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Martin Marcus

ABOVE THE FRAY OR INTO THE BREACH: THE JUDGE'S ROLE IN NEW YORK'S ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE*

*Martin Marcus***

INTRODUCTION

In the two principal models of criminal justice, the adversarial and the inquisitorial, the role of the judge is fundamentally different. The adversarial model, exemplified by the American and British systems, assumes that justice is best served by giving the prosecutor and defense counsel primary responsibility for the development and presentation of their own cases. In this model, the judge is a neutral and detached magistrate whose function is to mediate and resolve the opposing parties' inevitable conflicts. Reacting to both the legal and evidentiary presentations and contentions of the parties, the judge determines the law and, when required, finds the facts. In the inquisitorial model, exemplified by the French and German criminal justice systems, the judge has primary responsibility not only for determining the relevant facts, but also for gathering and eliciting those facts. The parties assist the judge in this task, but their role is only secondary and supportive.[1]

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** Judge of the New York Court of Claims, sitting as a Justice of the New York State Supreme Court, Bronx County. The author gratefully acknowledges the assistance of Denise Parillo in the preparation of this paper, and the comments and suggestions of Ronald Goldstock and Gail Sussman Marcus.

[1] On the contrasts between the inquisitorial and adversarial (or accusatorial) models, see Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240, 242-43 n.7 (1977), and the literature cited therein. In 1989 Italy abandoned its inquisitorial system in favor of an adversarial one. *See* Lawrence S. Fassler, *The Italian Penal Procedure*

The different approaches of the two models are most striking in the context of a trial. In an inquisitorial trial, the initiative for both calling and questioning witnesses lies with the judge, who relies on a dossier compiled (at least theoretically) under judicial supervision in the pre-trial investigative and charging phases. The prosecutor and defense counsel aid the judge in developing the facts, "at most suggesting additional questions and making motions for additional evidence."[2]

In an adversarial trial, each side calls its own witnesses and vigorously cross-examines those called by the other. The judge supervises the presentations of the parties, assuring that the trial is fair and that it adheres to the applicable rules of procedure and evidence. If the trial is by jury, the judge provides the jury with legal guidance, and the fact-finder—whether the judge or jury—determines the verdict based solely upon the evidence presented by the opposing parties. Without a dossier or its equivalent, the judge in the adversarial system—like the jury —usually knows little more than the broad outlines of the evidence until it is presented during the trial.[3]

The philosophical differences between the inquisitorial and adversarial models are equally evident in their attitude toward the disposal of cases without trial. At least as a theoretical matter, the inquisitorial model requires that every case receive a full judicial inquiry and that the disposition of the case be whatever the facts so found demand. It does not permit a compromise in which a defendant's admissions and an agreed upon disposition

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Code: An Adversarial System of Criminal Procedure in Continental Europe, 29 COLUM. J. TRANSNAT'L L. 245 (1991).

[2] Goldstein & Marcus, *supra* note 1, at 265. "The Western European trial is usually described as an active inquiry by the court into the defendant's guilt. Using a dossier that has been meticulously prepared before trial, the presiding judge questions the witnesses and the accused, without relying on the parties to develop the facts of the case." *Id.*

[3] Perhaps the only document equivalent to the inquisitorial dossier is the prosecutor's own file on the case. Before the trial begins, defense counsel will receive copies of those reports within the file that are discoverable, but the judge conventionally will not. While in some systems, including New York's Individual Assignment System (IAS), the same judge who tries a case is likely to have reviewed the minutes of the prior grand jury proceeding, the evidence presented to the grand jury is usually only the bare minimum necessary to obtain the indictment. Although there may have been hearings before the trial, such hearings generally relate to the admissibility of evidence, and they rarely permit or require the attorneys to explore the merits of the substantive case.

substitute for a trial and verdict.[4] By contrast, the reliance the adversarial model places upon the parties to protect and advance their respective positions makes permissible, and even desirable, an outcome upon which they can mutually agree. The practical consequences of permitting such a compromise are enormous: given the burdens on the criminal justice system in the United States, it is hardly surprising that the overwhelming majority of cases are resolved through the guilty plea and plea bargaining.[5]

In choosing the means for disposing of cases with or without a full-blown trial, each model reflects its own underlying assumptions. While the adversarial model looks to the partisan efforts of the prosecutor and defense counsel to search for the truth and to protect the public and the defendant, the inquisitorial model depends upon the even-handed initiative of the judge. Any conclusion about which model is more effective for these purposes is likely to reflect a cultural bias rather than a tested hypothesis.[6] It is clear, however, that in order to function effectively, a system based on either model must assure that the model's assumptions have some basis in fact and, to the extent that they do not, that some compensation is made for the inadequacies of court or counsel.

In an inquisitorial system, for example, parties lulled into passivity by the supportive role assigned them may be unable or unwilling to compensate for a judge whose approach to the case

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[4] There is, of course, a substantial debate over the extent to which inquisitorial systems match the model. Some authors have insisted that these systems, too, use practical legal and extra-legal compromises which permit shortcuts to full-blown fact—finding at trial and which substantially limit judicial control of the investigative, pre-trial and trial process. *See* Goldstein & Marcus, *supra* note 1. *But see* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). In response, see Abraham S. Goldstein & Martin Marcus, *Comment on "Continental Criminal Procedure,"* 87 YALE L.J. 1570 (1978).

[5] In 1990 more than 51,000 criminal cases were disposed of in New York City, more than 83% of which ended with the acceptance of a guilty plea. Less than six percent, or fewer than three thousand of the cases, went to trial. In 1987, when the number of cases disposed of was ten thousand fewer, still more than 80% of the cases were resolved by plea. *See* SOL WACHTLER, CHIEF JUDGE OF THE STATE OF NEW YORK, THE STATE OF THE JUDICIARY 1990, at 16.

[6] Beyond the obvious difficulties of measuring empirically which system better arrives at the "truth," comparisons flounder as well to the extent that each system has its own view of "justice." Suppression rules in the United States are a prime example of the willingness of the American system to sacrifice truth to a competing goal of deterring unlawful police conduct.

is unaggressive or biased. In such situations, neither side may advance or challenge the written statements contained in the dossier, and the trial may prove little more than a dispirited recitation of untested facts. In an adversarial system, on the other hand, if one or both of the parties are not effective advocates, a judge seeking to be "neutral and detached" might fail to take a more active role in the proceedings. Thus, important factual or legal aspects of the case, favoring either or both sides, might go inadequately explored or even entirely undeveloped.

This Article will review the manifestation of the adversarial model in a particular American jurisdiction—the felony criminal courts of the state of New York.[7] It will consider the ways in which New York's criminal justice system limits the judge to the reactive role contemplated by the adversarial model, and it will examine whether and how judicial intervention may compensate for the failures of the parties to play their assigned roles adequately in a particular case. In sum, it will analyze the constraints upon, the needs for, and the limits of judicial intervention in New York.

I. Judicial Intervention at Trial

In New York, as throughout the American criminal justice system, the principles of the adversarial model are respected by the assumption that at trial the prosecutor and the defense attorney can themselves best present the opposing views of fact and law. On the one hand, trial and appellate rules generally uphold convictions even if they result from defense strategies that seem, at least in retrospect, to have been unhelpful to the defendant's case. On the other hand, convictions are reversed in which the court has unnecessarily intervened in the course of the trial. In some cases, however, judicial intervention is deemed necessary either to enhance the truth-seeking process or to protect the accused's right to an effective defense. In these situations, the principles of the adversarial model are honored in the

[7] Obviously no single jurisdiction can be representative of the entire country. New York, however, is an interesting and informative example for these purposes. The case volume and limited resources of its criminal justice system push the assumptions of the adversarial model to its limits, while the litigiousness of New York's bar and the receptiveness of its courts to the issues explored in this paper have resulted in a lode of reported opinions.

breach, that is, by permitting or even requiring judicial intervention to compensate for the failures of the prosecutor or defense counsel.

