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CRIMINAL LAW—PLEA BARGAINING AGREEMENTS—RIGHT TO ENFORCEMENT DERIVED FROM FIFTH AND SIXTH AMENDMENTS—Cooper v. United States, 594 F.2d 12 (4th Cir. 1979)

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NOTES

CRIMINAL LAW—PLEA BARGAINING AGREEMENTS—RIGHT TO ENFORCEMENT DERIVED FROM FIFTH AND SIXTH AMENDMENTS—*Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979).

I. INTRODUCTION

Ralph Cooper, following a narcotics arrest, became a Drug Enforcement Administration (DEA) informer under the federal government's Witness Protection Program.[1] He subsequently made several valuable contacts for DEA agents resulting in the indictments of several persons on narcotics charges. While under the DEA's protection, Cooper contacted one of the persons against whom he was to testify and offered to remove himself as a witness for $10,000.[2] As a result, Cooper was arrested and indicted on two counts of bribery of a witness[3] and two counts of obstruction of justice.[4]

Approximately two months before Cooper's trial, an assistant United States attorney met with Cooper's lawyer to discuss a possible plea bargain.[5] The Government's attorney proposed a plea agreement under which Cooper would be removed from the Witness Protection Program, remain incarcerated, continue to cooperate with the federal authorities, plead guilty to one count of obstruction of justice, and testify on three occasions in the ongoing narcotics trial. In return, the Government would bring Cooper's cooperation to the court's attention and would dismiss all other counts of the indictment. Cooper's lawyer agreed to communicate

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1. The Witness Protection Program evolved from the Organized Crime Control Act of 1970, 18 U.S.C. § 3481 (1976) (*see* note preceding § 3481) and is funded under 28 U.S.C. § 524 (1976). The program, operated by the United States Marshals Service, provides assistance to select government witnesses including protection, new identities, relocation, housing, and medical care. [1979] ATT'Y GEN. ANN. REP. 79-80.

2. Cooper v. United States, 594 F.2d 12, 13-14 (4th Cir. 1979).

3. 18 U.S.C. § 201(e) (1976).

4. *Id.* § 1503.

5. *See* notes 17-28 *infra* and accompanying text for a discussion of the plea bargaining process.

the proposal to Cooper and to report back to the Government promptly.[6]

After being fully informed about the plea bargain, Cooper[7] agreed to the proposal. Meanwhile, however, the assistant United States attorney had met with his superior and had been instructed to withdraw the proposal. Approximately three hours later, Cooper's attorney contacted the assistant United States attorney, but before he was able to convey Cooper's acceptance, the Government's attorney revoked the offer.[8] Cooper moved to compel enforcement of the plea bargain proposal at a pretrial hearing, but the motion was denied by the district court.[9] He was convicted[10] and sentenced to fifteen years imprisonment.[11]

In *Cooper v. United States*,[12] Cooper appealed the district court's refusal to compel enforcement of the Government's plea bargain proposal. The United States Court of Appeals for the Fourth Circuit found constitutional error, vacated the judgment, and remanded with instructions that Cooper be allowed to enter a guilty plea on one count of obstruction of justice and that all other counts be dismissed.[13] The court held that the Government's failure to honor its plea proposal violated Cooper's guarantee of substantive due process under the fifth amendment and denied him effective assistance of counsel under the sixth amendment.[14] This decision enforcing the Government's plea proposal on constitutional grounds was a substantial departure from existing precedent which uni-

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6. 594 F.2d 12, 15 (4th Cir. 1979). At oral argument, the court was advised by Cooper's counsel that the assistant United States attorney, in making the plea proposal, had represented that it would be held open for acceptance for a week. The record indicates a substantial concession on this point by the attorney for the Government. The Government's attorney testified as to the validity of the proposal on cross-examination at the pretrial hearing of the motion to compel enforcement of the plea proposal. *Id.* at n.2.

7. Cooper was incarcerated during the plea offer and acceptance. *Id.* at 15.

8. The assistant United States attorney had been instructed by his superior, the United States Attorney for the District of Columbia, to withdraw the offer. *Id.*

9. *Id.*

10. Cooper was convicted on two counts for bribery of a witness under 18 U.S.C. § 201(e) (1976), and on two counts for obstruction of justice under 18 U.S.C. § 1503 (1976).

11. 594 F.2d 12, 15 (4th Cir. 1979).

12. *Id.* at 12.

13. The court of appeals determined that the defendant Cooper would be allowed to enter a plea of guilty to one count of obstruction of justice under 18 U.S.C. § 1503 (1976), and that upon the entry of a guilty plea to the single count, the indictment would be dismissed as to all remaining counts. *Id.* at 21.

14. *Id.* at 18.

formly had held that plea agreements were to be analyzed using contract law analogies.[15] Instead, the court held that, in appropriate circumstances, a constitutional right to a plea proposal may arise even before any technical contract has been formed.[16]

II. BACKGROUND

Plea bargaining is the disposition of criminal charges by agreement between the prosecutor and the accused.[17] This process plays a critical role in our judicial system, accounting for the disposition of approximately seventy percent of all criminal cases.[18] If every criminal charge required a full-scale trial, our state and federal courts would be flooded. Court facilities would have to be expanded and the number of court personnel greatly increased[19] to handle the volume of cases.[20] Without plea bargaining our system would be tremendously overburdened. Plea bargaining, therefore, is an essential part of our criminal justice system as the system is presently structured.[21]

Though integral to the American legal system, plea bargaining contrasts sharply with the traditional disposition of cases by jury trial. Thus, in this sense, plea bargaining has dramatically transformed the criminal justice system.[22] It has shifted the criminal

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15. *See* notes 47-60 *infra* and accompanying text for a discussion of the use of contract law analogies in the plea bargaining process.

16. 594 F.2d at 18.

