaining system.<sup>57</sup>

### ***Discovery***

Federal and state criminal procedure laws should be amended to incorporate strict compulsory discovery<sup>58</sup> under judicial supervision prior to the entry of a guilty plea.

This will require a conference hearing between the judge, prosecutor, and defense attorney prior to the entry of a guilty plea. At the hearing, the terms of the plea itself would have to be satisfactorily explained to the defendant before the judge

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<sup>54</sup> Rompilla v. Beard, *supra*, holds that counsel’s failure to investigate certain mitigating factors affecting sentencing constitutes ineffective assistance of counsel. Wiggins essentially held the same.

<sup>55</sup> *Monitoring the Plea Process*, Susan R. Klein, University of Texas School of Law, Public Law and Legal Theory Research Paper, Series Number 490 (2013).

<sup>56</sup> *Id.* at p. 36.

<sup>57</sup> Susan R. Klein, *Enhancing the Judicial Role in Plea Bargaining*, 84 *Texas Law Rev.* 2013; Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, Vol. 39, *University of Texas Law Rev.* 693, (2005).

<sup>58</sup> When a criminal defendant elects to proceed to trial, he or she is entitled to have the prosecution disclose the evidence and, in most cases, the sources of the evidence the government intends to proffer at trial. In the plea bargaining process the defendant waives the right to discovery of the government’s evidence and does not have the opportunity to confront the evidence and dispute it.

accepts the plea. This would require a pre-plea allocution full evidentiary hearing<sup>59</sup> in which the prosecution discloses its full case and the defendant is thoroughly advised of the strengths and weaknesses of the case against him or her and is fully informed of all of his alternatives on the record of proceedings at the hearing.<sup>60</sup> This would still be far less costly a process to the taxpayer than a full trial.<sup>61</sup>

### *Internal guidelines in prosecutor's offices*

The Department of Justice and the offices of state attorneys and district attorneys should develop, publish, and implement internal rules and guidelines to regulate the timing and content of plea negotiations and discovery procedures.

The incentive for the prosecutor to do this is to preempt harsher legislative and judicial action concerning the prosecutorial role in plea bargaining.<sup>62</sup> Mandatory, non-waivable pre-plea hearings or conferences would serve to make transparent and to preserve for the record the pre-plea investigation and discovery required of both defense counsel and the prosecution.<sup>63</sup> In New York, the Office of Court Administration should devise its own uniform plea hearing structure and make the proceedings subject to mandatory transcribing as exists in all of its courts of record. The hearing would provide the judge with the ability to direct questions and follow-up to both the defense and prosecution attorneys concerning the plea and to have direct input from the defendant. Where there is concern about the trial judge being directly involved in the plea negotiations, special judicial magistrates or trial hearing officers could be appointed by the chief administrator of the courts to conduct the pre-plea hearings. Retired judges and criminal lawyers could be appointed to these positions.

Questionnaires should be developed by court administrators to submit to defense attorneys and prosecutors for completion and submission prior to the hearing.<sup>64</sup> The questionnaires would be a compilation of the essential discovery and

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<sup>59</sup> A plea allocution is the part of the plea process in which the defendant recites element by element, the facts, circumstances, and events that led to the accusations against him or her.

<sup>60</sup> *Id.* at p. 695.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *id.*

<sup>64</sup> *id.*

disclosure data required for a full and fair hearing on the plea. There is already federal precedent on this subject.<sup>65</sup>

Pre-hearing questionnaires to defense counsel would go a long way toward eliminating negligence and ineffectiveness on the part of defenders. This process would ensure that defenders have a full understanding of the strengths and weaknesses of the People's case, the likelihood of a client's conviction, and the extent of the imposition of the punishment if they forego the plea and proceed to trial.

Prosecutorial dominance in the plea bargaining process, as is the case in New York, should be replaced with a system of "judicial gatekeeping," and changes should be implemented to expand discovery and provide the defendant "with enough information to make an informed decision as to the plea".<sup>66</sup>

### **Incorporating due process into plea bargaining**

There can be little doubt that in New York and other states, as well as in the federal system, the dominant role in the plea bargaining process lies in the prosecutor's office.

Administrative disposition of criminal cases in New York and throughout the U.S. has for the most part evaded the application of the Fifth, Sixth, Eighth and Fourteenth Amendments to criminal defendants who engage in the plea bargaining process.

Post-Warren Court due process in the U.S. has been replaced by a "Crime Control Model" of criminal case disposition that has been employed by the Burger and Rehnquist Courts, and most recently, by the Roberts Court.<sup>67</sup>

Until its 2012 decisions in Laffler and Frye, plea bargaining has been accepted by the Supreme Court as an essential and unavoidable administrative prosecutorial tool that trumps due process. Emboldened by such national judicial policies, prosecutors throughout the country, aided by enabling legislators, executives,

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<sup>65</sup> Giglio v. United States, 405 U.S. 150 (1972).