The ambivalence of New York courts toward judicial intervention at trial is evident from a review of the reported cases in which such intervention has occurred. The New York Court of Appeals has rejected the notion that a judge must be entirely passive, but it has also expressed strong concern about unnecessary or excessive judicial participation in a trial. In *People v. Moulton* the court observed that, "the role of a Trial Judge in a criminal case is not merely that of an observer or even that of a referee enforcing the rules of a game."[8] In *People v. Yut Wai Tom* the court attempted to strike a balance, describing the role of the trial judge as "neither that of automaton nor advocate."[9]

In *Yut Wai Tom*, the court explicitly accepted a standard for judicial intervention promulgated by the American Bar Association in 1978. According to the ABA standard:

> The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.[10]

As the ABA standard observes, however, and as the court of appeals emphasized, the judge must "be aware that there may be greater risk of prejudice from overintervention than from underintervention. While the judge should not hesitate to exercise his or her authority when necessary, the judge should avoid trying the case for the lawyers."[11] This balance is, thus, a delicate one, more easily described in general than applied in particular cases.

The court of appeals has recognized a variety of situations in which judicial intervention is appropriate. It has agreed, for example, that " 'when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to

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[8] 43 N.Y.2d 944, 945, 374 N.E.2d 1243, 1244, 403 N.Y.S.2d 892, 893 (1978).

[9] 53 N.Y.2d 44, 56, 422 N.E.2d 556, 563, 439 N.Y.S.2d 896, 903 (1981).

[10] ABA STANDARDS RELATING TO THE ADMIN. OF CRIM. JUSTICE §6-1.1(a) (1978) (Special Functions of the Trial Judge) [hereinafter ABA STANDARDS], *quoted in* People v. Yut Wai Tom, 53 N.Y.2d at 56, 422 N.E.2d at 563, 439 N.Y.S.2d at 903.

[11] ABA STANDARDS, *supra* note 10, commentary at 6-8, *quoted in Yut Wai Tom*, 53 N.Y.2d at 57, 422 N.E.2d at 563, 439 N.Y.S.2d at 903.

the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts.' "[12] Significantly, the court noted that " 'the judge may interrogate a witness after a cross-examination that appears to be misleading to the jury,' " even though the prosecutor could—more consistently with the adversarial model—make the same clarification on re-direct examination of the witness.[13] Rejecting a purist approach to adversarial theory, the court has held that a trial judge may "seize the affirmative, when proper and necessary, to clarify perplexing issues, to develop significant factual information, to enforce propriety, orderliness, decorum and expedition in trial."[14] Where "a witness has a language difficulty, [the judge] may intervene to clarify unclear answers. A judge may also properly question witnesses to insure that a proper foundation is made for the admission of evidence."[15]

All of these observations by the New York Court of Appeals, however, carry with them a warning, perhaps summarized by the comment that: "In the last analysis . . .[the judge] must be guided by the principle that his function is to protect the record, not to make it."[16] As one lower appellate court has expressed it, the trial judge may not "assume the role of the prosecutor," since "[i]t is not the function of the trial court, however well-motivated, to intrude on behalf of either side in a criminal trial because the court may not agree with the manner in which the case is being presented."[17] Indeed in that case the appellate court held the questioning of witnesses by the trial judge to have been improper, even though the same line of questioning would

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[12] *Yut Wai Tom*, 53 N.Y.2d at 56-57, 422 N.E.2d at 563, 439 N.Y.S.2d at 903 (quoting ABA STANDARDS, *supra* note 10, commentary at 6-7).

[13] *Id.* at 57, 422 N.E.2d at 563, 439 N.Y.S.2d at 903, (quoting ABA STANDARDS, *supra* note 10, commentary at 6-7). *See also* People v. Moulton, 43 N.Y.2d 944, 945, 374 N.E.2d 1243, 1244, 403 N.Y.S.2d 892, 893 (1978) (a trial judge may put "appropriate questions" to a witness in order to "keep the proceedings within the reasonable confines of the issues and to encourage clarity rather than obscurity in the development of the proof"); People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972) (court may properly question police witness).

[14] People v. De Jesus, 42 N.Y.2d 519, 523, 369 N.E.2d 752, 755, 399 N.Y.S.2d 196, 199 (1977).

[15] *Yut Wai Tom*, 53 N.Y.2d at 58, 422 N.E.2d at 564, 439 N.Y.S.2d at 904.

[16] *Id.*

[17] People v. Jacobsen, 140 A.D.2d 938, 940, 529 N.Y.S.2d 618, 620 (4th Dep't 1988) (citations omitted).

have been appropriate had it been conducted by the prosecutor.[18]

As the above quotations suggest, New York's appellate courts explicitly recognize that when a trial judge is overly involved in the development of the evidence, the judge's conduct offends the principles upon which the adversarial model is based. However, in reversing convictions because of such conduct, the appellate courts express concerns that are more practical than theoretical. Convictions are overturned, not because a trial is too "inquisitorial" in nature, but because the judge may, by the very nature of the judge's position, intimidate a witness, inhibit counsel, or prejudice the jury.

The New York Court of Appeals has recognized that numerous difficulties arise when the trial judge conducts "direct examination" of a prosecution witness. When, for example, "the court elicits crucial incriminating testimony on direct examination, the witness may be less likely to change his testimony on cross-examination."[19] Similarly, "a defense attorney who would object to a question if posited by the District Attorney might well be dissuaded from doing so if the question were asked by the Trial Judge, for fear of antagonizing the Judge or of creating the impression that he seeks to hide the truth."[20] Moreover, the mere

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[18] *Id.* In *Yut Wai Tom*, however, the court of appeals indicated that a judge was permitted to "interrogate" a witness after a "misleading" cross-examination. 53 N.Y.2d at 57, 422 N.E.2d at 563, 439 N.Y.S.2d at 903. *See* note 13 and accompanying text *supra*. The apparent conflict in the two holdings suggests the difficulty of drawing the line between partisan rehabilitation and neutral clarification.

[19] *Yut Wai Tom*, 53 N.Y.2d at 57, 422 N.E.2d at 563-64, 439 N.Y.S.2d at 903.