17. Santobello v. New York, 404 U.S. 257, 260 (1971).

18. *See* [1979] AD. OFF. U.S. CTS., ANN. REP. 108 (Table 55) (27,295 of the 32,913 criminal convictions in federal district courts during the 12-month period ending June 30, 1979 were the result of guilty pleas and pleas of nolo contendere). Chief Justice Burger has stated that in the federal system alone, the number of trials would double if the percentage of guilty pleas decreased by just 10%. Burger, *The State of the Judiciary*, 56 A.B.A.J. 929, 931 (1970).

19. In the 12-month period ending June 30, 1979, 33,442 criminal cases were terminated, amounting to a disposition rate of 68.9%. The disposition rate is determined by combining the number of cases which have been filed or are pending and dividing them by the number of cases which have been terminated. [1979] AD. OFF. U.S. CTS., ANN. REP., *supra* note 18, at 107. In 1979, 3,667 criminal jury trials were completed in the district courts, the lowest number completed since 1967. *Id.* Table 59, at 114. The low disposition rate and the low number of trials completed indicate that the federal court system would be incapable of handling the increased trial load if plea bargaining were not allowed. *See also* Burger, *supra* note 18, at 929.

20. Santobello v. New York, 404 U.S. 257, 260 (1971).

21. *Id.* at 261.

22. *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

prosecutorial function away from the traditional model in which an impartial trier of fact determines guilt or innocence after a formal adversarial process.[23] Instead, plea bargaining encompasses informal negotiations between the defense attorney and the prosecutor to arrive at a mutually satisfactory plea and recommended sentence. The plea bargaining system has eliminated many of the risks,[24] uncertainties,[25] and practical burdens[26] of a trial, permitting the judiciary and prosecution to concentrate their resources on those cases which warrant the most attention.[27] Additionally, law enforcement is furthered by permitting the state to exchange leniency in sentences for information and assistance helpful in prosecuting cases.[28]

United States Supreme Court Chief Justice Burger has underscored the importance of plea bargaining by declaring the process to be an essential component of the administration of justice. In *Santobello v. New York*,[29] he stated that the disposition of charges

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23. *See generally* Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (H. Berman ed. 1971).

24. To the defendant, a trial appears risky and unpredictable when compared with the plea bargaining process. Many factors, including limited pretrial discovery, indeterminate questions of credibility, and the uncertainties of jury decisions, make the outcome of a trial unpredictable. In addition, unpredictability is often prevalent in sentencing procedures. Most criminal statutes grant the judge a wide and largely uncontrolled latitude of sentencing discretion. Plea bargaining eliminates many of these uncertainties by providing a predetermined charge and sentence. *See* Note, *supra* note 22, at 564.

25. *Id.*

26. Among the practical burdens of a trial are costs and time. Plea bargaining avoids the expenses involved in a trial, expenses that in a lengthy trial may be prohibitive. Plea bargaining minimizes costs and time by enabling courts to process cases more expeditiously than they could by hearing full trials. In federal district courts in 1979, the median time interval which elapsed from filing to disposition through a guilty plea was nine months. This figure may be compared with 14 months for bench trials and 15 months for jury trials. [1979] AD. OFF. U.S. CTS., ANN. REP. *supra* note 18, at 115-16. *See* Santobello v. New York, 404 U.S. 257, 260 (1971); Brady v. United States, 397 U.S. 742, 752 (1970).

27. State v. Brockman, 277 Md. 687, 693, 357 A.2d 376, 381 (1976) (court honored plea bargain by allowing defendant to plead guilty to second-degree murder in return for dismissal of the first-degree murder charge). *See also* Brady v. United States, 397 U.S. 742, 752 (1970) (Court rejected defendant's argument that his guilty plea had not been voluntarily given); People v. Selikoff, 35 N.Y.2d 227, 233-35, 318 N.E.2d 784, 788-89, 360 N.Y.S.2d 623, 629-30 (1974), *cert. denied*, 419 U.S. 1122 (1975) (court refused to enforce plea bargained sentence upon learning of additional information of which the pleading court was unaware at the time of defendant's guilty plea).

28. State v. Brockman, 277 Md. 687, 693, 357 A.2d 376, 381 (1976).

29. 404 U.S. 257, 261 (1971).

after plea discussions is an essential and desirable part of the judicial process. Chief Justice Burger said that plea bargaining avoids the corrosive impact which the enforced idleness of pretrial confinement has on arrested persons, protects the public from accused persons prone to continue criminal conduct while on pretrial release, and enhances the rehabilitative prospects of the guilty by shortening the time between charge and disposition.[30]

The advantages of plea bargaining were first articulated in the 1970 United States Supreme Court decision of *Brady v. United States*,[31] the predecessor to *Santobello*. In holding that guilty pleas are not constitutionally forbidden, *Brady* formally approved plea bargaining, declaring that the plea bargaining process is inherent in criminal law.[32] While *Brady* sustained the constitutionality of plea bargaining, it simultaneously raised and left unanswered a number of important issues. Foremost is whether a defendant has a constitutional right to relief from a broken plea bargain; that is, when the government breaches the plea agreement, whether the defendant has a constitutional right to have the agreement enforced.[33] Although numerous lower courts[34] had dealt with relief for broken

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30. *Id.* Despite its many advantages, plea bargaining is met with an equal amount of criticism. *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180, 1314 (1975); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). For criticism directed at specific problems *see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 (the need to regulate abuses of prosecutorial discretion); D. NEWMAN, *supra* note 22, at 225-26 (the risk that innocent defendants will plead guilty); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. REV. 29, 38-44 (1974) (the coercive impact of plea concessions upon the defendant); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972) (the sentencing irrationalities of plea bargaining).

31. 397 U.S. 742 (1970). The Supreme Court held that the defendant's guilty plea had been voluntarily given and that the plea had not been coerced by the death penalty provisions for kidnapping.

32. *Id.* at 751-53.