<sup>66</sup> Sandra Guerra Thompson, *Daubert, Gatekeeping for Eyewitness Identifications*, 65 SMU L. Rev. 593, (2012); Sandra Guerra Thompson, *Judicial Gatekeeping of Police Generated Witness Testimony*, F.N. Advisory Committee Notes to 1944 and 1966 Amendment, (West, 2102), 102 Journal Of Criminology, 329 (2012).

<sup>67</sup> Susan R. Klein, *Enhancing the Judicial Role in Plea and Sentence Bargaining*, supra.

“lukewarm lawyers” and accommodating jurists, exact burdensome *quid pro quos* from indigent criminal defendants that include harsh sentences, mandatory minimum sentences, allocutions in open court to facts and circumstances that are untrue, admissions and other inculpatory acts, and cooperation in the prosecution of third parties—all under threat of longer and even life sentences if they decide to invoke their right to trial and to confront their accusers and call witnesses in their defense.

In New York State the four appellate divisions of the State Supreme Court and the State’s highest tribunal, the New York State Court of Appeals, once national models of progressive judicial excellence, have since the mid to late 1990s adapted the States’ jurisprudence to the “crime control model.” In doing so, the State abandoned many of the cherished traditions of its judicial lineage, including the jurisprudence of judges like Stanley Fuld, Charles Breitel, Sol Wachler, Jacob Fuchsberg, Vito Titone, Michael Gabrielle, Matthew Jasen, James Hopkins, Isaac Rubin, Morrie Slifkin, Milton Mollen and Judith Kaye. One need only to read New York criminal case digest reports from the ‘70s and ‘80s to see a drastic change. If we compare those decisions to contemporary versions with similar due process issues from Appellate Division and Court of Appeals Judges appointed by former Governor Pataki, we see the stark departure from the due process model.

The plea bargaining process in the American justice system allows prosecutors to interpret the law and administratively adjudicate cases in the complete absence of written standards, and hearings and judges are powerless to intervene until the plea is exacted from the defendant and the admissions and waivers secured. Constitutional criminal procedures intended to protect accused individuals during criminal investigations and trials do not apply to guilty pleas and waivers.<sup>68</sup> “What we have today is a system of *de facto* prosecutorial administration.”<sup>69</sup>

Hopefully a post-Laffler, Frye, Supreme Court will no longer ignore the due process implications of the plea bargaining process and will eliminate the pallor of waiver that has plagued defendants who have tried to undue a plea after the fact. In fact, Laffler may also have set the stage for reducing the burden of a state prisoner petitioners by employing the less exacting “contrary to” standard in place of the

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<sup>68</sup>Brady v. United States, supra, 397 U.S. 742 (1970).

<sup>69</sup> Gerald E. Lynch, supra, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. pp. 2117, 2142, (1998).

“objectively unreasonable test” imposed by the Antiterrorism and Effective Death Penalty Act of 1996<sup>70</sup> on claims of ineffective assistance of counsel.<sup>71</sup>

The Supreme Court now has clearly directed its attention to the need to protect indigent defendants from ineffective court-appointed lawyers. Such lawyers may, because of conflicts or a desire to avoid having to try a case, fail to inform clients of the full collateral consequences of their guilty plea, fail to inform indigent defendants about a plea offer, or advise or even pressure indigent defendants to accept guilty pleas even when the client is factually innocent.

### **Discriminatory consequences of refusing to enter into a guilty plea**

If there is indeed to be an equal-protection attack on plea bargaining, it no doubt will have to include criminal defendants who refuse to take a guilty plea and are convicted at trial.

Concerning potential challenges to the constitutionality of the plea bargaining process on equal-protection grounds, there does not seem to be any federal case that classifies criminal defendants who plead guilty to reduced charges as a “protected class” under Batson.<sup>72</sup>

### **Judicial and extrajudicial reforms**

Judicial activism in plea negotiation and consummation is just one of the critical components essential to the restoration of the due process model to the American justice system. The present state of the plea bargaining system in the U.S. borders on incompetence. Plea bargaining is a “shadowy process” influenced heavily by defense counsel’s competence, zeal, and compensation level, and indigent defendants represented by incompetent defense lawyers bear the terrible brunt of the system. Judicial and systemic reforms are required. The defects in the process are so severe that some highly prominent and objective legal scholars have

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<sup>70</sup> 28 U.S.C. sec. 2254.

<sup>71</sup> Alan S. Lewis, *‘Laffler v. Cooper’: Supreme Court Revolutionizes Habeas Corpus*, New York Law Journal, May 14, 2012.

<sup>72</sup> Batson v. Kentucky, 476, U.S. 79.



advocated for the total dismantling of the existing process and for replacing it with a new substantive due process model of case disposition.<sup>73</sup>

This requires full pre-plea allocution evidentiary hearings convened by the court, either at the request of defense counsel or the prosecution, or *sua sponte* (at the court's initiative), to explore the suitability of the case to disposition by plea to a lesser charge. This would further require full disclosure by the prosecutor and an examination of the defendant under oath to ascertain, on the record, if he or she understands the full implications of the plea and the likely consequences of going to trial, including the various sentencing scenarios available to the court and alternative means of case disposition and sentencing where appropriate.