[20] *Id.* at 57, 422 N.E.2d at 564, 439 N.Y.S.2d at 904. The practical considerations that enter into an attorney's ability to object to intervention by the court have even affected the willingness of appellate courts to consider a line of questioning by a trial judge that is not objected to during the trial. In *Yut Wai Tom*, for example, the prosecutor claimed on appeal that the defendant had waived the issue because his trial counsel had not objected to the judge's questions until late in the trial. The court of appeals rejected the waiver claim, first, because such an objection could not be made "until it [was] clear that the Judge intend[ed] to exceed his permissible role," *id.* at 55, 422 N.E.2d at 562, 439 N.Y.S.2d at 902, and second, because it might be difficult for counsel "to register objection to the Judge's conduct for fear of antagonizing him." *Id.* at 55, 422 N.E.2d at 563, 439 N.Y.S.2d at 902. *But see* People v. Charleston, 56 N.Y.2d 886, 438 N.E.2d 1114, 453 N.Y.S.2d 399 (1982) (claim that trial judge's "extensive participation" in questioning witnesses deprived defendant of fair trial was not preserved because defendant objected to only three specific questions and not to judge's participation as a whole); People v. Eldridge, 151 A.D.2d 966, 966, 542 N.Y.S.2d 65, 66 (4th Dep't) (error made by trial judge in "patently improper" examination of defendant was not preserved because no objection was made to it at trial), *appeal denied*, 74 N.Y.2d 808, 545 N.E.2d

manner or choice of words by the judge in questioning a witness may convey to the jury an impression of the judge's opinion of the witness's credibility or of a contested issue of fact in the case.[21]

By the same token, intervention, whether or not frequent, is less prejudicial and more tolerable when in appearance and effect it favors neither the prosecution nor the defense. In *People v. Jamison*,[22] for example, the judge's questioning was acceptable not only because it was infrequent and justified on the occasions when it occurred, but also because "[n]either the defense nor the prosecution was singled out for special treatment, and the defense was not treated in a hostile fashion."[23] Similarly, in *People v. Russo*[24] a conviction was upheld upon a finding that "the trial court in its questioning of witnesses 'interrupted' the People's case almost as much as that of the defense," and "in addition to giving the defense every opportunity to produce its proof . . . at times even aided the defense in adducing its proof."[25]

II. Ineffective Assistance of Counsel

Judicial intervention may be not merely permissible, but actually required, when defense counsel's performance is inadequate. Ineffective assistance of counsel disturbs the assumptions of the adversarial model, since neither truth nor justice may result if the prosecution fights hard for its position but the defendant's advocate is not equally vigorous. When judicial intervention at trial either cannot or does not compensate for counsel's inadequate defense, relief may instead be granted on appeal. Appeals in which a defendant claims to have received

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880, 546 N.Y.S.2d 566 (1989).

[21] *See* People v. Moulton, 43 N.Y.2d 944, 945, 374 N.E.2d 1243, 1244, 403 N.Y.S.2d 892, 893 (1978). *See also* People v. Mendes, 3 N.Y.2d 120, 121, 143 N.E.2d 806, 807, 164 N.Y.S.2d 401, 402 (1957) ("In the case at Bar a number of questions by the Trial Judge, many of them rhetorical, directed at defendant's witnesses were of such a nature as to indicate a communicable disbelief of their testimony."); People v. Jacobsen, 140 A.D.2d 938, 940, 529 N.Y.S.2d 618, 620 (4th Dep't 1988) ("In our view, the excessive questioning and examination of witnesses improperly conveyed to the jury the court's attitude as to the merits of the case, as well as to the credibility of the witnesses.").

[22] 47 N.Y.2d 882, 393 N.E.2d 467, 419 N.Y.S.2d 472 (1979).

[23] *Id.* at 884, 393 N.E.2d at 468, 419 N.Y.S.2d at 473.

[24] 46 A.D.2d 904, 362 N.Y.S.2d 191 (2d Dep't 1974).

[25] *Id.* at 905, 362 N.Y.S.2d at 193.

ineffective assistance thus represent another mechanism by which the criminal justice system can adjust to the failure of a trial to live up to the adversarial model.

Adversarial theory suggests that in the usual case a defendant should be content with the results of counsel's efforts. If a defendant is convicted after a trial in which defense counsel has adopted a conscious strategy not to oppose the introduction of a significant piece of evidence or not to cross-examine an important witness, the defendant should not be entitled to a second trial simply because hindsight suggests that a different defense strategy might have been more successful. However, if counsel has failed to address and exploit significant issues, not as part of a strategy, but out of inadvertence or incompetence, the theory of the adversarial trial is unfulfilled. If the trial court, relying on defense counsel, does not itself raise—and perhaps even advance—these issues, they will remain unexplored throughout the course of the trial.[26]

Because the right to counsel is guaranteed in both the federal[27] and state constitutions,[28] the failure of counsel to render effective assistance represents not only a flaw in the assumptions of the adversarial model, but a constitutionally defective criminal proceeding. Thus, when an appellate court finds a defendant has suffered from ineffective assistance of counsel, the result is a reversal of the conviction and a new trial. Of course, not every mistaken or misguided defense can or should be deemed a product of ineffective assistance of counsel. Not only would such a conclusion contradict adversarial theory, but it would enshrine an unrealistic view of the capacities of most counsel and place an intolerable burden on limited judicial resources. Thus, like trial judges who must decide whether or not to intervene when

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[26] The trial court's role in this situation, of course, is the subject of the previous section of this paper. At trial, when objections or motions are not made, prosecution witnesses are not cross-examined, or available defense witnesses are not called, the trial judge in an adversarial system faces a difficult dilemma. The court may itself take up issues on the defendant's behalf, issues that the defendant's attorney has chosen, consciously or unconsciously, not to raise. Such intervention, however, has its own risks. Attempting to compensate for the perceived inadequacies of the defense, the judge may instead inadvertently interfere in a strategy which the defense attorney has thus far not disclosed or made manifest at trial. Should a conviction follow, the focus of the appeal may simply shift from the attorney's effectiveness to the court's intervention.

[27] U.S. CONST. amend. VI.

[28] N.Y. CONST. art. I, § 6.

significant issues go unexplored by the parties at trial, appellate courts reviewing a defendant's conviction must strike a delicate balance in considering the adequacy of defendant's trial counsel.

In determining whether or not a defendant has received effective assistance of counsel, the New York Court of Appeals has applied a standard of "meaningful representation." As articulated in *People v. Baldi*, a court reviewing such a claim must take care,

> to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. . . . [T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances of a particular case . . . reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.[29]

Of course, differentiating between "losing tactics" and actual ineffectiveness may be difficult, particularly since a strategy may seem far more plausible before it is employed than after it fails.

The courts in New York have applied this standard for ineffective assistance of counsel not only to the performance of the defendant's attorney during a trial, but also in the making of pre-trial motions and during pre-trial hearings. In *People v. Sinatra*,[30] for example, the defendant's attorney failed to move to suppress a weapon that was the only evidence against his client, even though the judge presiding over the suppression hearing of his codefendant found the legality of the search that produced the weapon to be a "close question."[31] Defense counsel also chose not to request a hearing to determine his client's mental fitness to proceed to trial, despite comments from the trial court that implied the appropriateness of such an inquiry. Finally, counsel presented a defense at trial that the trial judge found to have "stretch[ed] credulity."[32] The appellate court held that the defense attorney's conduct "cannot be considered 'mere losing tactics' or unsuccessful trial strategy, but constitutes 'true ineffectiveness of counsel . . . .' "[33] Indeed, the appellate court not

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[29] 54 N.Y.2d 137, 146-47, 429 N.E.2d 400, 404, 444 N.Y.S.2d 893, 898 (1981).

[30] 89 A.D.2d 913, 453 N.Y.S.2d 729 (2d Dep't 1982).

[31] *Id.* at 914-15, 453 N.Y.S.2d at 731.

[32] *Id.* at 915, 453 N.Y.S.2d at 732.