33. *Id.*

34. *See* People v. Griggs, 17 Cal. 2d 621, 110 P.2d 1031 (1941) (when district attorney's promise of a life sentence instead of death was not fulfilled, court allowed withdrawal of guilty plea); People v. Fratianno, 6 Cal. App. 3d 211, 85 Cal. Rptr. 755 (1970) (court held that plea negotiations were only to make a recommendation, not a promise); State v. Ashby, 43 N.J. 273, 204 A.2d 1 (1964) (court granted specific performance of plea bargain); People v. Chadwick, 33 A.D.2d 687, 306 N.Y.S.2d 182 (1969) (defendant alleged that court promised to allow him to withdraw his guilty plea under certain circumstances, court held promise was in effect upheld); Courtney v. State, 341 P.2d 610 (Okla. Crim. App. 1959) (court enforced plea bargain, holding that county attorney abused his discretion); Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (1971) (prosecutor promised life instead of death in return for a guilty plea; court enforced promise).

plea agreements, the United States Supreme Court did not address this issue until it decided *Santobello v. New York*[35] in 1971.

In *Santobello*, the State of New York indicted the defendant on two felony counts. Subsequent plea bargain negotiations resulted in an agreement under which the defendant would plead guilty to a misdemeanor in return for dismissal of the original felony counts. Furthermore, the prosecutor agreed not to make a recommendation as to sentence. At sentencing, a new prosecutor, ignorant of his colleague's commitment, recommended the maximum sentence, which the judge imposed.[36] The defendant's conviction was unanimously affirmed by the state appellate court, and the defendant was denied leave to appeal to the New York State Court of Appeals.[37] The United States Supreme Court granted certiorari to determine whether the state's failure to honor the plea bargain violated the defendant's constitutional rights.[38] The Court held that the interests of justice and fundamental fairness required that the conviction be vacated and remanded to the state courts to decide whether to honor the plea bargain or to allow the defendant to withdraw his guilty plea.[39]

Santobello presented the Court with three novel issues. The first issue concerned whether a defendant has a constitutional right to relief when the government has breached a plea agreement. The second issue concerned identification of the source of that right in the Constitution. The third issue concerned what remedy would be allowed if that constitutional right was denied.

Santobello emphatically answered the first question, with all participating Justices[40] agreeing that a defendant has a constitutional right to some form of remedy for a broken plea agreement. *Santobello* undisputedly held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[41] Unfortunately, the Court avoided di-

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35. 404 U.S. at 257.

36. *Id.* at 258-60.

37. People v. Santobello, 35 App. Div. 2d 1084, 316 N.Y.S.2d 194 (1970), *vacated and remanded sub nom.*, Santobello v. New York, 404 U.S. at 257.

38. *Id.* at 257.

39. *Id.* at 263.

40. Justice Black and Justice Harlan did not take part in the *Santobello* opinion as a result of death and retirement, respectively.

41. 404 U.S. at 262.

rect confrontation with the remaining issues. It identified neither the constitutional source of this right nor the appropriate remedies for violations. The Court's vagueness concerning the actual source and nature of the constitutional right to relief for broken plea agreements has left the lower courts without the tools to elevate broken plea agreements to the level of constitutional violations.[42] Additionally, *Santobello* failed to provide courts with clear guidelines to assist them in determining what remedies are appropriate.[43]

The Supreme Court in *Santobello* indirectly alluded to the right to fundamental fairness embraced within the substantive due process guarantees of the fifth amendment. In formally approving the plea bargaining process, the Supreme Court stated that the purpose of the process was to "presuppose fairness in securing agreement between an accused and a prosecutor."[44] *Santobello* admonished that plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[45] Beyond these general allusions to due process guarantees, the precise source of the right recognized and given protection in *Santobello* was not identified, but it was clear that the source was based on constitutional considerations.[46]

III. CONSTITUTIONAL SOURCE FOR PLEA BARGAINS

Courts, in an attempt to fill the gap between a constitutional right and its source, typically have relied upon established common-

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42. Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 476 (1978).

43. A discussion of the appropriate remedies required when a broken plea bargain is enforced is beyond the scope of this note. For the remedy provided to Cooper by the Fourth Circuit, *see* note 13 *supra*. On the issue of relief for broken plea agreements, *see* Fischer, *Beyond* Santobello*—Remedies for Reneged Plea Bargains*, 2 U. SAN. FERN. V. L. REV. 121 (1973); Westen & Westin, *supra* note 42, at 471; Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771 (1973).

44. 404 U.S. at 261.

45. *Id.* at 262.

46. The majority opinion, written by Chief Justice Burger, never explicitly stated that the decision was based on a construction of the Constitution. *Santobello*, however, involved a review of a state court decision with no applicable federal statute. *Id.* at 257. For the Supreme Court to have jurisdiction under 28 U.S.C. § 1257 (1976) to reverse the state court below, it must have based its decision on federal constitutional grounds. Justice Douglas, concurring, specifically identified the right as constitutional. *Id.* at 266-67.

law doctrines.[47] For example, in shaping the fourth amendment, courts have analogized to the common law of agency,[48] the common law of trespass,[49] and the common law of property.[50] Plea bargaining, in its constitutional sense, has evolved in this manner. Courts have identified the constitutional right to enforce a plea bargain but have not identified the source of this right in the Constitution. Consequently, to fill the gap between the constitutional right to enforcement of a plea bargain and the unnamed source of that right, "[b]oth before and since *Santobello*, the courts have understandably drawn heavily on the ready analogies of substantive and remedial contract common law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process."[51] At the same time, however, reliance on contract analogies was often inadequate. Thus, the courts were left without the means to enforce the broken plea bargain, and the injured defendant was left remediless.

