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NOTES

IS A BAN ON PLEA BARGAINING AN ETHICAL ABUSE OF DISCRETION? A BRONX COUNTY, NEW YORK CASE STUDY

Roland Acevedo*

INTRODUCTION

Plea bargaining is an essential and important component of the American criminal justice system. The significance of plea bargaining within our criminal justice system is readily revealed by a single statistic—plea bargaining accounts for ninety percent of all criminal convictions in the United States. As the principal means of resolution in criminal cases, plea bargaining is no longer "some adjunct to the criminal justice system; it is the criminal justice system." Nonetheless, although plea bargaining has gained near unanimous acceptance among scholars and practitioners and its use is encouraged by the United States Supreme Court, a number of jurisdictions have banned the practice.

In 1975, in an attempt to restore the public's confidence in the existence of a system in which defendants could be fairly charged, tried,

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1. Plea bargaining is defined as "[t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval." Black's Law Dictionary 1152 (6th ed. 1990).

2. Santobello v. New York, 404 U.S. 257, 260 (1971) (noting that plea bargaining is essential because it allows the states and the federal government to save resources by avoiding full-scale trials).


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and sentenced, Alaska became the first state to ban plea bargaining. The Alaskan ban remained in effect for a decade, until plea bargaining resumed in 1985. El Paso County, Texas implemented a second but shorter lived ban in 1978. The El Paso County ban, designed to bring about sentence uniformity among defendants, was in effect for six years before the county restored plea bargaining. At least three other jurisdictions have implemented experimental or limited plea bargaining bans that also proved ineffective.

The latest jurisdiction to ban plea bargaining is Bronx County, New York ("Bronx"). In November, 1992, Bronx County District Attorney Robert Johnson announced that his office would no longer plea bargain with criminal defendants who had been indicted for felony offenses. While the Bronx District Attorney's decision was portrayed by the press as a ban on plea bargaining, the term ban is a misnomer when used in the context of the Bronx plea bargaining policy. The Bronx District Attorney did not ban plea bargaining totally; the practice is still permitted with defendants who have not been indicted. Once the grand jury indicts a defendant on a felony offense, however, no plea bargaining is permitted. Under the new plea policy, an indicted defendant must plead guilty to the highest count of the indictment or face a trial.

9. Id. at 311.
10. Id. at 317.
11. See Weninger, supra note 6, at 270.
12. See id. at 275-76.
13. Id. at 270.
14. See Cams & Kruse, supra note 8, at 311 n.11 (discussing an experimental plea bargaining ban on drug trafficking cases prosecuted in a Michigan County).
15. Id. (discussing Detroit, Michigan's ban on plea bargaining with defendants charged with felony firearm offenses); Jeff Brown, Proposition 8: Origins and Impact—A Public Defender's Perspective, 23 Pac. L.J. 881, 939 (1992) (discussing California's ban on plea bargaining with defendants charged with "serious" offenses).
16. See, e.g., Brown, supra note 15, at 941-42 (discussing how plea bargaining still occurs with defendants charged with "serious" crimes despite a ban prohibiting the practice).
17. Robert Johnson was elected to the Bronx County District Attorney's Office in November 1988 in a special election held to fill the vacancy created by the death of long time Bronx District Attorney Mario Merola. Telephone Interview with Office of Public Affairs, Bronx County District Attorney's Office (Nov. 8, 1995). Mr. Johnson was reelected to new four year terms in 1991 and 1995. Id.
20. DA: No Deals, supra note 18, at 3.
21. See id.
22. Id.
The Bronx District Attorney's plea bargaining ban "shocked" the entire legal community. In the Bronx, a county that prosecutes more than 10,000 felonies annually and where the rate of felony prosecution has increased fifty percent since 1985, plea bargaining appeared to be an indispensable tool of the criminal justice system. Indeed, prior to the implementation of the ban, plea bargaining accounted for resolutions in approximately eighty-five percent of all Bronx felony prosecutions.

Not surprisingly, the imposition of the ban set off a furor among judges, defense attorneys, and other officials who feared a "catastrophic backlog of cases," "unfair" treatment of defendants, "jail overcrowding," and "violations of a federal court order" that could expose New York City to fines and force the release of prisoners. Three years have elapsed since the Bronx plea bargaining ban went into effect and many of the expressed fears are now realities. While

23. Id.
25. Problems Seen, supra note 18, at 5 ("Plea negotiations are as important to the [Bronx] court system as breathing, sleeping and eating are to human[s] . . . ." (quoting Bronx Administrative Judge Burton B. Roberts)).
27. Court Clog in Bronx, supra note 19, at 29.
28. See Policy Draws Fire, supra note 26, at 23.
29. Martin Fox, Next Six Weeks Seen Critical in Bronx Courts: No Impact Yet from Bar on Plea Bargaining, N.Y. L., Jan. 4, 1993, at 1, 2 [hereinafter Next Six Weeks]. According to Irwin Shaw, Supervising Attorney at The Legal Aid Society's Bronx Criminal Defense Division, the Bronx plea bargaining ban is "philosophically wrong," "a mistake," and "unfair" because it does not look at each case individually. Id.
30. See Problems Seen, supra note 18, at 5. Declaring that the Bronx lacked sufficient court resources to try a large number of additional cases, Administrative Judge Burton B. Roberts warned that New York City's jails would become "overcrowd[ed]." Id.
31. Id. Matthew T. Crosson, Chief Administrator of the New York State Courts, voiced concern that a sharp rise in the number of inmates awaiting trial at Rikers Island could "trigger violations of a federal court order that limits the number of prisoners in city jails and thereby requires additional facilities or release of the detainees on constitutional grounds." Id.
32. Id. In 1978, New York City entered into a stipulation ("Benjamin Stipulation") in which it acknowledged that pretrial detainees were being confined in overcrowded facilities that violated the detainees' constitutional rights. See Benjamin v. Malcolm, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980) modified 646 F. Supp. 1550, 1554 (S.D.N.Y. 1986). In that stipulation the City agreed to allow the district court to impose appropriate remedies to correct the overcrowding. 495 F. Supp. at 1359. Among the remedies imposed was a cap on the number of pretrial detainees that could be housed in certain New York City jails. 495 F.Supp. at 1365. A sharp rise in the number of pretrial detainees resulting from the Bronx ban could trigger violations of the Benjamin Stipulation, expose the city to fines, and force the release of prisoners to relieve the overcrowding. See Problems Seen, supra note 18, at 5.
33. See Anthony M. DeStefano, No Place Like Rikers-Bronx Inmates Staying Longer, N.Y. Newsday, May 27, 1993, at 35 ("An increase in the percentage of Bronx prisoners waiting a year or more on Rikers Island for trial is apparently traced to a
there is little doubt that the Bronx plea bargaining ban is legal, its harsh impact upon the Bronx criminal justice system raises serious ethical concerns. This Note will examine and address some of these ethical concerns.

Part I of this Note discusses the advantages and criticisms of plea bargaining and the prosecutor’s role in the plea bargaining process. Part II examines the origin of the Bronx plea bargaining ban and the effects that the ban has had on the Bronx criminal justice system. Part III examines the prosecutor’s ethical duties and discusses whether the Bronx District Attorney’s behavior violated those ethical duties when

34. At least one New York court recently rejected a challenge to a plea bargaining policy similar to that in place in the Bronx. See, e.g., People v. Cohen, 588 N.Y.S.2d 211, 212 (App. Div. 1992) (holding that defendant’s constitutional right to equal protection was not violated by District Attorney’s policy not to accept pleas to less than the highest count of an indictment). Courts have also held that defendants do not have a right to engage in plea bargaining. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (holding that defendants do not have a constitutional right to plea bargain); People v. Harmon, 586 N.Y.S.2d 922, 925 (App. Div. 1992) (“The People . . . are not obliged to make any offer in any case . . . .”); People v. Memminger, 469 N.Y.S.2d 323, 324 (Sup. Ct. 1983) (“[D]efendants have no constitutional entitlement to a plea offer.”). In the absence of a constitutional right to plea bargain, it appears that a ban on the process would comport with the law. Furthermore, plea bargaining bans are not novel and have been implemented and accepted in other jurisdictions. See supra notes 8-16 and accompanying text.