[33] *Id.* at 915, 453 N.Y.S.2d at 732 (citations omitted). Of course, not every decision of counsel with adverse consequences to the defendant renders assistance ineffective. In

only reversed the defendant's conviction, but specifically authorized the defendant to make the motion to suppress that his counsel had previously waived.[34]

Ineffective assistance of counsel claims may succeed even where the case against the defendant is much stronger than it was in *Sinatra*. In *People v. Duke*,[35] although there was "ample proof to justify the jury's verdict of guilty,"[36] the appellate court sharply criticized the performance of defense counsel. The court found the cross-examination of a prosecution witness to be too extensive, rather than too meager, since it damaged the defendant's case and brought out, among other things, the defendant's involvement in other crimes, something the prosecutor could not properly have elicited on direct. The court also surmised that counsel had not prepared one of the defense witnesses, since he unintentionally elicited incriminating testimony from that witness as well. Finally, the court considered counsel's defense summation "weak, ineffective and of no help to the defendant."[37] Concluding that the defendant had not received meaningful representation, the court reversed the conviction and ordered a new trial.[38]

People v. Glover, 99 A.D.2d 1012, 474 N.Y.S.2d 1 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 790, 476 N.E.2d 336, 486 N.Y.S.2d 937 (1985), counsel neglected, among other things, to move to suppress incriminating statements made by the defendant, to object when a police officer improperly read to the jury the contents of a document not in evidence, and to cross-examine one of two eyewitnesses called by the People. Agreeing with the appellate division that the defense approach was "a calculated strategy of appearing to minimize the prosecution's case by a minimum of defense participation," the court of appeals rejected the defendant's claim of ineffective assistance of trial counsel and affirmed the conviction. *Id. See also* People v. DiMauro, 48 N.Y.2d 892, 894, 400 N.E.2d 1336, 1338, 424 N.Y.S.2d 884, 886 (1979) (failure to move to suppress statements not ineffective assistance where the defendant "apparently thought [them] to be usefully exculpatory"); People v. Abdullah, 164 A.D.2d 260, 263, 562 N.Y.S.2d 470, 471 (1st Dep't 1990) (not ineffective assistance of counsel for defendant's attorney, who successfully moved to suppress drugs seized on person, to fail to move to suppress drugs in bag defendant allegedly dropped on the ground, where defendant denied having possessed them), *appeal denied*, 76 N.Y.2d 937, 564 N.E.2d 676, 563 N.Y.S.2d 62 (1990).

[34] *Sinatra*, 89 A.D.2d at 915, 453 N.Y.S.2d at 732.

[35] 58 A.D.2d 31, 395 N.Y.S.2d 200 (1st Dep't 1977).

[36] *Id.* at 33, 395 N.Y.S.2d at 201.

[37] *Id.*

[38] *Id.* at 33, 395 N.Y.S.2d at 202. *See also* People v. Jenkins, 68 N.Y.2d 896, 501 N.E.2d 586, 508 N.Y.S. 2d 937 (1986) (claim of ineffective assistance of counsel may be based upon defense counsel's failure to bring out at trial that only witness identifying defendant had misidentified two others as his accomplices); People v. Ofunniyin, 114 A.D.2d 1045, 495 N.Y.S.2d 485 (2d Dep't 1985) (ineffective assistance of counsel for de-

Where counsel's representation at trial is truly ineffective, not even the constant intervention of the trial judge may be sufficient to stave off a claim of ineffective assistance on appeal. In *People v. LaBree*[39] the court of appeals described a sorry performance by the attorney appointed to represent the defendant and a persistent effort by the trial judge to assist counsel in his presentation of the defense case. Indeed, when the defendant told the judge on the eve of trial that his lawyer was unprepared to defend his case, the judge denied his request for new counsel, but told him that if there was need for help, the court itself would provide it.

The judge was true to his word. When defense counsel conducted a "brief and fruitless" cross-examination of a prosecution witness, the judge asked the prosecutor whether the witness had made any prior statements and prompted counsel to use the statements in his questioning.[40] The judge even "cross-examined" the witness, eliciting the witness's prior drug convictions and certain discrepancies in his testimony. When counsel failed to object to improper comments by the prosecutor in his summation, the judge sua sponte gave a curative instruction. The judge not only "conduct[ed] an inordinate amount of questioning of witnesses" but also explained to the jury that he had done so because of defense counsel's omissions.[41]

The court of appeals found that the trial judge had made an "exhaustive effort . . . to assure the defendant a fair trial."[42] "However," said the court, "it should not be required of him to actually conduct the defense."[43] Holding that the judge's "valiant attempt to cure vital and obvious deficiencies [could] not satisfy *in toto* the constitutional requirement of the assistance of counsel," the court reversed the conviction and ordered a new trial.[44]

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fendant's attorney to have asked defendant whether he had ever been convicted of a crime after the court had precluded the prosecutor from asking the same question).

[39] 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974).

[40] *Id.* at 259, 313 N.E.2d at 731, 357 N.Y.S.2d at 413.

[41] *Id.* at 259, 313 N.E.2d at 731, 357 N.Y.S.2d at 414.

[42] *Id.* at 260, 313 N.E.2d at 732, 357 N.Y.S.2d at 414.

[43] *Id.* at 260, 313 N.E.2d at 732, 357 N.Y.S.2d at 414-15.

[44] *Id.* In any case, there are some circumstances in which the court may have no contemporaneous opportunity to review the adequacy of counsel's representation. In People v. Corona, 149 Misc. 2d 581 (Sup. Ct. Bronx County 1991), the defendant's attorney failed to consult with his client before waiving the defendant's statutory right to

III. SUMMARY: INTERVENTION AT TRIAL

The adversarial trial functions as intended when the assumptions of the adversarial model are reflected in the realities of the courtroom: prosecution and defense counsel are effective adversaries, and an even-handed trial judge regulates and clarifies the fact-finding process, but does not advocate, or appear to advocate, the position of either side. When either attorney performs his or her task inadequately, however, judicial intervention may be appropriate or even required. Whether to intervene, and what form any intervention should take, necessarily varies with the nature and the circumstances of the case, the extent of the problem, and the personalities and abilities of the parties and the court.

Judicial intervention of any kind is not without its own risks. When a trial judge fails to intervene at all, or intervenes with undue restraint, the public interest may pay the price for the prosecutor's failings or the defendant may be unjustly convicted by the inadequacies of his attorney. On the other hand, when the judge's intervention is too intrusive, it can interfere with the legitimate strategy of the prosecutor or the defendant, undermine the relationship between defendant and counsel, or prejudice the jury hearing the case. If there is an acquittal, there will be no review of the judge's conduct; only if there is a conviction may an appellate court decide whether the trial judge intervened too little or too much.

Despite the dangers, there are unquestionably cases in which judicial intervention is both appropriate and necessary. In some circumstances a judge need do very little. By interjecting a single question, or by beginning a line of questioning, the judge may affirmatively, but gently, provoke the development of relevant facts. In an extreme case, a judge may introduce and develop completely an area neither side chooses to address. Alternatively, the judge may interrupt the trial and point out—at the bench or in chambers—an unraised or inadequately developed

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appear before the grand jury hearing his case. Once indicted, and now represented by a new attorney, the defendant challenged the adequacy of his pre-indictment representation. Finding the attorney's "unilateral waiver" of his client's rights at a critical stage of the proceedings to be "such a complete lack of meaningful representation as to be the equivalent of no representation at all," *id.* at 583, the court dismissed the indictment, requiring the case to be re-presented to the grand jury.

issue, leaving to the prosecutor or defense counsel the choice of whether or not to pursue it.[45] Where, in particular, defense counsel announces an intention to forego an approach the judge thinks would likely be advantageous to the defendant, the judge might inquire into the existence, if not the wisdom, of any strategy underlying the decision to do so. If the strategy seems implausible, the judge might even question the defendant directly about the defendant's understanding and acceptance of counsel's approach. By gauging the form of intervention to the needs of the case and the abilities of the parties, the trial judge can maintain and display the respect due to the opposing parties, while still making certain that the trial is a sufficiently full and fair exploration of the issues in the case.