Courts, relying upon contract law for resolving the issue of whether a defendant is entitled to relief for a broken plea agreement, have approached their analysis as if they were interpreting an oral contract.[52] Thus, judicial inquiry has centered on the fac-

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47. *See* notes 48-54 *infra*.

48. People v. Stoner, 205 Cal. App. 2d 108, 22 Cal. Rptr. 718 (1962), *rev'd*, 376 U.S. 483 (1964).

49. Silverman v. United States, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961).

50. Jones v. United States, 362 U.S. 257, 266 (1960), *overruled on other grounds*, United States v. Salvucci, 100 S. Ct. 2547 (1980).

51. Cooper v. United States, 594 F.2d at 15-16.

52. "[T]he decision in *Santobello* . . . involved fundamental principles of contract law, notably those concerning mutually binding promises freely given in exchange for valid consideration." United States v. Bridgeman, 523 F.2d 1099, 1109-10 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). *See also* Blackledge v. Allison, 431 U.S. 63, 75 n.6 (1977) (defendant allowed to introduce evidence of an oral promise by the state; Court analogized to the parol evidence rule); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 295 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (state's promise made in exchange for defendant's promise to return stolen property was not made while defendant was under "extreme duress"); United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975) (prosecutor's statements to the defendant concerning the sentence he could expect to receive as a result of a guilty plea constituted a promise and was, therefore, an inducement for the defendant's guilty plea); United States v. Boulier, 359 F. Supp. 165, 170 (E.D.N.Y. 1972), *aff'd*, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 1086 (1973) (state's promise was not enforceable because the defendant did not perform his part of the bargain); Shields v. State, 374 A.2d 816, 818-19 (Del.), *cert. denied*, 434 U.S. 893 (1977) (state may rescind its promise any time prior to the actual entry of the guilty plea by the defend-

tual determination of whether a plea agreement actually has been formed.[53] This required examination of whether the defendant and the government had exchanged a valid offer and acceptance. If they had, the courts then sought to identify the terms of the plea bargain.[54] Further issues raised in the plea bargaining analysis have included full or substantial performance and detrimental reliance.[55] Finally, courts have considered whether the agreement was breached, and, if so, whether the breach was excused.[56] In the context of plea bargaining, each of these inquiries derives from the general law of contracts. "To the extent therefore that there has evolved any general body of 'plea bargain law,' it is heavily freighted with these contract law analogies."[57] In fact, judicial reliance upon contract law analogies is exhibited in the majority of plea bargaining cases.[58]

The cases which result in findings that a defendant's plea bargaining rights have been violated are often based upon similar factual situations. Typically, the defendant had entered a guilty plea and in some instances had fully or substantially performed his side of the bargain before the government revoked some element of its plea agreement.[59] Accordingly, it was possible to view the defend-

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ant or other action by him constituting detrimental reliance upon the agreement); State v. Brockman, 277 Md. 687, 698, 357 A.2d 376, 383 (1976) (state's promise is enforceable because defendant substantially performed his part of the bargain); People v. Selikoff, 35 N.Y.2d 227, 238, 318 N.E.2d 784, 791, 360 N.Y.S.2d 623, 633 (1974), *cert. denied*, 419 U.S. 1122 (1975) (state's promise is not enforceable because of fraud in the inducement). *But see* United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (principles of contract law are inapposite to criminal proceedings); State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 383 (1976) (the rigid application of contract law to plea negotiations would be incongruous).

53. *See* notes 54-58 *infra*.

54. *See* Blackledge v. Allison, 431 U.S. 63, 66 n.1 (1977); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 294 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975).

55. *See* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 294-95 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Hammerman, 528 F.2d 326, 328 (4th Cir. 1975).

56. *See* Palmero v. Warden, Green Haven State Prison, 545 F.2d 286, 294-96 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Hammerman, 528 F.2d 326, 330 (4th Cir. 1975).

57. 594 F.2d at 16.

58. *See* note 45 *supra*.

59. *See* Santobello v. New York, 404 U.S. at 259-61 (defendant pled guilty in exchange for a promise by the government not to recommend sentence); United States v. Bowler, 585 F.2d 851, 852-55 (7th Cir. 1978) (defendant pled guilty and cooperated in an investigation); Palermo v. Warden, Green Haven State Prison, 545

ant's situation as one perfectly analogous to that of a party aggrieved by the breach of an express commercial contract or by the failure of another to fulfill a promise upon which the performing party had relied.[60]

Reliance upon contract law, while providing the courts with the means to resolve the problem of broken plea bargains, has failed to answer the question left open by *Santobello*. Contract principles do not identify the source of the constitutional right which entitles a defendant to enforcement of a plea bargain. This failure illustrates the limits upon which analogies can be drawn from contract law. At a certain point, the technical rules of contract law fail to provide the court with a basis upon which to enforce a constitutional right. The elements of an express contract or of promissory estoppel are not present in every plea negotiation. Often, in the court's perception, when these elements are lacking, the defendant has suffered no legal wrong, and he therefore is not entitled to relief. The absence of a contract breach, however, does not mean that the defendant was not injured in a constitutional sense.