35. While seemingly a paradox, behavior that is legal in the eyes of a court can still be unethical. The gap between legal and ethical conduct exists because courts do not equate professional codes or canons of ethics with decisional and statutory law. See Nix v. Whiteside, 475 U.S. 157, 189-90 (1986) (Blackmun, J., concurring) (noting that the time had not yet arrived for the Court to specify the weight to be assigned to professional codes or canons of ethics in defining attorney performance); Paretti v. Cavalier Label Co., 722 F. Supp. 985, 986 (S.D.N.Y. 1989) (“[T]he Model Code does not have the force of legislation or decisional law, [but only] provides guidance on issues of professional conduct.”); S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 508 N.E.2d 647, 650 (N.Y. 1987) (“The Code of Professional Responsibility establishes ethical standards that guide attorneys in their professional conduct . . . . [T]he Code provisions cannot be applied as if they were controlling statutory or decisional law.”). Thus, while at least one New York court has upheld a plea bargaining policy similar to that in place in the Bronx, and a number of other jurisdictions have approved plea bargaining bans, see supra note 34, the effects of the Bronx ban could still lead to the conclusion that Robert Johnson abused his prosecutorial discretion and acted unethically when he banned plea bargaining.
he banned plea bargaining. Part IV suggests possible methods of tailoring the Bronx plea bargaining ban to lessen its adverse impact, while still allowing the ban to accomplish its goal. This Note concludes that while the Bronx plea bargaining ban does not violate any specific ethics rules, it raises serious concerns that must be addressed before the Bronx criminal justice system suffers irreparable harm.

I. PLEA BARGAINING IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

Plea bargaining has its proponents and its critics. This section discusses the reasons for the popularity of plea bargaining, as well as the criticisms that have been leveled against the practice. This section also examines how the exercise of prosecutorial discretion makes the District Attorney the principal player in the plea bargaining process.

A. The Mutual Advantages of Plea Bargaining

Criticized harshly in the past, plea bargaining has gained the imprimatur of our courts and has become the most prevalent form of case resolution in the American criminal justice system. The popularity of plea bargaining stems from its "mutuality of advantage"—the process offers advantages to defendants, prosecutors, defense counsel, judges, victims, and the public alike.

Plea bargaining allows defendants, in exchange for the surrender of certain constitutional rights, to gain prompt and final dispositions of...
their cases, "avoid the anxieties and uncertainties of a trial," and escape the maximum penalties authorized by law. Prosecutors, by agreeing to reduce charges or to recommend lower sentences, avoid costly, time consuming trials and, thus, conserve vital and scarce prosecutorial resources. Defense counsel, most of whom are court appointed public defenders, dispose of cases quickly and reduce overwhelming caseloads through plea bargaining. Judges ameliorate congested court calendars and conserve judicial resources through the speedy dispositions attributed to plea bargaining. Victims may benefit by avoiding the rigors of a trial and by not having to relive the horrors of their victimization in the presence of the defendant and the public. Finally, the public is protected from the risks posed by defendants who are free on bail while awaiting completion of the criminal proceedings against them.

B. Criticisms of Plea Bargaining

While plea bargaining is often praised for the advantages it offers, the process is also sharply criticized at times. A large portion of the public disapproves of plea bargaining because it perceives the process as being too lenient on defendants. Statistics support public perception—the average sentence for defendants convicted of serious felonies after pleading guilty was one-half that of defendants convicted after trials in state courts. In addition to viewing plea bargaining as

41. Santobello, 404 U.S. at 261.
43. See Brady, 397 U.S. at 752.
44. Prosecutors engage in two types of plea bargaining—charge bargaining and sentence negotiation. In charge bargaining, the prosecutor agrees to reduce the charges against a defendant in exchange for a guilty plea. By pleading guilty to reduced charges, a defendant reduces the maximum time of incarceration to which he will be subject by the sentencing judge. See Weninger, supra note 6, at 279.
45. In sentence negotiation, the second type of plea bargaining, the prosecutor agrees to recommend a specific term of incarceration or probation to the sentencing judge in exchange for a guilty plea. Id. at 279-80. Sentence negotiation is the more prevalent form of plea bargaining. Id. at 279.
46. Blackledge, 431 U.S. at 71; Brady, 397 U.S. at 752.
47. Richard Klein, The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, 29 B.C. L. Rev. 531, 550 (1988) ("Public defenders often use plea bargaining . . . [as] 'a necessary technique to deal with an overwhelming caseload.'"). At least one study conducted in Michigan concluded that court appointed counsel submitted guilty pleas for their clients more than twice as frequently as privately retained counsel. Id. at 550-51 n.140.
48. See Blackledge, 431 U.S. at 71.
52. Scott & Stuntz, supra note 5, at 1909 n.2; see also Gifford, supra note 38, at 66 ("[D]efendants who plead guilty receive an average sentence of either probation or
too lenient, many commentators believe the process undermines legislative intent. These commentators argue that plea bargaining allows prosecutors to circumvent sentencing statutes that fix the punishment for certain crimes.

Another criticism of plea bargaining is that its sub rosa nature has led to a decline of public confidence in the criminal justice system. Because plea bargaining takes place in private and is not open to public scrutiny, the public is suspicious of the secretive nature of the process. The public's confidence is further eroded because plea bargaining circumvents the trial process. Trials allow the public to participate directly in the criminal justice process and the high visibility of criminal trials serves as a check on government oppression and misconduct. The absence of trials deprives the public of the opportunity "to restore [a] sense of equilibrium to ... communit[ies] defaced by ... criminal act[s]."

Removing criminal cases from the trial process through plea bargaining also circumvents the "rigorous standards of due process and proof imposed during trials." Plea bargaining permits the defendant's fate to be determined without a full investigation, presentation of testimony and evidence, and impartial fact finding. The absence of these procedural safeguards presents a possibility that the prosecution will coerce innocent defendants into pleading guilty. The law

less than one year's imprisonment, while those convicted after trial received a typical sentence of three or four years.

53. See Gifford, supra note 38, at 66-70.

54. Id. at 68.

55. Id. at 71.

56. Id.

57. Id.

58. Id.

59. Id. at 70. While the absence of trials can disrupt an entire community's sense of equilibrium, crime victims are particularly affected. Trials have cathartic effects on victims by providing outlets for feelings of retribution and the psychological need to participate in the societal condemnation of a defendant. See id. at 72-73; see also Maria L. Imperial & Jeanne B. Mullgrav, The Convergence Between Illusion and Reality: Lifting the Veil of Secrecy Around Childhood Sexual Abuse, 8 St. John's J. Legal Comment. 135, 146 (1992) (discussing how civil actions further a victim's healing process and allow society to publicly denounce unacceptable behavior).


61. See Scott & Stuntz, supra note 5, at 1912; see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1043 (1968) (finding that it is not unethical for a defense attorney to advise his client to plead guilty without first examining the government's case).

62. Felten, supra note 51, at *2; see Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1975 (1992). It is no surprise that innocent defendants may buckle under the emotional strains of the criminal justice system. The criminal justice process has been known to destroy marriages and cause alienation or emotional disturbance among a defendant's children. See Monroe H. Freedman, Understanding Lawyers' Ethics 218 (1990). The financial burden of paying legal fees can be tremendous, especially if a defendant has been fired from his job due to the stigma
recognizes this possibility and allows courts to accept guilty pleas containing protestations of innocence; an admission of guilt is not "a constitutional requisite to the imposition of criminal penalty."