Under this scenario, the judge would be involved in the entire plea process along with the prosecutor and defense counsel, including the negotiation phase, a prospect prohibited by existing federal rules and officially disfavored in New York.

### **Formally incorporating restorative justice practices within the plea bargaining and pre-sentencing process**

As part of the preparation for the pre-allocution plea bargaining hearings discussed above, prosecutors and defense lawyers, especially indigent defense lawyers, should evaluate each case for its suitability for disposition through restorative justice means. Most plea cases are particularly well suited for alternative sentencing without prison or jail time, and for the application of the defendant's circumstances, skill set, or experiences to serve the community in compensation for the offense pleaded to.<sup>74</sup>

Adding a restorative justice component to the plea bargaining process would also help balance the disproportional numbers of prosecutions and guilty pleas involving people of color and would foster their assimilation into the community in place of isolation and despair in prison

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<sup>73</sup> Stephanous Bibas, *Incompetent Plea Bargaining and Extra Judicial Reforms*, Harvard Law Review, Vol. 126:150, (2012).

<sup>74</sup> Dan Givelber and Amy Farrell, *Not Guilty: Are the Acquitted Innocent?* New York University Press, New York, N.Y., 2012

Utilizing a restorative justice program as part of the pre-sentencing process in the form of deferred sentencing mechanisms would help to divert criminal case plea dispositions away from prisons and to direct the punishment phase of the proceedings to constructive and healing community and victims' services.<sup>75</sup> Applying the restorative justice approach at the initial stages of sentencing is critical. The sooner in the process that prosecutors, probation officers, and public defenders start thinking of alternative dispositions, the more likely they are to occur. Once the notion of a prison term becomes part of the prosecutorial and defense mindset, prison becomes a self-fulfilling prophecy.

A restorative justice initiative will require legislative action, and support and involvement by the jurisdictions' administrative office of the courts.<sup>76</sup> Until recently, most of the experimentation and proposals for pre-sentence adult diversion through restorative justice have taken place in other parts of the world. New Zealand, for example, has been exploring new models of justice for the past 14 years to respond to victims, reduce recidivism, enhance community safety, and reduce criminal justice and prison expenditures. These models are used with significant success at most levels of offense, including violent and sex crimes and especially in drug and white-collar cases. They are referred to as "Restorative Justice," "Indigenous Justice," "Community Justice" and "Diversion" and are set up by the courts as "Community panel adult pre-pleas, pre-trial diversion systems."<sup>77</sup>

In the U.S. in recent years there have been some very significant inroads made at the state level.<sup>78</sup> In 2009 the State of Colorado amended its Children's Code by incorporating, implementing, and enacting restorative justice principles in the form of "legislative intent."<sup>79</sup> In 2013 Colorado passed additional legislation to actually codify restorative justice practices within the state criminal justice system.<sup>80</sup>

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<sup>75</sup> Ian Marder, *Using restorative justice at the pre-sentence stage of the criminal justice process* (<http://www.transconflict.com/2013/04/using-restorative-justice-at-the-pre-sentence-stage-of-the-criminal-justice-process-094/>)

<sup>76</sup> Id

<sup>77</sup> Gabrielle Maxwell, Allison Morris and Tracy Anderson, *Community Panel adult pre-trial diversion Supplementary evaluation Wellington*, New Zealand: Victoria University of Wellington, Institute of Criminology (1999).

<sup>78</sup> Pavelka, S., *Restorative Justice Legislation and Policy, A National Assessment* (2015).

<sup>79</sup> Colorado Revised Statutes, 19-2-102; HB 07-1129 and HB 08-1117.

<sup>80</sup> Colorado Revised Statutes, 18-1-901 (3) (5); *Restorative Justice Colorado*, Legislative Report, January 2014.

California has incorporated restorative justice procedures within its state judicial code.<sup>81</sup> Massachusetts has pursued legislation to incorporate restorative justice principles and practices within its penal and criminal procedure laws.<sup>82</sup> Vermont's restorative justice policies are mandated by state statute. The Vermont policy has three goals: resolving conflicts, repairing damages, and reducing the risk of recidivism.<sup>83</sup>

## **Conclusion**

There are two essential steps necessary to accomplish meaningful criminal justice reform. First, we must educate the public about how the criminal justice system works, or does not work. Second, we must move ahead with study, development, and enactment into law of alternative criminal justice procedures and mechanisms that create a criminal justice paradigm shift. The end result of this might very well be that traditional means of case disposition become the exception to the rule, and that alternative methods, practices, and procedures take precedence.

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<sup>81</sup> *Balanced and Restorative Justice*, An Informational Manual for California, Administrative Office of the Courts, Center for Families, Children and the Courts.

<sup>82</sup> Berastain, P., *Restorative Justice Introduced in Massachusetts Senate Bill 52*. Huffington Post, August 17, 2013.

<sup>83</sup> 28 V.S.A. 2(a). Steiny, J., *Restorative Justice in Vermont 22 Years On*, Education News.org, July 15, 2015.