Finding and enforcing a right which lies beyond those provided by contract law analogy was the precise task facing the Fourth Circuit in *Cooper*. Cooper requested that his constitutional right to the offered plea bargain be enforced. Before Cooper accepted the Government's offer, however, the Government revoked the proposal. Thus, in classic contract law a contract was never

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F.2d 286, 289-93 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (defendant returned $4,000,000 worth of jewelry in return for a promised reduction in sentence); United States v. Hammerman, 528 F.2d 326, 327-30 (4th Cir. 1975) (defendant cooperated with the government in return for a promised suspended sentence); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173, 1173-74 (4th Cir. 1975) (defendant pled guilty in exchange for a promised 24-year sentence recommendation); Geisser v. United States, 513 F.2d 862, 863-69 (5th Cir. 1975) (defendant supplied information to the government in exchange for a promised maximum sentence and no deportation); United States v. Brown, 500 F.2d 375, 376-77 (4th Cir. 1974) (defendant pled guilty for a promised sentence recommendation); United States v. Ewing, 480 F.2d 1141, 1142-43 (5th Cir. 1973) (defendant pled guilty in return for a promise of probation); Correale v. United States, 479 F.2d 944, 946 (1st Cir. 1973) (defendant pled guilty in return for a promised sentence recommendation); United States v. Carter, 454 F.2d 426, 426-27 (4th Cir. 1972) (defendant incriminated himself and others in return for a promised misdemeanor charge); State v. Kuchenreuther, 218 N.W.2d 621, 623 (Iowa 1974) (defendant testified and returned stolen property in exchange for promised immunity and a reduced sentence); State v. Brockman, 277 Md. 687, 689-92, 357 A.2d 376, 378-80 (1976) (defendant testified in return for a promised sentence reduction).

60. 594 F.2d at 16.

formed since the offer was withdrawn before it was accepted.[61] Accordingly, the Fourth Circuit recognized that under contract analogies Cooper was not vested with any rights which could be violated by the government or enforced by the courts.[62] Furthermore, Cooper could not rely on the defense of promissory estoppel because there had been no tangible detrimental reliance by him.[63] Instead, he had been able to do no more than form the subjective intent to accept the offer and experience whatever expectations of benefit had been created by anticipation of its fulfillment.[64] Enforcement of a contract on grounds of promissory estoppel requires specific reliance and is measured by objective, not subjective, standards.[65]

Rather than rely on these contract law doctrines,[66] the court in *Cooper* chose to take the case "not one but two steps beyond"[67] any earlier decisions, enforcing the plea bargain despite the fact that contract analogies failed. *Cooper* held that in appropriate circumstances a constitutional right to enforcement of plea proposals may arise *before* any technical contract has been formed.[68] The conclusion in *Cooper*, that a constitutional right not only existed but also had been violated, forced the court to identify the constitutional source of the right. The Fourth Circuit correctly identified

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61. "The power of acceptance created by an ordinary offer is terminated by a communicated rejection." A. CORBIN, CORBIN ON CONTRACTS § 94, at 141 (one vol. ed. 1952). "An offeree's power of acceptance is terminated by a rejection. . . ." D. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 2-23(d), at 80 (2d ed. 1977).

62. 594 F.2d at 16.

63. A "promise may be enforceable by reason of action in reliance upon it. . . ." A. CORBIN, *supra* note 61, § 194, at 280.

64. 594 F.2d at 16. The use of promissory estoppel analogies requires the plea bargaining process to have more substantiality than mere expectation and hope. *Id.* at n.5.

65. *Id.*

66. In a situation in which the defendant has not yet entered a guilty plea or taken other action constituting detrimental reliance upon the plea bargaining agreement, the government has been allowed to withdraw its offer. *See* Shields v. State, 374 A.2d 816, 818-20 (Del.) *cert. denied*, 434 U.S. 893 (1977); State v. Edwards, 279 N.W.2d 9, 10 (Iowa 1979); Wynn v. State, 22 Md. App. 165, 172, 322 A.2d 564, 568 (1974); People v. Heiler, 79 Mich. App. 714, 721-22, 262 N.W.2d 890, 895 (1977); State *ex rel.* Gray v. McClure, 242 S.E.2d 704, 707 (W. Va. 1978).

67. 594 F.2d at 17 n.6. The court expressed this opinion in recognizing that its holding was unsupported by its earlier decisions. *Id.*

68. *Id.* at 18. Even though the Fourth Circuit held that its decision was not based on contract law, it emphasized that this holding does not deny the utility of contract analogies in certain plea bargaining circumstances. The court stated that *Cooper* was only expressing the limits of their utility. *Id.* at 17.

the constitutional grounds alluded to in *Santobello*,[69] naming the fifth amendment guarantee of substantive due process and the sixth amendment guarantee of effective assistance of counsel as the constitutional source for its decision.[70]

The fifth amendment declares that no person "shall be deprived of life, liberty or property without due process of law."[71] The phrase, "due process of law," while recognized as difficult to define accurately, completely, and appropriately under all circumstances,[72] has come to be interpreted as law in accordance with natural, inherent, and fundamental principles of justice.[73] The Fourth Circuit stated that the guarantee of due process is so basic and plain that it eliminates the need for any explanation or discussion. The court noted that the fundamental fairness guarantee of the fifth amendment is so inherently part of the plea bargaining mechanism that any mention beyond identification of the constitutional right and source is unwarranted.[74]

The sixth amendment guarantee of effective assistance of counsel was identified as the second source of the constitutional right to enforce a plea bargain.[75] The Fourth Circuit reasoned that the plea bargaining process requires prosecutors to conduct plea negotiations through defense counsel.[76] The government's behavior has a tremendous impact on the effectiveness of the defense counsel because the government's positions and communications necessarily

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69. *Id.* at 18 n.8.

70. *Id.*

71. U.S. CONST. amend. V.

72. *See, e.g.*, Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); Green v. Fraizer, 253 U.S. 233, 238 (1920); Twining v. New Jersey, 21 U.S. 78, 99-100 (1908); Ballard v. Hunter, 204 U.S. 241, 255 (1907); Brown v. New Jersey, 175 U.S. 172, 176 (1899); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 519 (1885); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884).

73. The theme that the guarantees of due process reflect traditional notions of fair play and substantial justice prevails throughout the Supreme Court's decisions. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940); Holden v. Hardy, 169 U.S. 366, 390 (1898); Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

74. 594 F.2d at 18.

75. *Id.* at 18-19.