IV. The Adversarial Model in Plea Bargaining

The adversarial model is applicable not only to contested trials, but also to guilty pleas and plea bargaining, the process by which the overwhelming majority of New York's criminal cases are disposed.[46] In this process, long an important part of the American criminal justice system,[47] prosecutor and counsel agree that the defendant will plead guilty to a particular charge or charges, often less serious than the most serious charge the defendant faces, and that in exchange the remaining charges will be dismissed. Usually (although not always) as a part of this process, the parties also agree upon the sentence, or at least the

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[45] Of course, this approach would make certain that the jury did not perceive the trial judge as having adopted an advocate's role. It would have another advantage as well. Because the judge is often unfamiliar with the details of the evidence, and becomes privy to the parties' strategies only as they become apparent at trial, the failure to consult with them before intervening may result in unwarranted and harmful interference with a strategy based upon considerations of which the judge is unaware. Prior consultation permits the judge to determine, informed by the parties, whether intervention is truly necessary or appropriate.

[46] *See* note 5 *supra*.

[47] Throughout history the punishment to be imposed upon wrongdoers has [been] subject to negotiation (see Comment, The Plea Bargain in Historical Perspective, 23 Buffalo L. Rev. 499, 500-501). Plea negotiation, in some form, has existed in this country since at least 1804 (see *id.* at 512). . . . Moreover, convictions upon guilty pleas, pleas probably to lesser crimes, have been high since 1839 both in rural, where there is little trial court congestion, and in urban areas, where there is much congestion . . . .

People v. Selikoff, 35 N.Y.2d 227, 232-33, 318 N.E.2d 784, 788, 360 N.Y.S.2d 623, 628-29 (1974) (some citations omitted), *cert. denied*, 419 U.S. 1122 (1975).

maximum sentence, that the judge will impose. The agreed upon plea and sentence are then submitted to the judge for approval.[48] There are, of course, variations. In some jurisdictions prosecutors negotiate over the crime to which a defendant will be permitted to plead, but—on the theory that sentencing is exclusively the court's function—refuse to participate in bargaining over the sentence. Instead, prosecutors in such jurisdictions consent to a plea to a crime carrying an adequate scope of punishment, provide the court with any available information about the nature of the offense and the history and circumstances of the offender, and make no (or at least no specific) recommendation at the time of plea or sentence.[49] Some courts, at the time a plea is taken, refuse to promise the defendant any particular sentence, or promise only that the sentence will not exceed a "cap" or maximum term.

On the other hand, depending on the particular jurisdiction, the particular court, or the particular situation, the judge may take an active part in bargaining over plea and sentence, seeking a compromise in the parties' respective positions. The judge may, for example, point out to the prosecution any weaknesses in its case, or describe to defense counsel the prosecution's strengths. Similarly, the judge may insist that the sentence demanded by the prosecutor is unduly harsh, or that the one sought by the defense is unduly lenient. Where the defendant is to plead guilty to the entire indictment (or, as a matter of practice, to the most serious count in it), the agreement of the prosecutor is not required. Sentence bargaining may then occur directly between defense counsel and the judge, leaving the prosecutor with the right to object to the agreed-upon sentence but not to prevent its imposition.[50]

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[48] The court of appeals has described the negotiated sentence as "an integral part of the plea bargaining process." People v. Farrar, 52 N.Y.2d 302, 306, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981).

[49] *See* ABA STANDARDS, *supra* note 10, § 5.3 (Sentencing Alternatives and Procedures).

[50] If the defendant agrees to plead guilty to every count in the indictment, the prosecutor's consent is not necessary, N.Y. CRIM. PROC. LAW § 220.10(2) (McKinney 1982), and the court is free to impose any authorized sentence, whatever the prosecutor's recommendation. If the defendant offers to plead guilty to less than every count in the indictment, then the prosecutor's consent to the plea is required by law. *Id.* § 220.10(3)-(4). Thus, where the most serious charge carries a mandatory sentence more severe than that which the defendant is willing to accept and the court is willing to impose, the

In New York plea bargaining flourishes with the active participation of the courts as well as the parties. Prosecutors who refuse to engage in sentence bargaining are rare, and judges who do so even rarer. Not surprisingly, the process and results of plea bargaining have become a regular and routine subject of appellate review.

In *People v. Selikoff* the New York Court of Appeals set forth the many salutary purposes served by plea bargaining.[51] In particular, the court made reference to its "essential" function in relieving calendar congestion, noting that "in budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts but also to local detention facilities."[52] The court also accepted the observations of scholars, presidential commissions and bar association projects that plea negotiations permit both prosecution and defense to avoid " 'the inevitable risks and uncertainties of trial,' "[53] allow the system to avoid delay by telescoping the judicial process, make it possible for law enforcement to exchange leniency for information and assistance, and enable the trial judge to individualize justice when a mandatory penalty is too harsh for a particular offender.[54]

In the framework of plea bargaining, the adversarial system no longer operates by contesting questions of fact and law before a neutral fact-finder. Instead, it relies on the opposing parties to agree upon a resolution that is consistent with the interests of each, subjecting their agreement to a judge whose function is to insure that the agreed-upon disposition is consistent with the interests of justice. In reaching such agreements, the parties and

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prosecutor can prevent the court from promising the defendant the lower sentence by withholding consent to a plea to a lesser offense. Generally, however, when the defendant agrees to plead guilty to one or more of the most serious counts in the indictment, even if the court promises a sentence lower than that recommended by the prosecutor, the prosecutor will not require the defendant to go through the sometimes tedious ritual of pleading guilty to each and every count in an indictment, but will be content instead to place on the record an objection to the sentence.

[51] 35 N.Y.2d 227, 232-33, 318 N.E.2d 784, 788, 360 N.Y.S.2d 623, 628-29 (1974). *See also* People v. Seaberg, 74 N.Y.2d 1, 8, 541 N.E.2d 1022, 1024-25, 543 N.Y.S.2d 968, 970-71 (1989).

[52] *Selikoff*, 35 N.Y.2d at 233-34, 318 N.E.2d at 788, 360 N.Y.S.2d at 629.

[53] *Id.* (quoting UNITED STATES PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967)).

[54] *Id.* at 233-35, 318 N.E.2d at 788-89, 360 N.Y.S.2d at 629-30.

the judge nonetheless take on roles similar to those assigned them in the model of the adversarial trial—advocacy by the attorneys and umpiring and fact-finding by the judge—and some of the same analysis applies. When a plea agreement is reached between the prosecutor and defendant, however, the judge is cast in at least a quasi-inquisitorial role. Because the parties are both advocates for their agreed-upon disposition, the judge must take the initiative to inquire into the relevant facts and circumstances surrounding the proposed plea and sentence.

As the judge need not act as an "automaton" when the parties present evidence during a trial, so the judge need not accept a particular guilty plea or impose a particular sentence merely because both are agreeable to the prosecutor and defendant. A defendant may "as a matter of right" plead guilty to all the charges in an indictment, but a plea to anything less is acceptable only "with the permission of the court."[55] Using this discretion the judge may decide that although the disposition is acceptable to the prosecutor, the conduct attributed to the defendant is too serious to permit a plea to a lesser crime, or that the plea is acceptable but the promised sentence too high or too low.[56] Similarly, although the defendant has agreed to plead guilty, when any question arises during the plea proceedings, the judge must assure that the defendant has been fully advised by counsel of the consequences of the plea, that the plea is voluntary, and that there is a factual basis for the defendant's guilt.[57]

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[55] N.Y. CRIM. PROC. LAW § 220.10(3)-(4) (McKinney 1982). *See* People v. Esajerre, 35 N.Y.2d 463, 323 N.E.2d 175, 363 N.Y.S.2d 931 (1974); People v. Melo, 160 A.D.2d 600, 554 N.Y.S.2d 530 (1st Dep't 1990), *appeal denied*, 76 N.Y.2d 792, 559 N.E.2d 691, 559 N.Y.S.2d 997 (1990).