C. Prosecutorial Discretion and Plea Bargaining

Both proponents and critics of plea bargaining agree that the prosecutor is the central and controlling figure in the plea bargaining process. Because defendants do not have a constitutional right to plea bargain, the decision whether to permit plea bargaining in any particular case is solely a matter of prosecutorial discretion. In exercising this discretion, prosecutors can refuse to plea bargain entirely, or can set the terms and conditions on any offer made. This absolute control over the plea bargaining process has led to characterizations of the prosecutor as an "unregulated monopoly," capable of changing at will the "going rate" for a particular category of crime. The reluctance of courts to interfere in the process further buttresses the prosecutor's monopoly over plea bargaining. Courts presume that prosecutors exercise their discretionary powers in good faith and require a strong showing of proof before inferring that a prosecutor has associated with allegations of criminal activity or extended absenteeism because of pretrial confinement. Id.

64. Id.; Freedman, supra note 62, at 220-21 ("The law, in its even-handed majesty, permits the innocent as well as the guilty to plead guilty in order to avoid the coercive threat of extended imprisonment.").
65. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (stating that a prosecutor need not plea bargain if he prefers to go to trial); United States v. Dockery, 965 F.2d 1112, 1116 (D.C. Cir. 1992) ("The prosecutor generally is free to refuse to plea bargain or, having made a plea offer, to withdraw it at any time."); People v. Harmon, 586 N.Y.S.2d 922, 925 (App. Div. 1992) ("The People . . . may set the terms and conditions of their consent to a guilty plea to a lesser charge."); Gifford, supra note 38, at 45 (noting that a prosecutor can refuse to plea bargain or set the terms and conditions on any offer); Judge Burton B. Roberts, Remarks at the Alan Fortunoff Criminal Justice Colloquium on Evaluating the Plea Bargaining Ban in Bronx County (Oct. 25, 1993) ("No judge can take a lesser plea unless the District Attorney recommends the lesser plea.").
66. See Weatherford, 429 U.S. at 561; Harmon, 586 N.Y.S.2d at 925.
68. Weatherford, 429 U.S. at 951; Dockery, 965 F.2d at 1116.
69. Harmon, 586 N.Y.S.2d at 925.
70. Gifford, supra note 38, at 45.
71. See Bordenkircher v. Hayes, 434 U.S. 357, 362-64 (1978) (holding that due process is not violated when a prosecutor carries out a threat made during plea bargaining); People v. Lofton, 366 N.Y.S.2d 769, 776-77 (Sup. Ct. 1975) (noting that the remedy against a prosecutor who abuses his discretion is his removal from office or the election of a successor, both of which are beyond the power of the court).
abused his discretion. This high standard of proof affords prosecutors tremendous leeway in exercising their discretionary powers.

D. The Limited Judicial Review of Prosecutorial Discretion

Prosecutors' decisions are not immunized from judicial scrutiny. Recognizing that prosecutorial discretion carries with it the potential for "individual and institutional abuse," appellate courts regularly review defendants' claims of alleged abuse of prosecutorial discretion during the plea bargaining process.

Most courts use one of two tests in reviewing claims of alleged abuse of prosecutorial discretion. Claims of individual abuse of prosecutorial discretion are reviewed under a motive test. The motive test examines a prosecutor's subjective reasons for acting against a particular defendant. If the court determines that the prosecutor had an improper motive for his actions, it will deem his otherwise authorized behavior impermissible. The motive test, however, focuses on the behavior of individual prosecutors, and thus is inadequate to evaluate an institutional prosecutorial practice such as the Bronx plea bargaining ban.

In evaluating institutional practices which do not involve fundamental rights, courts employ a rational basis test. Under the rational basis test, courts will uphold an institutional practice and not find an abuse of discretion as long as some relationship exists between the

73. See McClesky v. Kemp, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

74. See Lofton, 366 N.Y.S.2d at 776 (stating that a prosecutor has wide latitude in determining when and how to prosecute); see also In re Holtzman v. Goldman, 523 N.E.2d 297, 303 (N.Y. 1988) ("District Attorneys . . . possess[ ] broad discretion in determining when . . . [to prosecute."]); People v. DiFalco, 377 N.E.2d 732, 735 (N.Y. 1978) (commenting on prosecutor's broad discretion); The Prosecutor's Role, supra note 4, at 105 (noting that courts have sanctioned the prosecutor's discretionary powers).


78. Id.

79. Id. For example, a prosecutor cannot use his charging authority to retaliate against a defendant who exercises his right to trial. Id. Nor can a prosecutor subpoea a defendant's lawyer to testify merely to disqualify the lawyer from the case. Id.; see Richard P. Adelstein, The Negotiated Guilty Plea: A Framework for Analysis, 53 N.Y.U. L. Rev. 783, 829 (1978) (examining a prosecutor's improper motives during plea bargaining).

80. See Genego, supra note 77, at 841.

challenged practice and a legitimate state interest. At least one New York court employed the rational basis test to reject a challenge to a plea bargaining practice similar to that in use in the Bronx. Thus, according to current jurisprudence, the Bronx District Attorney did not abuse his discretion in implementing a plea bargaining ban.

II. ORIGIN AND EFFECTS OF THE PLEA BARGAINING BAN

This part examines the Bronx District Attorney's reasons for banning plea bargaining. This part also discusses the adverse and beneficial effects the plea bargaining ban has had on the Bronx criminal justice system.

A. The Origins of the Ban

Contending that "society [had] ceded control" of the criminal justice system to those accused of violating the law and that it was time for the "system to take stock of itself," the Bronx District Attorney banned plea bargaining in all indicted felony cases. In addition to causing the criminal justice system "to slow down, take a breather and refocus," the Bronx District Attorney intended the ban to increase the severity of punishment judges imposed on defendants by, in effect, socializing judges into imposing harsher sentences acceptable to the District Attorney. The District Attorney claimed that this socialization was necessary because judges' sentencing practices were responsible for a case backlog and the resulting disproportionate acquittal rate in the Bronx. According to the District Attorney, judges in the

82. See Dranzo, 577 A.2d at 1355.
83. See Cohen, 588 N.Y.S.2d at 212. In Cohen, the defendant challenged the District Attorney's plea bargaining ban on equal protection grounds, arguing that his rights were violated because defendants in other New York counties were still permitted to plea bargain while he was prohibited from doing so. In rejecting the defendant's argument, the court held that it was rational to have different plea bargaining policies in different counties because prosecutorial caseloads and staffing varied throughout the state. Id.
84. Next Six Weeks, supra note 29, at 2. Although Robert Johnson publicly stated that he banned plea bargaining to reform the Bronx criminal justice system, a number of newspapers reported that the District Attorney banned plea bargaining because he was angered by a judge's decision to hold an evidentiary hearing over the prosecutor's objections. See Problems Seen, supra note 18, at 5 (reporting that Robert Johnson decided to end plea bargaining "out of pique" with a decision by a Supreme Court judge to hold an evidentiary hearing over the prosecutor's objections); Policy Draws Fire, supra note 26, at 23 (reporting that the Bronx District Attorney was motivated by "pique" over the actions of one trial judge).
85. Mirsky, supra note 33, at 3.
87. See Mirsky, supra note 29, at 3, 5.
88. Id. at 4. The acquittal rate in the Bronx in November 1992—the month in which the District Attorney implemented the ban—exceeded 40%. Id. at 5.
Bronx created a disincentive to plead guilty by not adhering to a policy of sentence disparity. Because defendants had no incentive to plead guilty in the absence of sentence disparity, their cases languished, created a backlog in the Bronx, and made it more difficult for the prosecutor to obtain a conviction.