76. FED. R. CRIM. P. 11(e)(1). "The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching [a plea bargain] agreement. . . ." *Id. See* Anderson v. North Carolina, 221 F. Supp. 930, 935 (W.D.N.C. 1963) (lack of effective counsel at a critical stage of the proceedings, in this instance, during the plea negotiations, is constitutionally defective).

must be mediated through defendant's counsel.[77] "For this reason, not only the credit and integrity of the government but those of his counsel are involved in a defendant's perception of the process."[78]

Cooper emphasized the importance of effective counsel, declaring the defense lawyer to be the essential medium through which the demands and commitments of the government are communicated to the citizen.[79] Any attempt by the government to change or retract a position already communicated to the defendant through his counsel would jeopardize the defendant's confidence in his lawyer.[80] This would erode the effectiveness of counsel's assistance.[81] Taking these considerations into account, the court stated: "[a]t the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."[82]

The court of appeals, identifying Cooper's constitutional right to enforcement of the Government's plea proposal, attempted to confine its holding to the narrowest grounds possible.[83] The court, limiting its holding by emphasizing the factual elements most crucial to its finding, did not endanger the principles enunciated. Rather, examination of *Cooper* reveals that the case embodied the typical set of facts present in the overwhelming majority of plea bargaining cases.[84] The factual elements limiting the holding in *Cooper* are not atypical. The court held that a plea proposal must be specific and unambiguous and must be made without any reservation related to a superior's approval. The proposal must be reasonable in content and must be made by a prosecutor with appar-

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77. FED. R. CRIM. P. 11(e)(1).

78. 594 F.2d at 18.

79. *Id.* The court cited a remark by Justice Stevens of the United States Supreme Court concerning the relationships among the defendant, the defense counsel, and the Government. Justice Stevens, stressing the importance of effective counsel, stated that the participation by an independent professional was of vital importance to the accused and to society. Brewer v. Williams, 430 U.S. 387, 415 (1977) (concurring opinion).

80. 594 F.2d at 18.

81. *Id.* at 18-19. The court pointed out that this reasoning, although subtle, was "certainly familiar to every lawyer who has had to take to his client bad news regarding his settlement negotiations with the other side, particularly when these involve unfavorable changes of earlier positions." *Id.* at 19 n.9.

82. *Id.* at 19.

83. *Id.*

84. *See* notes 52-60 *supra* and accompanying text for a discussion and examples of the typical plea bargaining situation.

ent authority. It also must be communicated promptly to the defendant so that no question of staleness is involved. The defendant must promptly and unequivocally assent to the proposal. Finally, the assent must be made through defendant's counsel, who must expediently communicate defendant's acceptance to the government.[85] When a plea proposal embodies these criteria, constitutional fairness requires that the proposal be enforced.[86]

The court, cautioning that the right to enforce a plea bargain is not limitless,[87] enunciated one condition limiting this right. When extenuating circumstances that were unknown to and not readily discoverable by the government when the proposal was made supervene or become known, the plea may be withdrawn.[88] In other words, once presented, a plea proposal cannot be rescinded without sufficient justification.[89] If the prosecution, prior to the consummation of a plea bargain, learns that the defendant has not told the truth, or if evidence comes to light that was previously unknown, the prosecutor would be justified in withdrawing the plea offer.[90]

IV. BEYOND *COOPER*

Cooper succeeded in answering the question left open by *Santobello*, naming the fifth and sixth amendments as the source of the constitutional right to enforcement of a plea bargain. In doing

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85. 594 F.2d at 19.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* The withdrawal of the plea proposal by the Government in *Cooper* was a result of an objection voiced by a superior with respect to the offer that had been made. The court pointed out that this reason does not qualify as an extenuating circumstance. *Id. But cf.* Shields v. State, 374 A.2d 816, 820 (Del.), *cert. denied*, 434 U.S. 893 (1977) (state may withdraw from a plea bargain at any time prior to, but not after, the entry of the defendant's guilty plea or other action by him constituting detrimental reliance upon the agreement); State v. Edwards, 279 N.W.2d 9, 11 (Iowa 1979) (state may withdraw from plea bargain prior to guilty plea); State v. Brockman, 277 Md. 687, 698, 357 A.2d 376, 383-84 (1976) (state may withdraw plea bargain if defendant has not to a substantial degree and in a proper manner performed his obligation); Wynn v. State, 22 Md. App. 165, 172, 322 A.2d 564, 568 (1974) (plea bargain should not be specifically enforced in the absence of affirmative evidence of prejudice); People v. Heiler, 79 Mich. App. 714, 721-22, 262 N.W.2d 890, 895 (1977) (plea bargain should not be enforced unless abuse of prosecutorial discretion and resultant prejudice to defendant are found); State *ex rel.* Gray v. McClure, 242 S.E.2d 704, 707 (W. Va. 1978) (state is not bound to the terms of an inchoate plea agreement if the defendant has not yet acted to his detriment).

90. *See* note 89 *supra* and accompanying text.

so, *Cooper* constructed a solid constitutional foundation for the right to enforce broken plea agreements. In providing the answer to the question left open by *Santobello*, however, the Fourth Circuit left three unknowns: First, whether *Cooper* spells the end of the utility of contract analogies in plea bargaining analysis; second, whether *Cooper* inhibits or enhances the plea bargaining process; and third, whether *Cooper* will likely be embraced by other jurisdictions.

The *Cooper* court emphasized that it did not intend to end the application of contract principles to plea bargain disputes in all circumstances. Instead, it merely recognizes the limited use of these analogies.[91] By noting these limits, *Cooper* avoids overextending the relative certainties of established common-law analogies in developing difficult constitutional doctrine.[92] Fear that courts will overextend their use of contract law analogies does not require the complete elimination of the use of analogies in the plea bargaining process. "[A]nalogies from contract law will usually provide a reliable inclusive test for the existence of constitutional right and violation, but not an equally reliable exclusive test."[93] Thus, when noncompliance with a technical contract rule directly impairs a defendant's formal acceptance of an offer, denying him a constitutional right to enforce a plea bargain, the contract rule must not, in and of itself, determine whether the defendant is entitled to enforcement of this right.