[56] In exercising this discretion, the court is obligated to consider the prosecutor's views, but it is not bound by them. As the American Bar Association Standards remind us, the trial judge "should reach an independent decision on whether to grant charge or sentence concessions" and should approve them only "when the interest of the public in the effective administration of criminal justice would thereby be served." *See* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 47 (1981). While there appears to be no reported case in New York restricting the authority of a court to reject a negotiated plea, see United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973), and GOLDSTEIN, *supra*, at 48-51.

[57] People v. Nixon, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967). *See also* People v. Lebron, 68 A.D.2d 836, 414 N.Y.S.2d 518 (1st Dep't 1979) (upon his plea of guilty to arson, defendant's admission that he threw a cigarette on floor was insufficient to establish his intent to cause a fire). Even when the defendant denies one or more of the elements of the crime to which he is pleading guilty, he may be permitted to plead guilty to avoid the risk of conviction of a more serious offense. *See* People v. Serrano, 15

As in the conduct of a trial, however, the judge may go too far and the defendant's counsel may do too little. The judge may offer "substantial benefits" to a defendant to induce a plea of guilty, including conviction on a lesser charge and imposition of a lesser sentence, even though such incentives are "bound to have the concomitant effect of discouraging a defendant's assertion of his trial rights."[58] Nonetheless, the judge's participation in negotiating and accepting a plea can exceed permissible bounds. The judge may not coerce a guilty plea by "threatening the defendant with dire consequences,"[59] or by "the explicit threat of a heavier sentence should he choose to proceed to trial."[60]

Just as a defendant may have ineffective assistance of counsel at trial, so defense counsel may inadequately serve the defendant in negotiating and entering into a plea. Defendants who have chosen to forego their right to trial may nonetheless challenge the resulting convictions. In reviewing such claims, an appellate court will look to the record of the plea and sentence to determine what it can about the adequacy of the advice given and the possible strategy behind the acceptance of the plea.[61]

N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965). In such circumstances it is particularly important that the judge make inquiry to insure that the defendant's plea is knowing and voluntary. *See* People v. McDougle, 67 A.D.2d 989, 990, 413 N.Y.S.2d 426, 428 (2d Dep't 1979) ("where defendant's story does not square with the crime to which he is pleading, the court should take all precautions to assure the defendant is aware of what he is doing.").

[58] People v. Pena, 50 N.Y.2d 400, 411-12, 406 N.E.2d 1347, 1353, 429 N.Y.S.2d 410, 416 (1980). As a logical result, of course, "it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea." *Id.* at 412, 406 N.E.2d at 1353, 429 N.Y.S.2d at 416.

[59] People v. Fulmore, 84 A.D.2d 566, 443 N.Y.S.2d 260 (2d Dep't 1981).

[60] People v. Griffith, 80 A.D.2d 590, 435 N.Y.S.2d 767 (2d Dep't 1981).

[61] *Compare* People v. Nixon, 21 N.Y.2d at 350-51, 234 N.E.2d at 694, 287 N.Y.S.2d at 668 (conviction of defendant Lang reversed where "the record [did] not establish that there must have been adequate consultation between lawyer and client" and where, during the proceedings on sentencing, "the only help [defendant] received from his counsel was advice to listen to the judge") *with* People v. Angelakos, 70 N.Y.2d 670, 512 N.E.2d 305, 518 N.Y.S.2d 784 (1987) (through defense counsel's efforts, defendant's primary concerns—to avoid jail and multiple criminal charges—were satisfied, and strategy of plea, while alleged to be based upon an erroneous view of the relevant law, "might well have been pursued by 'reasonably competent attorney' "). *See also* People v. Bourdonnay, 160 A.D.2d 1014, 1015, 555 N.Y.S.2d 134, 136 (2d Dep't 1990) ("Under the circumstances of this case, where the record clearly indicates no basis for allowing the withdrawal of the plea, or even holding a hearing thereon, defense counsel's failure to join in the defendant's *pro se* motion to withdraw his plea did not constitute ineffective assis-

However, because the record of a plea is much sparser than that of a trial, the appellate examination is inevitably that much more limited. If the judge who took the plea made inquiry of the defendant on the record, assuring that the defendant understood the consequences of the plea and the rights the defendant waived by entering into it, the resulting conviction is unlikely to be upset on appeal.[62]

More questions arise concerning the respective roles of the judge and the parties when the disposition of the case agreed upon at the time of the plea appears unacceptable to the judge at the time of the sentence. When and in what way is the judge bound after accepting a plea and promising a particular sentence? Under what circumstances may the defendant or the prosecutor insist upon specific performance of a promise made by the other party or by the judge? Under what circumstances may either insist on withdrawal of the plea?

Around questions such as these, a body of law has developed in New York with two central tenets. The first tenet is that by making a sentence commitment at the time of the plea, the judge does not surrender the obligation to reconsider the appropriateness of the promise at the time of sentence. As the court of appeals made clear in *People v. Selikoff*, "any sentence 'promise' at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent presentence report or information obtained from other reliable sources."[63]

Should the judge determine that the previously agreed-upon sentence is not appropriate, the second tenet of this law of plea

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tance of counsel.").

[62] *See, e.g.*, People v. Black, 170 A.D.2d 383, 566 N.Y.S.2d 273 (1st Dep't 1991), *appeal denied*, 77 N.Y.2d 992, 575 N.E.2d 404, 571 N.Y.S.2d 918 (1991). If, of course, the record of the plea and sentence provide an insufficient basis upon which to resolve the defendant's claim of ineffective assistance of counsel, a hearing may be ordered. *See, e.g.*, People v. Gonzalez, 171 A.D.2d 413, 566 N.Y.S.2d 639 (1st Dep't 1991).

[63] 35 N.Y.2d 227, 238, 318 N.E.2d 784, 791, 360 N.Y.S.2d 623, 633 (1974). For all felony convictions, and for misdemeanor convictions for which certain sentences are to be imposed, the court must order a presentence investigation and may not sentence the defendant until a written report of that investigation is received. N.Y. CRIM. PROC. LAW § 390.20 (McKinney 1983 & Supp. 1992). The presentence investigation "consists of gathering information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habits." *Id.* § 390.30(1).

bargaining comes into play. If the judge intends to impose a sentence greater or lesser than that promised as part of the plea agreement, the side adversely affected by the judge's decision is provided with a remedy: either specific performance of the agreement or an opportunity to withdraw from it. Which alternative it is to be, however, is generally a matter for the judge to decide, unless the particular circumstances of the case make only one or the other possible or appropriate.

In *Selikoff* both the prosecutor and defense counsel represented to the judge that the defendant's role in a real estate swindle was peripheral, and in reliance on those representations the judge promised at the time of his plea that the defendant would not be sentenced to imprisonment. Before sentencing, however, the judge presided over the trial of Selikoff's codefendants and heard evidence that Selikoff was in fact a principal participant in the criminal activity. As a result, on the day of sentence the judge announced that he could not keep his promise and offered the defendant an opportunity to withdraw his plea. The defendant declined to do so, and insisted that the judge impose the promised sentence. Instead, the judge sentenced the defendant to five years imprisonment, and the defendant appealed.