In an effort to reverse this trend, the District Attorney banned plea bargaining with indicted defendants and thereby eliminated a judge's opportunity to impose a lesser sentence for a reduced charge. Under the new plea policy, judges are required by law to impose the

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89. Id. at 4. Sentence disparity refers to the practice in which judges impose markedly different sentences on defendants convicted following a trial, compared to defendants convicted upon guilty pleas. For example, defendants A and B are charged with first degree robbery, a class B felony carrying a maximum term of imprisonment of twenty-five years upon conviction. See N.Y. Penal Law §§ 70.00(2)(b), 160.15 (McKinney 1992). Defendant A believes that the state's case against him is weak, rejects a plea bargaining offer by the prosecutor, and elects to proceed to trial. Defendant A is convicted of first degree robbery after a trial and is sentenced to twenty-five years in prison, the maximum term allowed by law. Id. § 70.00(2)(b). Defendant B, on the other hand, feels that the state has a strong case against him and elects to plead guilty to first degree robbery in exchange for a recommendation by the prosecutor to the sentencing judge that the defendant be sentenced to nine years in prison. See N.Y. Crim. Proc. Law § 220.50(5) (McKinney 1992) (requiring that the agreed upon sentence be made "orally on the record, or in writing filed with the court" as a condition of the plea bargain). The court accepts the prosecutor's recommendation and sentences defendant B to a maximum term of imprisonment of nine years. In this example, the court adhered to a policy of sentence disparity by sentencing the defendant who pled guilty to a much shorter term of imprisonment than the defendant who elected to have his guilt determined following a trial. The defendant who pleads guilty and saves the prosecutor and the court valuable resources by allowing them to dispose of a case quickly and efficiently is thus rewarded with a less severe sentence. According to the Bronx District Attorney, a policy of sentence disparity induces defendants to plead guilty to avoid the more severe sentences that are imposed following a conviction.

90. In the absence of sentence disparity, defendants have no incentive to plead guilty because they receive the same sentence regardless of whether they are convicted upon a plea of guilty or after a trial. See supra note 33, at 4.

91. It is axiomatic that the longer a case languishes, the more difficult it is for a prosecutor to obtain a conviction. With the passage of time, witnesses may die or disappear, memories may fade, evidence may disappear or be inadvertently destroyed, needed trial resources may become scarcer, and statutory speedy trial provisions may mandate that the charges against a defendant be dismissed. See Anthony M. DeStefano, Letting 'Em Go in the Bronx, N.Y. Newsday, Sept. 23, 1993, at 36, 36 ("The longer cases stay around, the more chance there is of [a] witness becoming unavailable, the more chance there is of a witness becoming intimidated and the more chance there is of a witness' recollection becoming dimmed." (quoting Bronx Administrative Judge Burton B. Roberts)); Mirsky, supra note 33, at 6 ("[A]s cases age, the ability to prosecute successfully is reduced. ... ").

92. In New York State, the consent of both the prosecutor and the court is required before a defendant is permitted to enter a plea of guilty to a lesser included offense. See N.Y. Crim. Proc. Law § 220.10(3)-(4) (McKinney 1992). In the absence of the prosecutor's consent, a defendant may plead guilty as a matter of right only to the entire indictment. Id. § 220.10(2); see also supra notes 18-22 and accompanying text.
mandatory minimum sentence\textsuperscript{93} under the highest count of the indictment.\textsuperscript{94} The District Attorney surmised that judges faced with the plea bargaining ban would be forced to revive sentence disparity rather than risk a greater backlog of pending cases and an increase in the number of trials.\textsuperscript{95} This situation, in turn, would create an incentive to plea bargain and allow plea bargaining to return to the Bronx.\textsuperscript{96}

B. *The Effects of the Ban*

The plea bargaining ban has not had its intended effect of reforming the sentencing practices of Bronx judges. Under the ban, Bronx judges have become more lenient and appear to be imposing shorter sentences on the highest counts of indictments.\textsuperscript{97} According to the Bronx District Attorney's theory,\textsuperscript{98} this additional leniency should result in a further disincentive to plea bargain and an increase in the backlog of cases. Indeed, since the imposition of the ban, guilty pleas have decreased by eleven percent,\textsuperscript{99} and the backlog of pending cases in the Bronx has increased by twenty-four percent.\textsuperscript{100} As a direct result of the increase in the backlog of pending cases, the average time defendants remain in custody has also increased. Since the imposition of the ban, Bronx defendants average in excess of 160 days in custody, compared to the 120 day average for other New York City boroughs.\textsuperscript{101} There has also been a forty-seven percent increase in the number of Bronx defendants incarcerated for over one year.\textsuperscript{102} These additional days of incarceration cost New York City taxpayers three to four million dollars annually.\textsuperscript{103}

The increase in the average time defendants remain in pre-trial custody has also had a substantial effect on the dismissal rate in the
Bronx. Dismissals have increased twenty-one percent since the prohibition of plea bargaining in the New York Supreme Court. Presently, one out of every ten criminal cases filed in the Bronx is dismissed. This marked increase is primarily attributed to two factors: (1) the weakening of the prosecutor’s case with the passage of time; and (2) constitutional and statutory speedy trial provisions.

More troubling than the rise in the dismissal rate and the concomitant threat posed to society by the release of potentially guilty defendants is the probability that innocent defendants are being convicted because of the Bronx ban. This probability results from a combination of three factors. First, under the new plea policy, defendants must usually decide within six days, before they are indicted, whether to accept a prosecutor’s offer and plead guilty. This time limit places tremendous pressure on a defendant who, from a jail cell, must attempt to contact and consult with family and counsel before making a decision that could affect him for the rest of his life. Furthermore, not only must a defendant make this crucial decision within a few days, he must do so without the benefit of necessary information to assist him. Finally, because innocent defendants are highly risk

104. Mirsky, supra note 33, at 10; see also Girgenti, supra note 97 (“We do see the percentage of disposed indicted dismissals has increased.”).
105. Mirsky, supra note 33, at 10.
106. See supra note 91.
107. The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees defendants the right to a speedy trial. See U.S. Const. amends. VI, XIV. This guarantee is codified at N.Y. Crim. Proc. Law §§ 30.20, 30.30 (McKinney 1992 & Supp. 1995). The New York State speedy trial provisions provide that a defendant’s motion to dismiss a criminal prosecution must be granted where the People are not ready for trial within a certain amount of time. Id. § 30.30(1)(a)-(d).
108. Lynch, supra note 33 (“I think there are some innocent people taking pleas as a result of pressure from the [Bronx] system.”).
109. This six-day window of opportunity to plead guilty is based on N.Y. Crim. Proc. Law § 180.80, which requires that defendants held in custody on felony complaints be given a preliminary hearing within 144 hours (six days) to determine if reasonable cause exists to believe that the defendant committed the offense charged. See N.Y. Crim. Proc. Law § 180.80 (McKinney 1992). Because New York City prosecutors do not have the resources to conduct thousands of preliminary hearings every year, they circumvent the hearing requirement by having defendants indicted. New York State law does not require preliminary hearings for defendants who have been indicted. Id. § 180.80(2)(a)-(b). Indictments are normally not filed by the Grand Jury until the sixth day, and thus a defendant usually has up to six days to engage in plea bargaining while the New York City Criminal Court still has jurisdiction over his case. Id. § 10.30(1)(a)-(b), (2). Once an indictment is filed, however, the New York Supreme Court acquires jurisdiction of the case. Id. §§ 10.20(1)(a), 210.10. At this point, plea bargaining is no longer permitted.
110. See Lynch, supra note 33 (“The Legal Aid Society has no information other than what the District Attorney gives them. We don’t have any police reports by the [N.Y. Crim. Proc. Law § 1] 180.80 day. We have nothing.”); A Plea for Better Justice in the Bronx—The DA’s Plan Is No Bargain, N.Y. Newsday, July 29, 1993, at 54 (“It’s especially tough [for a person to consider a plea] when police reports, medical records and the like are unavailable.”). Indicted defendants in New York State are not pro-
averse, they will likely succumb to the pressure of making a rushed decision without adequate information. These defendants will often conclude that their interests are best served by pleading guilty, accepting the certainty of a lesser punishment, and avoiding the risk of a longer period of incarceration.

While more innocent defendants will be pressured into pleading guilty because of the Bronx ban, others will continue to maintain their innocence and proceed to trial. Innocent defendants have strong reasons for going to trial because they have a greater chance of success. Nonetheless, "convicting innocents [after a trial would] likely be easier in a no-bargaining world" because of deterioration in the trial process caused by the plea bargaining ban. To compensate for the additional requests for trials without a corresponding increase in resources, the trial process in the Bronx will become more "casual."