The second concern arising from the *Cooper* decision is whether the holding will enhance or inhibit the plea bargaining process. *Cooper*, reiterating the language in *Santobello*, stated that a defendant's constitutional rights are confined to the process "rea-

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91. 594 F.2d at 17-18.

92. *Id.* The Supreme Court has observed that it is necessary to resist the temptation to take common-law analogies too far in developing constitutional doctrine. *See* Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977) (stating that the Court was not dealing with notions of offer, acceptance, consideration, or other concepts of the law of contracts, but rather with constitutional law); Stoner v. California, 376 US. 483, 488 (1964) (holding that rights protected by the fourth amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrine of apparent authority); Silverman v. United States, 365 U.S. 505, 513 (1961) (Douglas, J., concurring) (stating that the Court's concern in determining the reach of the fourth amendment should not be with the trivialities of the local law of trespass); Jones v. United States, 362 U.S. 257, 266 (1960), *overruled on other grounds*, United States v. Salvucci, 100 S. Ct. 2547 (1980) (cautioning that it was unnecessary and ill-advised to integrate into fourth amendment law subtle distinctions of private property law).

93. 594 F.2d at 17.

sonably due" under the circumstances.[94] The limits of reasonableness are found by weighing the practical burdens imposed on the government by recognition of the defendant's rights against the consequences to the defendant if the rights are not recognized.[95]

Prosecutors have protested that denying the government the power to withdraw its offer unless extenuating circumstances exist[96] may severely impede the plea bargaining process. If the prosecution negotiates with the defendant on the premise that once it makes an offer it will be bound, the prosecution may be extremely reluctant to participate in plea bargaining. Courts have argued that binding the prosecutor to plea agreements before the defendant has entered a guilty plea or has detrimentally relied upon the agreement might inhibit the dispositional use of plea bargaining by placing the prosecutor at an absolute disadvantage;[97] if defendants are free to withdraw from plea agreements prior to entry of their guilty plea, regardless of any prejudice to the prosecutor, then the government in turn should be provided the right to withdraw. This argument, however, ignores the principles of fundamental fairness and effective assistance of counsel enunciated in *Cooper*. Enforcing plea agreements does not put the government at an absolute disadvantage; instead, the government is only required to act with fairness.

It is argued that enforcement of the offer, once it is made, would eliminate the abusive practice of freely making and withdrawing plea proposals as a means of testing the will and confidence of the defendant and his counsel.[98] *Cooper* recognizes that failure to find the arbitrary rescission of a plea agreement to be a constitutional violation would necessarily give judicial approval to a practice which has a clear possibility for abuse.[99] In addition to potential abuse of the plea bargaining process, allowing the prosecutor to rescind his offer might impugn the honor of the government and public confidence in the fair and efficient administration of justice.[100] The United States Court of Appeals for the Second Cir-

94. *Id.* at 16.

95. *Id.* at 19.

96. *See* note 88 *supra* an accompanying text.

97. People v. Heiler, 79 Mich. App. 714, 721-22, 262 N.W.2d 890, 895 (1977). After the defendant in *Heiler* agreed to a proposed plea bargain, the prosecutor's office withdrew the plea offer because the bargain was contrary to the prosecutor's charging policy.

98. 594 F.2d at 20.

99. *Id.*

100. United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) (government

cuit has stated that "fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.' "[101]

The final issue raised by *Cooper* is whether other courts are likely to embrace *Cooper*'s analysis of the plea bargaining process when that process is beyond the limits of contract analogies. *Cooper* acknowledges that its decision to enforce the right to a plea bargain on constitutional rather than contract grounds takes it "not one but two steps beyond"[102] any earlier decisions. *Cooper* unmistakenly identifies a constitutional due process right to specific performance of a broken plea bargain. *Santobello*, however, did not go that far.[103] Though *Cooper* extended protection to a defendant when he has neither pled guilty nor detrimentally relied on a plea agreement, the issue is whether other jurisdictions also will extend *Santobello* in this manner. Two courts[104] have specifically declined to follow the *Cooper* extension, and prior to *Cooper*, many states denied enforcement of plea bargain agreements in factual situations comparable to *Cooper*.[105]

V. CONCLUSION

The United States Court of Appeals for the Fourth Circuit identified the fifth amendment guarantees of fundamental fairness

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failed to fulfill its promise that the defendant would not be subject to further prosecution). *See* Geisser v. United States, 513 F.2d 862, 863 (5th Cir. 1975) (government went back on its word); State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) (state breached its promise not to prosecute defendant for a felony).

101. Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (prosecuting attorney failed to fulfill the promise made during plea negotiations).

102. 594 F.2d at 17 n.6.

103. 404 U.S. at 261.

104. "We decline to follow the *Cooper* rationale." Government of V.I. v. Scotland, 614 F.2d 360, 362 (3d Cir. 1980). In *Scotland*, the plea bargain was factually similar to that in *Cooper*, but the availability of an alternative remedy, the withdrawal of the plea by the defendant, caused the court to reject the *Cooper* rule. *Id.* "We decline to follow *Cooper*." State v. Edwards, 279 N.W.2d 9, 12 (Iowa 1979). In *Edwards*, the defendant accepted a plea bargain in which his guilty plea to a misdemeanor would be exchanged for dismissal of a felony charge. The state, however, withdrew the offer before the defendant had an opportunity to enter a guilty plea to the misdemeanor. *Id.*

105. *See* Shields v. State, 374 A.2d 816, 820 (Del.), *cert. denied*, 434 U.S. 843 (1977) (plea proposal withdrawn before guilty plea was entered); People v. Heiler, 79 Mich. App. 714, 721-22, 262 N.W.2d 890, 895 (1977) (plea proposal withdrawn before guilty plea was entered); State *ex rel.* Gray v. McClure, 242 S.E.2d 704, 707 (W. Va. 1978) (plea proposal withdrawn before guilty plea was entered).

and substantive due process and the sixth amendment guarantee of effective assistance of counsel as the basis for the constitutional right to enforcement of a plea bargain.[106] While prior cases have granted constitutional protection to plea agreements, *Cooper*'s utilization of specific constitutional guarantees without the foundation of contract law analogies is extraordinary. *Cooper* went beyond existing case law and held that, under appropriate circumstances, a constitutional right to enforcement of a plea bargain may arise even before any technical contract between prosecution and defendant has been formed.[107] In other words, under *Cooper*, a defendant may be able to compel performance of a plea bargain on constitutional grounds even if he has not yet accepted or acted upon the agreement.