In reviewing the defendant's sentence, the court of appeals explicitly refused to apply the principles of contract law to the plea bargaining process, explaining that "the strong public policy of rehabilitating offenders, protecting society, and deterring other potential offenders presents considerations paramount to benefits [arising from] the power of individuals to 'contract.' "[64] Accordingly, while the defendant was not required to accept a sentence greater than the one that had induced his plea, the judge could not be compelled to fulfill the promise. There were thus two options: the judge could impose the promised sentence or afford the defendant an opportunity to withdraw his plea. Which option to choose "rest[ed] in the discretion of the sentencing court" and was not up to the defendant.[65] Here the judge decided to permit the defendant to withdraw his plea rather than impose the non-incarceratory sentence he had promised. Informed that the judge intended to impose a prison sentence, the defendant nonetheless chose to let his guilty plea

[64] *Selikoff*, 35 N.Y.2d at 238, 318 N.E.2d at 791-92, 360 N.Y.2d at 633-34.
[65] *Id.* at 239, 318 N.E.2d at 792, 360 N.Y.S.2d at 634.

stand. Under these circumstances, the judge was free to impose the higher sentence.[66]

In other situations, however, only one of the two options may be available at the time of sentence and the judge may therefore have no choice to make. In *People v. Esposito*,[67] for example, the defendant absconded after entering a guilty plea which had been conditioned upon a promise of a maximum sentence of four years in prison. When he finally returned and was sentenced two years later, he asked to withdraw his plea because of prejudicial newspaper articles linking him to unrelated events. The judge denied his request and, in spite of and without reference to his promise at the time of the plea, sentenced the defendant to seven years imprisonment.

Although the defendant did not object to the sentence, the court of appeals declined to find that he had thereby waived his right to the benefit of the promise. Finding error in the sentencing judge's failure to advise the defendant that he could no longer impose the promised sentence, the court of appeals reversed the conviction. However, because the case might no longer be prosecutable, the court refused to permit the defendant the option of withdrawing his plea. Instead, it required specific performance of the four-year sentence originally promised.[68] Ironically, the result was a conviction based upon a plea the defendant had once, but no longer, wanted and a sentence the trial court had once, but no longer, believed was appropriate.

Specific performance of the sentencing promise may also be required where withdrawal of the plea may cause prejudice to the defendant. In *People v. McConnell*[69] the defendant had

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[66] *Id.* at 245, 318 N.E.2d at 795, 360 N.Y.S.2d at 639.

[67] 32 N.Y.2d 921, 300 N.E.2d 438, 347 N.Y.S.2d 70 (1973).

[68] *See* People v. Selikoff, 35 N.Y.2d at 240, 318 N.E.2d at 793, 360 N.Y.S.2d at 635 (stating that, "In *Esposito*, vacating the plea may well have resulted in dismissal of the charges because of the difficulty, if not inability, of the prosecution to locate the witnesses necessary for trial of the then stale indictments"). For a more recent example, see People v. Tindle, 61 N.Y.2d 752, 460 N.E.2d 1354, 472 N.Y.S.2d 919 (1984). There the prosecutor violated a plea agreement not to take a position at the time of sentence by making remarks concerning the defendant's conduct that were "tantamount to a request for a substantial prison term." *Id.* at 754, 460 N.E.2d 1355, 472 N.Y.S.2d at 920. Nonetheless, because the guilty plea was taken after a two-week trial and closing arguments, the court found the prosecution would be prejudiced if the defendant were permitted to withdraw the plea. Accordingly, it ordered instead that the defendant be resentenced before another judge. *Id.* at 754-55, 460 N.E.2d at 1355, 472 N.Y.S.2d at 920.

[69] 49 N.Y.2d 340, 402 N.E.2d 133, 425 N.Y.S.2d 794 (1980).

placed himself in a "no-return" position by testifying in compliance with his plea agreement against others who had participated in the crime. The court found that by his cooperation, the defendant had both waived his privilege against self-incrimination and risked retaliation from those against whom he had testified. Holding that the new information the sentencing judge relied upon in revoking his promise (that the defendant had used a knife in committing the crime) was too insignificant to justify the harsher sentence, the court ordered the originally promised sentence imposed.[70]

In New York the prosecution, as well as the defendant, may seek to hold the judge to the terms of a plea bargain for which the prosecution's consent was required. In *People v. Farrar*[71] the defendant was charged with murder, attempted murder, robbery and burglary, and pleaded guilty to a lesser-included manslaughter charge in satisfaction of the indictment. The judge promised at the time of the plea that if the defendant had a prior felony conviction, she would be sentenced to twelve-and-one-half to twenty-five years in prison. The presentence investigation confirmed that the defendant had indeed been previously convicted of a felony, but the defendant nonetheless urged the court to impose a lesser sentence of ten to twenty years. The judge agreed that the lower term was appropriate, but feeling "morally and professionally bound to follow that negotiated plea,"[72] imposed the longer sentence it had originally promised.

On appeal from the sentence, the appellate division held that the sentencing judge had improperly considered himself bound by his promise and ordered that the defendant be resentenced free of this self-imposed constraint. In reviewing this order, the court of appeals reaffirmed that the sentencing commitment made at the time of a plea agreement is not final and is

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[70] *Id.* Similarly, in People v. Danny G., 61 N.Y.2d 169, 461 N.E.2d 268, 473 N.Y.S.2d 131 (1984), the court of appeals followed *McConnell* in requiring specific performance of a sentence promised to a defendant who testified at the trial of his accomplice. In *Danny G.* the sentencing judge had conditioned a promise of probation not only upon the defendant's cooperation, but also upon a favorable presentence report. The report the judge received revealed that the defendant had, since his arrest for this crime, been arrested for two others, but the court of appeals found that because the two arrests preceded the plea agreement, they were an insufficient basis for the judge to refuse to honor his promise.

[71] 52 N.Y.2d 302, 419 N.E.2d 864, 437 N.Y.S.2d 961 (1981).

[72] *Id.* at 305, 419 N.E.2d at 865, 437 N.Y.S.2d at 962.

subject to reconsideration based upon the information received between the time of plea and sentence. Logically, upon receipt of such information,

> [j]ust as the court must be free to impose a more severe sentence when warranted, the plea and sentence process must leave the court leeway to consider a lesser penalty when the facts and justice so require. No less can be accepted if the integrity of the criminal justice system is to be maintained.[73]

The court also recognized, however, that when a defendant pleads guilty to an offense other than the most serious charged, the commitment to a particular sentence is not only a condition of the defendant's plea, but also of the prosecution's consent to it. Thus, as the court had previously recognized the defendant's right to withdraw a plea if the judge decided that a harsher sentence was necessary, so it found that the prosecution had a similar right to withdraw its consent to the plea should the judge intend to impose a more lenient one.[74] The court reasoned that the prosecution's right to withdraw consent at the time of sentence was implicit in the statute requiring its consent to a lesser plea, by which the legislature had recognized "the prosecutor's independent role and interest concerning the course the prosecution will take."[75]

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[73] *Id.* at 306, 419 N.E.2d at 865-66, 437 N.Y.S.2d at 963.