The relaxation of the trial process will result in higher error rates and in a greater number of innocent defendants being provided with detailed information concerning the charges against them until they make specific written requests or file motions. See N.Y. Crim. Proc. Law §§ 200.95(1),(3), 240.20(1)(a)-(j), 240.80(1), 240.90(2), 255.20(1)-(2) (McKinney 1992). These requests and motions cannot be made or filed until after a defendant has been arraigned on the indictment. Id. §§ 200.95(3), 240.80(1), 240.90(2), 255.20(1). Thus, a defendant will usually not be provided with detailed information about the charges against him until weeks after he has been arraigned in Supreme Court.

111. See Scott & Stuntz, supra note 5, at 1943 (noting that innocent defendants are less prone to take risks than guilty defendants). As a class, criminal defendants are usually prone to take risks. Id. A criminal history strongly suggests that the defendant is willing to take risks and fears punishment less than most people. Id. "But risk aversion is a much more plausible assumption where innocent defendants are concerned... ." Id.

112. See Gifford, supra note 38, at 58-59; see also Felten, supra note 51, at *2 ("Under pressure to cop a plea, innocent people may opt for punishment, deciding that the time, expense and risk of going to trial is too great.").


114. Scott & Stuntz, supra note 5, at 1933.

115. It can be assumed that in the absence of plea bargaining in the Bronx, an increased number of defendants will exercise their constitutional right to trial. In at least one jurisdiction where plea bargaining was banned, El Paso County, Texas, the proportion of cases disposed of by trial doubled following the implementation of the ban. See Weninger, supra note 6, at 276-77.

116. The Bronx criminal justice system's budget would need to double to pay for the costs of additional trials if plea bargaining was reduced by only 10 percentage points—from 85% to 75%. See Felten, supra note 51, at *7. Unfortunately, the New York City criminal justice system is already broke, as is evidenced by the condition of facilities. Id.; see also Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037, 1040 (1984) ("A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities. ... ") (quoting Chief Justice Burger).

117. Scott & Stuntz, supra note 5, at 1916 ("If plea bargaining were abolished—if, that is, the system had to process many more cases by trial than it presently does—one might reasonably suppose that the trial process would be more casual than it is now."). To accommodate a substantial increase in trials without additional resources, the trial process would also have to be "truncated." Id. at 1950. Shortening the trial process would also increase the error rate. Id.; see also National Prosecution Stan-
Thus, regardless of the means of obtaining a conviction—by guilty plea or trial—innocent defendants will have a greater chance of being convicted under the new ban.

Another adverse effect of the plea bargaining ban is the erosion of a defendant's constitutional right to be prosecuted by indictment.119 The New York State Constitution provides that "[n]o person shall be held to answer for ... [an] infamous crime ... unless on indictment of a grand jury."120 This constitutional guarantee is aimed at preventing potentially oppressive prosecutorial behavior by requiring that, before an individual is publicly accused of a crime, the state must convince a grand jury that sufficient evidence exists for it to believe that the accused is guilty.121 This important constitutional right has eroded due to the tremendous increase in the use of Superior Court Informations ("SCI").

The SCI is essentially a waiver of indictment by a defendant that permits the prosecutor to forego the grand jury process and proceed in the New York Supreme Court on the basis of a written accusation drafted by the prosecutor.122 While the legislature hoped that the use of SCIs would result in "speedier and equally fair dispositions" for defendants,123 it did not intend to eliminate the grand jury process and its inherent protections.124 The right to be prosecuted by indictment is so vital to our criminal justice system that a defendant can only waive the right in open court in the presence of an attorney.125 Even then, a defendant's waiver is subject to approval by the court.126

Prior to the imposition of the plea bargaining ban, approximately twenty-five percent of the cases filed in the Bronx were disposed of by defendants pleading guilty to reduced felony charges in SCIs.127 The ban has resulted in a sixty percent increase in the use of SCIs.128 Now,
forty percent of Bronx cases are disposed of with SCIs. The dramatic increase in the use of SCIs indicates that the locus of plea bargaining in the Bronx has moved away from the New York Supreme Court to the New York City Criminal Court. Recognizing this, defendants are pressured into waiving the constitutional protections of the grand jury process and agreeing to be prosecuted by SCI to avoid the strict no bargaining policy that applies to indicted defendants.

An examination of two hypothetical defendants, A and B, charged with murder in the second degree reveals why increasing numbers of Bronx defendants are electing to be prosecuted by SCI to circumvent the plea bargaining ban. In New York, second degree murder is a class A-I felony, carrying a minimum indeterminate sentence of fifteen years to life imprisonment and a maximum indeterminate sentence of twenty-five years to life imprisonment upon conviction.

Defendant A is arraigned on a felony complaint charging second degree murder and elects not to plead guilty because she feels that the state’s case against her is weak. Defendant A is subsequently indicted for second degree murder. Under the Bronx plea bargaining ban, once defendant A is indicted she must plead guilty to the highest

129. Id.
130. Id. at 9. The New York City Criminal Court is the forum in which defendants are usually arraigned on criminal complaints or prosecuted on misdemeanors. See N.Y. Crim. Proc. Law § 10.30(1)(a)-(b), (2) (McKinney 1992). Once the grand jury indicts a defendant on a felony offense, however, the New York City Criminal Court transfers jurisdiction of the case to the Supreme Court. See id. §§ 10.20(1)(a), 210.10.

131. The ability of defendants to circumvent the ban by pleading guilty to SCIs led Bronx Administrative Judge Burton Roberts to declare that the “[no plea bargaining] policy is as phony as a three-dollar bill. It’s a bunch of smoke and mirrors.” See Roberts, supra note 65; see also supra notes 18-22 and accompanying text.


133. New York law provides for the imposition of two types of sentences upon defendants convicted of a criminal offense—indeterminate sentences and definite sentences. N.Y. Penal Law § 70.00(1), (4) (McKinney 1992). With indeterminate sentences, the length of imprisonment “is not fixed by the court but is left to the determination of penal authorities within minimum and maximum time limits fixed by the court of law.” Black's Law Dictionary 771 (6th ed. 1990). For example, a defendant sentenced to an indeterminate term of 5 to 15 years imprisonment must serve at least 5 years in prison and cannot serve in excess of 15 years. Penal authorities, however, can release the defendant on parole as a reward for exemplary behavior anytime after he has served 5 years. Penal authorities can also penalize a recalcitrant defendant who habitually violates prison rules by holding him in prison for up to 15 years. With definite or determinate sentences, the length of imprisonment is specified by the court and penal authorities have no discretion in deciding when to release the defendant. Id. at 450. For example, a defendant sentenced to two years in prison would have to be released by penal authorities after serving two years.

134. N.Y. Penal Law § 70.00(3)(a)(i) (McKinney 1992).
135. Id. § 70.00(2)(a).
136. Id. § 70.00(3)(a)(i).
137. Id. § 70.00(2)(a).
count of the indictment, second degree murder, or attempt to vindicate herself at trial. If defendant A decides to plead guilty, the court must impose an indeterminate sentence with a minimum term of at least fifteen years and a maximum term of life imprisonment. If defendant A refuses to plead guilty, elects to proceed to trial and is convicted, she will be subject to an indeterminate sentence with a minimum term of as much as twenty-five years and a maximum term of life imprisonment.

Defendant B, like defendant A, is also arraigned on a felony complaint charging second degree murder. Defendant B, however, feels that the state's case against her is strong and attempts to circumvent the Bronx plea bargaining ban by waiving her right to be prosecuted by indictment and consenting to be prosecuted by SCI. Because the plea bargaining ban only applies to indicted defendants and defendant B is being prosecuted by SCI, defendant B will still be permitted to plea bargain. Under this scenario, the District Attorney offers to allow defendant B to plead guilty to a reduced charge, second degree manslaughter, a class C felony. If defendant B consents and pleads guilty, her potential exposure to imprisonment will be greatly reduced because the permissible sentence for a class C felony conviction ranges from a definite term of one year in prison to an indeterminate term of five to fifteen years imprisonment. Thus, by waiving her right to be prosecuted by indictment and consenting to be prosecuted by SCI, defendant B circumvented the Bronx ban and secured a plea bargain offer from the District Attorney that guarantees that the minimum and maximum terms of imprisonment to which she would be subject are well below that of her counterpart, defendant A.