The Fourth Circuit's reliance on the fifth and sixth amendments in the plea bargaining context, however, must be scrutinized. Dependence on the sixth amendment right to effective counsel is suspect in the unconsummated plea bargaining situation. *Cooper* held that any attempt by the government to change or retract a position already communicated to a defendant through his attorney would jeopardize the defendant's confidence in his counsel.[108] On its face, this argument appears persuasive. Many events, however, may occur during the course of a criminal case which might disappoint the defendant. He often may be inclined, rightly or wrongly, to blame his attorney for these developments. More specifically, in any plea negotiation, even when it does not involve the withdrawal of a plea proposal, the possibility exists that a defendant may lose faith in his attorney. For example, the government might decide not to offer a plea proposal or might offer only one which the defendant considers unfavorable. A defendant's loss of faith, without more, however, does not appear to reach the status of a constitutional violation. The appropriate focus for determining whether a defendant's right to effective counsel has been violated is on defense counsel and his performance, rather than on the defendant's perception of defense counsel.[109]

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106. 594 F.2d at 18.

107. *Id.*

108. *Id.* at 18-19.

109. McMann v. Richardson, 397 U.S. 759, 770-71 (1970); United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978); United States v. Gray, 565 F.2d 881, 887 (5th Cir.), *cert. denied*, 435 U.S. 955 (1978); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); Moore v. United States,

The Fourth Circuit recognized that its reliance on the sixth amendment as a basis for enforcing plea agreements was shallow. At the same time, however, the court was not willing to completely dismiss this rationale, stating that "At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."[110] By treating the sixth amendment merely as supplementary support to its decision, the court obviously emphasized that the fifth amendment due process guarantees, rather than the sixth amendment guarantees, formed the nucleus of its holding. In fact, the concept of fundamental fairness embodied within the substantive guarantees of the fifth amendment, standing alone, is sufficient to support enforcement of a broken plea bargain. The *Cooper* court correctly annunciated that the denial of fundamental fairness is shocking to the universal sense of justice.[111] The Fourth Circuit, citing the Supreme Court's decision in *Santobello*, stated that, at the very least, a criminal defendant who enters into a plea bargain has the right to receive that process reasonably due under the circumstances.[112]

The Fourth Circuit further emphasized that its holding is limited to factually similar plea bargaining situations.[113] This limitation suggests that *Cooper* is an anomaly. This is an erroneous assumption. Despite the uniqueness of the *Cooper* holding, courts which choose to follow *Cooper* should not be deterred from doing so. The plea bargaining process encountered in *Cooper* is comparable to a normal plea negotiation.[114] Subsequently, the facts of *Cooper* should not provide an insurmountable obstacle.[115] A defendant

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432 F.2d 730, 736 (3d Cir. 1970); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

110. 594 F.2d at 19.

111. *See* Kinsella v. United States *ex rel.* Singelton, 361 U.S. 234, 246 (1960). "Due process cannot create or enlarge power. . . . It has to do . . . with the denial of that 'fundamental fairness, shocking to the universal sense of justice.'" *Id. See also* Betts v. Brady, 316 U.S. 455, 462 (1942). "[Due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. . . . [It constitutes] a denial of fundamental fairness, shocking to the universal sense of justice." *Id.*

112. 594 F.2d at 19.

113. *Id.*

114. *See* notes 83-90 *supra*.

115. *See* United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979) (Fourth Circuit declined to follow its holding in *Cooper* on the basis of distinguishable facts). The court stated that *McIntosh* did not fall within the plea bargain criteria enunciated in

who enters into a typical plea bargain with the government is entitled to constitutional relief if the bargain is breached. Under *Cooper* the fifth amendment provides the basis for this relief, requiring the government to be held to a standard of fundamental fairness.

Plea bargaining plays a critical role in the criminal justice system. As such, it is essential that the plea bargaining process be conducted with the highest level of due process protections. At a time when confidence in government is waning, government officials should be held to meticulous standards of both promise and performance in order to restore the public's trust. Enforcement of broken plea bargains will help to eliminate the abusive practices of government attorneys by regulating their prosecutorial discretion. Though discretion is a critical part of a prosecutor's decisionmaking process, this discretion is not limitless. Discretion must be regulated not only because the liberty of a defendant is at stake, but also because the honor of the government and public confidence in the fair and efficient administration of justice are at stake.[116] These tenets are essential to a full understanding of *Cooper*'s implications. *Cooper* rightly provides an aggrieved defendant with the constitutional right to enforce a broken plea bargain. In doing so, *Cooper* elevates the plea bargaining process "not one but two steps beyond . . . earlier cases."[117] As such, the Fourth Circuit's decision is an important step toward improving the criminal justice system and restoring public confidence in its administration.

Paul Briggs

Cooper. The alleged plea proposal in *McIntosh* was not in fact made and was ambiguous. There was no evidence of any actual authority in the state prosecutor to act on behalf of the United States, and no substantial evidence from which apparent authority could be found. *Id.* at 837-38 (Phillips, J., concurring).

116. United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972).

117. 594 F.2d at 17 n.6.