[74] However, just as a change of circumstances may affect the defendant's right to insist on a particular remedy for a violation of a sentence commitment by the court, so may it affect the prosecutor's right to withdraw consent to the defendant's plea. In *Farrar* the court specifically noted that "this is not to say that the People's application [to withdraw consent to a plea] must be granted in all cases, for among other things, prejudice to a defendant following a plea may prevent restoration to *status quo ante* and render vacatur of the plea inappropriate." *Id.* at 308, 419 N.E.2d at 866, 437 N.Y.S.2d at 963, *citing* People v. McConnell, 49 N.Y.2d 340, 402 N.E.2d 133, 425 N.Y.S.2d 794 (1980). Thus where a defendant has cooperated against others, or where favorable witnesses once available to the defendant can no longer be found, the prosecution may be required to accept less than the sentence for which it exchanged its consent to a lesser plea.

[75] *Farrar*, 52 N.Y.2d at 307, 419 N.E.2d at 866, 437 N.Y.S.2d at 963. The statute provides that the appellate division may reverse or modify a sentence if it concludes that the "sentence, though legal, was unduly harsh or severe." N.Y. CRIM. PROC. LAW § 470.15(6)(b) (McKinney 1983). In People v. Thompson, 60 N.Y.2d 513, 458 N.E.2d 1228, 470 N.Y.S.2d 551 (1983), the appellate court had reduced an agreed-upon sentence as unduly harsh, but had believed itself required by *Farrar* to give the prosecution leave to withdraw its consent to the plea. The court of appeals, however, found that *Farrar*'s logic had no application to a sentence reduced as excessive on appeal and held the prosecutor bound by his consent to the plea. Despite the decision in *Thompson*, the power of the

V. SUMMARY: THE ADVERSARY SYSTEM IN PLEA SENTENCING

When negotiated pleas and sentences replace contested adversarial trials, New York's criminal justice system continues to pay homage to the adversarial model by showing substantial deference to agreements reached by the parties. Here, too, though, the trial judge retains the right to reject an agreed-upon plea and sentence because it is not a reasonable and just resolution of the case, or because of an insufficient showing that a factual basis for the plea exists or that the defendant's plea offer is knowing and voluntary.

Even after making a commitment to a particular sentence at the time of the plea, the judge may withdraw the promise should new and significant facts come to light before sentence is imposed. In such a situation, the judge may impose a higher sentence only with the defendant's consent, and a lower one only with the prosecutor's. Should that consent not be forthcoming, the defendant or prosecutor may, depending on the circumstances, insist that either the judge impose the sentence originally promised or that the case proceed to trial. Limited appellate review is available to insure that the defendant was adequately represented in reaching and entering into the agreement and that the sentence—whether it is the one agreed upon, or one greater or lesser—was justified. Thus, as in a contested trial, the adversarial model is served by giving the interests of the parties recognition and full play, but with the process subject to judicial approval and review.

As in a contested trial, judicial intervention must be delicately gauged. On the one hand, a judge who participates too aggressively in plea discussions risks coercing the defendant's plea. On the other, a judge who takes no part in such negotiations and then unquestioningly defers to the parties' agreement abdicates his function and risks the uninformed imposition of an

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appellate division to review agreed-upon sentences has rarely been exercised. In *Thompson* itself, the court of appeals acknowledged that the risk that an appellate court would reduce a negotiated plea was "minimal." 60 N.Y.2d at 520, 458 N.E.2d at 1231, 470 N.Y.S.2d at 554. In fact, appellate courts routinely and formalistically reject such appeals. In any case, the court of appeals has recently approved the procedure, now commonly employed by prosecutors, in which a defendant waives the right to appeal as one of the terms of the plea. People v. Seaberg, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989). Given such a waiver, the defendant is precluded from appealing his sentence as unduly harsh.

unjust result. A judge should, of course, reject a sentencing commitment that appears (first from the plea allocution, or later, from the presentence report and the sentencing proceedings) to be unacceptably harsh or lenient. Similarly, a judge who concludes that the defendant does not understand the consequences of the plea offer, or has not voluntarily entered into it, may simply not accept it. At the same time, however, a judge must recognize that forcing a case to trial could produce an outcome adverse to the party the judge sought to protect by rejecting the plea. When, for example, a judge refuses a defendant's offer to plead guilty to a lesser crime before trial, and the jury convicts the defendant of a more serious crime thereafter, it will be small consolation for the defendant that the judge rejected the plea to protect the defendant from an unknowing waiver of the right to a trial.

Here, too, both the theory and the reality of the adversary process dictate prudence in the exercise of the judge's discretion. There is no question that the trial judge may reject a negotiated plea. Nor is there any question that a judge is the final arbiter of the appropriate sentence in any case. However, where—as in New York—the dockets are heavy and bargaining over sentences is routine, judges are inevitably called upon to pass judgment in cases with which they have little familiarity. Before trial, a judge has no routine access to a "dossier" of the case, no direct knowledge of the credibility of the witnesses, and cannot divine what legal questions concerning the admissibility or sufficiency of the evidence will arise if the case is tried. Before trial, the parties presumably have a greater knowledge of the factual and legal issues in the case, as well as an adversarial stake in the outcome. When each has agreed upon an appropriate resolution of the case, a trial judge should make careful inquiry before rejecting it because of the judge's own and different view of the public's best interest or the defendant's.

CONCLUSION

In New York, as elsewhere in the United States, the criminal justice system operates imperfectly. It performs at its best with experienced adversaries, who skillfully present those few cases that go to trial and carefully and responsibly negotiate plea agreements for the many more that do not. With such advocates, the judge's role is clear and unconfused, limited—as the

adversarial model would have it—to supervising the trial process and determining whether agreed-upon dispositions are reasonable and just.

The criminal justice system, unfortunately, cannot always work so well. Responding in a particular case to the perceived inadequacies of either the prosecutor or defense counsel, or both, the judge may play an essential role in insuring that justice is done. However, when counsel for either side seems inexperienced, unprepared, or incompetent, role confusion may result. A judge too determined to function as a neutral and detached magistrate may hesitate and intervene too little. A judge too anxious to compensate for the attorneys' failings may leap into the fray and intervene too much.

During a trial or in considering a possible plea, a judge may decline to give the defense or prosecution help that one or the other desperately needs. Alternatively, the judge may give help to either which is not only unwanted, but inconsistent with that side's reasonable approach to the case. In the course of a trial, for example, a judge may permit critical facts or legal issues to be ignored by the oversight of the attorneys, or the judge may bring them out in a manner that prevents or inhibits the side adversely affected from responding. Worse, the judge may prejudice a jury that confuses judicial acquiescence or intervention with advocacy of either the prosecution or defense case. Before trial, the judge may inappropriately defer to the parties' agreed-upon disposition, ignoring a felt concern that the defendant was not well counseled or that the agreement does not sufficiently serve the public. Alternatively, a judge may refuse to accept a guilty plea only to preside over a trial ending in a verdict that compounds the injustice the judge sought to avoid.

In sum, when the opposing parties do not play their own roles effectively in New York, neither adversarial theory nor the case law requires trial judges to be "automatons" or potted plants. Neither, however, does either permit judges to assume the aggressive role assigned them in the inquisitorial model. Adversarial systems are built on the assumption that two sides must be presented, that each side is best positioned to present its own view, and that unbiased judges cannot better develop the truth by their own initiative. A judge who does intervene in an adversarial system must not cross the line from neutrality to advocacy. A judge can shore up the parties when they fail to per-

form adequately, but has not the information, the position, or the responsibility to substitute effectively for them. In the final analysis, the judge simply cannot take on tasks the adversarial model unequivocally assigns to others in the process.