While the plea bargaining ban has severely impacted the Bronx criminal justice system, not all of its effects have been adverse. As a result of the ban, the Bronx is now the New York City borough with the highest percentage of defendants convicted on the highest count of indictments charging felonies. The Bronx also boasts a dramatic increase in the number of people convicted of low level drug offenses. Overall, however, these positive effects are greatly out-

138. See supra notes 18-22, 93-94 and accompanying text.
139. N.Y. Penal Law § 70.00(3)(a)(i) (McKinney 1992).
140. Id. § 70.00(2)(a).
141. Id. § 70.00(3)(a)(i).
142. Id. § 70.00(2)(a).
143. See supra note 122 and accompanying text.
144. See supra notes 18-22, 92 and accompanying text.
146. Id. § 70.00(2)(c), (3)(b), (4).
147. Girgenti, supra note 97 ("Bronx County convicted the highest percentage of defendants charged with [class] B, C, D, and E felonies—the top count that is.").
148. Id. ("With low level drug offenses there has been a dramatic increase of people convicted of the top count that they were indicted for.").
weighed by the adverse effects of the ban, resulting in a deterioration of the quality of justice in the Bronx.

III. AN EXAMINATION OF THE EFFECTS OF THE BAN UNDER ETHICS RULES

While the Bronx District Attorney's exercise of discretion in imposing a plea bargaining ban appears to pass judicial muster, his behavior still raises serious ethical questions. Behavior that is legal can nonetheless be unethical. Prosecutors, like all members of the bar, must conform their behavior to the professional rules of ethics. The

149. See supra notes 81-83 and accompanying text.

150. This Note will examine the Bronx District Attorney's behavior under the Model Code of Professional Responsibility (1981) [hereinafter Model Code], the Model Rules of Professional Conduct (1983) [hereinafter Model Rules], the New York Code of Professional Responsibility (1990) [hereinafter N.Y. Code], and the ABA Standards Relating to the Administration of Criminal Justice (1992) [hereinafter Standards for Criminal Justice]. While this Note will examine the Bronx District Attorney's behavior under all of the above provisions, only the N.Y. Code has been adopted in New York and can serve as the basis of a disciplinary action against the Bronx District Attorney. Both the Model Code and the N.Y. Code employ the designations Disciplinary Rules ("DR"), Ethical Considerations ("EC"), and Canons. Their purposes are as follows:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive . . . .

The Disciplinary Rules . . . are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

Model Code, supra, Preliminary Statement; N.Y. Code, supra, Preliminary Statement. The Standards for Criminal Justice are intended as a guide to professional conduct and in New York cannot serve as the basis for disciplinary action against a prosecutor. See Standards for Criminal Justice, supra, Standard 3-1.1.


role of prosecutors significantly differs from that of other attorneys, however, and a number of particularized ethics rules govern their behavior. These particularized rules provide guidance in determining whether the Bronx District Attorney abused his discretion and acted unethically in implementing a plea bargaining ban.

A. The Bronx District Attorney's Duty to "Seek Justice"

Foremost among the special ethics rules governing the Bronx District Attorney's conduct is N.Y. Code EC 7-13, which states that prosecutors have a "duty to seek justice [and] not merely to convict." In seeking justice, the prosecutor performs an "oversight function" and must be mindful of his responsibilities to the community, victim, defendant, and state. The prosecutor must protect the community, quench the victim's desire for vengeance, safeguard the defendant's rights, and ensure that the state has a fair and efficient criminal justice system. An examination of the effects of the Bronx plea bargaining ban suggests that the District Attorney may have neglected his obligation to certain constituencies.

While the community and victims are applauding the plea bargaining ban because felons are being increasingly convicted on the highest counts of indictments, defendants are lamenting its effects. The ban has not only resulted in a substantial increase in the average length of defendants' pre-trial detention, but has also heightened the possi-
bility that innocent defendants are being unjustly convicted. Additionally, the increased reliance on SCIs as a means of prosecution deprives defendants of the constitutional protections afforded by the grand jury process.

The state also suffers as a result of the Bronx District Attorney’s failure to maintain a fair and efficient criminal justice system. The large increase in the backlog of pending cases and the number of dismissals undermines the efficiency of the system. Further, a system that convicts innocent defendants and holds others in lengthy pre-trial detention leads the public to question its fairness. In sum, the effects of the Bronx ban strongly suggest that the District Attorney is failing to seek justice for segments of society that he is responsible for representing.

Nonetheless, the effects of the Bronx ban alone are insufficient to substantiate a finding that the District Attorney is acting unethically by failing to seek justice. First, the duty to seek justice standard is too nebulous to be enforceable. In fact, no prosecutor has ever received a disciplinary sanction for failing to comply with the duty to seek justice standard. Instead, if the Bronx District Attorney was faced with disciplinary action for failing to seek justice based on his plea bargaining ban, he would probably be charged under a New York disciplinary rule prohibiting “[e]ngag[ing] in conduct that is prejudicial to the administration of justice.” While some of the ban’s effects have clearly prejudiced the administration of justice in the Bronx, the prejudicial standard is also nebulous and provides no parameters by which to judge behavior. Thus, this standard would most likely not support a finding that the Bronx District Attorney acted unethically.

161. See supra notes 108-18 and accompanying text.
162. See supra notes 119-29 and accompanying text.
163. See supra note 100 and accompanying text.
164. See supra notes 104-07 and accompanying text.
165. See supra notes 108-18 and accompanying text.
166. See supra notes 101-02 and accompanying text.
167. See Gershman, supra note 76, at 445; see also Zacharias, supra note 153, at 48 (“The ‘do justice’ standard . . . establishes no identifiable norm.”).
168. Zacharias, supra note 153, at 105. In New York, the seek justice standard could not form the basis of a disciplinary action because it is an ethical consideration which is aspirational in nature. See supra note 150.
169. N.Y. Code, supra note 150, DR 1-102(A)(5); see also Model Code, supra note 150, DR 1-102(A)(5) (“A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice.”); Model Rules, supra note 150, Rule 8.4(d) (“It is professional misconduct for a lawyer to: Engage in conduct that is prejudicial to the administration of justice . . . .”).
170. See supra notes 97-131 and accompanying text.
172. An exhaustive search failed to discover a single instance in which a prosecutor was sanctioned for engaging in conduct prejudicial to the administration of justice.
Although the District Attorney must seek justice and refrain from engaging in conduct prejudicial to the administration of justice, these two standards alone do not guide his behavior. In exercising his discretionary powers, the Bronx District Attorney must also attempt to discern the needs of the public and must avoid being guided by improper motivation. The District Attorney should have banned plea bargaining only if he "conscientiously believe[d it] to be in the public interest." Accordingly, if the Bronx District Attorney "conscientiously believe[d]" that a ban on plea bargaining would reform sentencing practices and benefit the criminal justice system, his decision was well within ethical bounds. If, however, the Bronx District Attorney banned plea bargaining because of his personal dissatisfaction with a specific judge's ruling, as a number of newspapers have reported, his behavior was unethical.

B. The Prosecutor's Duty to Identify and Correct Deficiencies in the Criminal Justice System

As a key player in the criminal justice system, the Bronx District Attorney also has an ethical duty to "recognize deficiencies in the legal system and to initiate corrective measures therein." This ethical obligation to innovate imposes a duty on the Bronx District At-
torney to encourage and aid in making needed changes in the legal system.\textsuperscript{180} Arguably, the Bronx District Attorney was implementing needed changes when he banned plea bargaining. First, restrictive plea bargaining policies are associated with efforts to crack down on crime by refusing to offer lenient sentences.\textsuperscript{181} In a borough that has sixteen percent of New York City's population yet twenty-five percent of its homicides, twenty-two percent of its drug arrests, and twenty percent of its rapes,\textsuperscript{182} the public may perceive the plea bargaining ban as a welcome and needed change to combat the disproportionate amount of crime in the Bronx.\textsuperscript{183} The public may also perceive the Bronx ban as an innovative attempt to secure desperately needed additional courtrooms and judges from the state.\textsuperscript{184} While some may view the Bronx ban as an innovative corrective measure designed to improve the legal system, others perceive it as a death knell for criminal justice in the Bronx.\textsuperscript{185} The plea bargaining ban has not only increased the backlog of pending cases\textsuperscript{186} and the number of dismissals,\textsuperscript{187} but has also forced defendants to remain in pre-trial detention longer\textsuperscript{188} and has cost the state millions of extra dollars.\textsuperscript{189} In light of these results,\textsuperscript{190} there is support for the proposition that the

\textsuperscript{180} See N.Y. Code, \textit{supra} note 150, EC 8-9; Model Code, \textit{supra} note 150, EC 8-9. Both the N.Y. Code and the Model Code provide that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements." N.Y. Code, \textit{supra} note 150, EC 8-9; Model Code, \textit{supra} note 150, EC 8-9; \textit{see also} Standards for Criminal Justice, \textit{supra} note 150, Standard 3-1.2(d) ("When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."); Cody, \textit{supra} note 67, at 456 (stating that the prosecutor's duty extends beyond merely seeking convictions).

\textsuperscript{181} See Worden, \textit{supra} note 60, at 340.

\textsuperscript{182} Kanner, \textit{supra} note 24, at 48.


\textsuperscript{184} See Assael, \textit{supra} note 86, at 99 ("If we continue to plea-bargain because the system is crowded, we won't address the real issue: getting more courtrooms and judges."); (quoting Bronx District Attorney Robert Johnson)). One effect of the El Paso County plea bargaining ban was a greatly expanded and restructured court system to counteract the adverse effects of the ban. \textit{See} Weninger, \textit{supra} note 6, at 305-06.

\textsuperscript{185} See \textit{Next Six Weeks}, \textit{supra} note 29, at 2 ("If the policy of no plea bargaining... remains in effect, [a]fter the new year, we'll begin to die a slow death." (quoting Justice Eggert, Acting Bronx County Administrative Judge)).

\textsuperscript{186} \textit{See} supra note 100 and accompanying text.

\textsuperscript{187} \textit{See} supra notes 104-07 and accompanying text.

\textsuperscript{188} \textit{See} supra notes 101-02 and accompanying text.

\textsuperscript{189} \textit{See} supra note 103 and accompanying text.

\textsuperscript{190} A study of other plea bargaining bans would have alerted the Bronx District Attorney to the adverse effects associated with such bans. For instance, following a ban on plea bargaining in El Paso, Texas, the number of requests for trials doubled, resulting in a 250% increase in the number of pending cases. \textit{See} Weninger, \textit{supra} note 6, at 277-78. The increase in pending cases delayed the start of the average trial
Brion District Attorney is impairing the quality of justice rather than fulfilling his ethical obligation to improve the legal system.

C. The Bronx District Attorney Did Not Violate Ethics Rules

Unquestionably, the plea bargaining ban has adversely affected the Bronx criminal justice system. The adverse effects of the ban, however, are not enough to substantiate a finding that the Bronx District Attorney acted unethically by abusing his discretion. First, the nebulous standards governing the Bronx District Attorney's behavior make it nearly impossible to define exactly what constitutes unethical behavior in these circumstances. Second, many ethics rules are couched in subjective terms, providing the Bronx District Attorney with tremendous leeway to decide what is right and wrong. Moreover, absent an admission by the District Attorney, this subjectivity makes it impossible to ascertain whether or not he was improperly motivated, and thus acting unethically, in banning plea bargaining. Third, the adverse effects of the Bronx ban cannot be viewed in isolation. The ban has resulted in a number of positive changes in the Bronx, suggesting that the District Attorney exercised "sound discretion" in his attempt to change a system in dire need of reform. In sum, the vague, subjective ethical standards governing a prosecutor's behavior and the mixed effects of the Bronx ban do not support a conclusion that the District Attorney abused his discretion and acted unethically in implementing a plea bargaining ban.

IV. Modifying the Bronx Ban

An examination of the effects of the Bronx ban under existing case law and ethics rules does not support a conclusion that the District

by one hundred days. Id. at 305 tbl. 5. As a result, incarcerated defendants were required to remain in jail longer while awaiting their day in court. Id.
191. See supra notes 167-72 and accompanying text.
192. The seek justice standard is an example of an ethics rule couched in subjective terms. See supra note 155 and accompanying text. The absence of objective criteria in the seek justice standard makes the rule nebulous and impossible to enforce. See supra note 167 and accompanying text. A second ethics rule couched in subjective terms is N.Y. Code EC 8-4, which prohibits a prosecutor from acting unless he "conscientiously believes [his action] to be in the public interest." N.Y. Code, supra note 150, EC 8-4; see also supra notes 174-75 and accompanying text. This rule establishes an entirely subjective standard since it is impossible to determine if a prosecutor actually believed he was acting in the public's interest. Id. The requirement that a prosecutor exercise sound discretion in the performance of his duties is a third rule couched in subjective terms. See infra note 196. Actions seemingly "sound" to one prosecutor may appear foolish to another.
193. See supra notes 72-74 and accompanying text.
194. See supra notes 77-80 and accompanying text.
195. See supra notes 147-48 and accompanying text.
196. See Standards for Criminal Justice, supra note 150, Standard 3-1.2(b) ("[T]he prosecutor must exercise sound discretion in the performance of his or her functions.")

Attorney acted illegally or unethically. Rather, it indicates the need to modify the plea bargaining ban to avoid irreparable harm to the Bronx criminal justice system. This part proposes two possible modifications: (1) extending the time in which to allow plea bargaining; and (2) using written guidelines in the plea bargaining process.\footnote{197}

A. Extending the Time in Which to Plea Bargain

A major criticism of the Bronx ban is that its coercive nature pressures defendants into making hasty, uninformed decisions.\footnote{198} Under the ban, defendants must make crucial decisions on plea offers within six days, before the grand jury indicts them and the New York City Criminal Court transfers their cases to the New York Supreme Court.\footnote{199} Defendants often make these decisions without any relevant information\footnote{200} or sound legal advice.\footnote{201} To temper the coercive nature of the Bronx ban and to allow for more informed decisions by defendants, the District Attorney should extend the time period in which the state will plea bargain with indicted defendants.

A reasonable time limit on plea bargaining is not a novel idea. In 1977, the National District Attorneys' Association recommended that individual jurisdictions "set a time limit after which plea negotiations may no longer be conducted."\footnote{202} More recently, a pilot program commenced in Brooklyn, New York, under which time limits are imposed on plea bargaining.\footnote{203} The pilot program allows defendants to engage in plea bargaining for sixty days.\footnote{204} On the sixty-first day, the District Attorney makes a final plea offer.\footnote{205} If the defendant refuses the offer, the case is immediately scheduled for trial.\footnote{206} The results of the program are phenomenal—judges have shaved an average of sixty-five days off the time it takes to dispose of a case; twenty-seven percent more indictments have been disposed of; and there has been a seventy-eight percent increase in guilty pleas to the severest charge against a defendant.\footnote{207}

\footnote{197. Although these proposed modifications are discussed separately, they are not mutually exclusive and could be implemented jointly.}
\footnote{198. See, e.g., Lynch, supra note 33 ("The Bronx District Attorney's policy is onerous. It makes sometimes for uninformed decisions.").}
\footnote{199. See supra note 109 and accompanying text.}
\footnote{200. See supra note 110 and accompanying text.}
\footnote{201. See Lynch, supra note 33 ("How can we give good advice to the client when we have no information?"); see also supra note 110 (commenting on how defendants must decide whether to plead guilty without the benefit of police reports and other vital information).}
\footnote{202. See National Prosecution Standards, supra note 36, Standard 16.7.}
\footnote{203. See Anthony M. DeStefano & Patricia Hurtado, B'klyn Makes Case for Faster Trials. N.Y. Newsday, Apr. 23, 1993, at 8.}
\footnote{204. Id.}
\footnote{205. Id.}
\footnote{206. Id.}
\footnote{207. Id.}
The Brooklyn pilot program provides concrete proof that a prosecutor can restrict plea bargaining, be tough on crime, and yet still treat defendants fairly and reform the criminal justice system. The Bronx District Attorney should follow Brooklyn's lead and replace the plea bargaining ban in the New York Supreme Court with a policy that permits bargaining for a reasonable but limited period of time.

B. Guidelines for Plea Bargaining

Another method of reforming the Bronx plea bargaining ban is through the use of written guidelines. Like most jurisdictions, the Bronx does not employ guidelines to regulate plea bargaining. The adverse effects of the Bronx ban, however, demonstrate the need to adopt such guidelines in the near future.

Implementing plea bargaining guidelines in the Bronx would serve two purposes. First, guidelines would impose structure on, and control over, the prosecutor's discretion without eliminating the prosecutor's ability to treat each defendant as an individual. Second, guidelines would "limit the opportunities for any of the actors [in the criminal justice system] to stonewall the system at the expense of . . . others."

The use of written guidelines in New York State's criminal justice system is not new. In 1978, the New York State Board of Parole implemented written guidelines to control the discretion of parole commissioners and to aid them in determining when to release inmates from state prisons. Under the parole guidelines, inmates are given numerical scores in two categories—offense severity and prior

208. The use of written guidelines for prosecutors is not novel. The Standards for Criminal Justice list seven factors to guide prosecutors in exercising their discretion when deciding whether to initiate criminal charges against a defendant. See Standards for Criminal Justice, supra note 150, Standard 3-3.9(b)(i)-(vii).

209. See Mirsky, supra note 33, at 2.

210. Id.


212. Mirsky, supra note 33, at 3.


214. N.Y. Comp. Codes R.& Regs. tit. 9, § 8001.3(b)(3) (1991); Revised Guidelines for Parole Board Decision Making, N.Y.S. Div. of Parole (Oct. 1978) (hereinafter Revised Guidelines). In the offense severity category, inmates receive scores in the following three subcategories: (1) felony class of conviction; (2) weapon involvement; and (3) forcible contact. Id. at 3. In New York State, felonies are classified from A through E, with A felonies being the most serious. N.Y. Penal Law §§ 55.00(1)(a)-(e), 70.00(2)(a)-(e) (McKinney 1992). Under the guidelines, inmates convicted of class A felonies receive a score of five; inmates convicted of class B felonies receive a score four, and so on. Revised Guidelines, supra, at 3. After receiving a score on the class of felony for which they were convicted, inmates are scored on weapon possession. If a weapon was possessed during the commission of the crime, the inmate receives one
criminal history.\textsuperscript{215} The two scores are then added together and matched against a guideline time range which indicates the suggested time an inmate should serve in prison.\textsuperscript{216} Inmates who commit serious crimes and have lengthy criminal histories receive high scores under the guidelines and are severely penalized by the Parole Board by being forced to serve lengthy periods of incarceration.\textsuperscript{217} Conversely, inmates who commit less serious crimes and have no criminal histories benefit most from the guidelines by being released early from prison by the Parole Board.\textsuperscript{218}

Guidelines similar to those governing parole could be implemented easily and efficiently in the Bronx to regulate the plea bargaining process. Under such a guideline system, the District Attorney could restrict or refuse to plea bargain with career criminals charged with serious offenses—defendants who score high under the guideline system. On the other hand, defendants who score low under the guidelines—those charged with less serious offenses and who do not have lengthy criminal histories—would be given reasonable plea offers by the District Attorney. By implementing guidelines, the Bronx District Attorney could restore plea bargaining and ameliorate the harsh effects of the ban, maintain a tough stance on crime, and reestablish a sense of fairness in the criminal justice system.

point. If no weapon was possessed, the inmate does not receive any points. \textit{Id. Next, the inmate receives a score on the amount of forcible contact he had with the victim. Physical injury to the victim results in one point, serious injury results in two points, and death results in three points. \textit{Id. The higher an inmate scores in these three categories, the more likely he will be penalized by the Parole Board under the guideline system. N.Y. Comp. Codes R. & Regs. tit. 9, § 8001.3(b)(3); Revised Guidelines, supra, at 2.}

\begin{itemize}
\item \textsuperscript{215} N.Y. Comp. Codes R. & Regs., tit. 9 § 8001.3(b)(3) (1991); Revised Guidelines, supra note 214, at 4. In the prior criminal history category, inmates receive scores in the following six subcategories: (1) number of prior misdemeanor convictions; (2) number of prior felony convictions; (3) number of prior jail terms; (4) number of prior prison terms; (5) prior probation/parole revocations; and (6) whether the inmate was on probation/parole at the time he committed the current offense. \textit{Id. For instance, an inmate with up to two prior misdemeanor convictions will receive zero points, while an inmate with three or more misdemeanor convictions will receive one point. \textit{Id. Likewise, an inmate with one prior felony conviction will receive one point, while an inmate with three or more prior felony convictions will receive three points. \textit{Id. Again, the higher an inmate scores in these categories, the more likely he will be penalized by the Parole Board under the guidelines. N.Y. Comp. Codes R. & Regs. tit. 9, § 8001.3(b)(3); Revised Guidelines, supra note 214, at 2.}
\item \textsuperscript{216} N.Y. Comp. Codes R. & Regs. tit. 9, § 8001.3(b)(3) (1991); Revised Guidelines, supra note 214, at 2. A point system similar to that used by New York State's Division of Parole was used in El Paso, Texas to determine if defendants were eligible for probation. Weninger, supra note 6, at 286 n.90.
\item \textsuperscript{217} See N.Y. Comp. Codes R. & Regs. tit. 9, § 8001.3(b)(3) (1991); Revised Guidelines, supra note 214, at 2; see also supra notes 214-15 (explaining the guidelines used by the New York State Board of Parole); Weninger, supra note 6, at 286-89 (commenting on the judicial guidelines used in plea bargaining in El Paso, Texas).
\item \textsuperscript{218} See N.Y. Comp. Codes R. & Regs., tit. 9, § 8001.8(b)(3) (1991); Revised Guidelines, supra note 214; supra notes 214-15.
\end{itemize}
Conclusion

The ban on plea bargaining has severely impacted the Bronx criminal justice system. The overall adverse effects of the plea bargaining ban suggest that the Bronx District Attorney may be acting unethically. An examination of the relevant ethics rules, however, reveals that the standards governing the Bronx District Attorney's behavior are nebulous, provide no concrete standards upon which to judge his behavior, and afford him tremendous latitude in exercising his discretion. This discretion makes the Bronx District Attorney's behavior nearly irreproachable under ethical standards. Furthermore, not all of the effects of the Bronx plea bargaining ban have been adverse. The few positive effects of the plea bargaining ban could lead one to conclude that the Bronx District Attorney was being innovative in his attempt, through the ban, to pressure the state to provide much needed additional courtroom space and judges.

But while the Bronx District Attorney's behavior does not appear to violate any ethics rules, his behavior is nonetheless adversely impacting the Bronx criminal justice system. To avoid further deterioration and possible irreparable harm to the Bronx criminal justice system, the Bronx District Attorney needs to take prompt and definitive action. Two possible courses of action are available. First, the District Attorney could expand the time allotted for plea bargaining so that defendants would have sufficient time to secure the information necessary to assist them in deciding whether or not to plead guilty. Second, the District Attorney could implement written guidelines governing the plea bargaining process to prevent abuses of discretion and to ensure that appropriate sentences are imposed on defendants.

In the absence of modifications, the Bronx plea bargaining ban is destined to fail, and the Bronx District Attorney will be forced to rescind his ban and restore plea bargaining, as was done in Alaska and El Paso County, Texas. The Bronx ban should serve as a model to other jurisdictions that are contemplating banning plea bargaining, alerting them to the dangers of banning the principal means of resolution in our criminal justice system. If plea bargaining bans like the Bronx ban are to succeed, controls are needed to guide prosecutors in exercising their discretion.