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Judith A. Wood
University of Baltimore School of Law

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — PLEA BARGAINS — CONSTITUTION HELD TO AFFORD CRIMINAL DEFENDANTS A RIGHT TO SPECIFIC PERFORMANCE OF PLEA PROPOSALS UNDER APPROPRIATE CIRCUMSTANCES. *COOPER v. UNITED STATES*, 594 F.2d 12 (4th Cir. 1979).

I. INTRODUCTION

In *Cooper v. United States*,[1] an opinion filed in 1979 by the United States Court of Appeals for the Fourth Circuit, constitutional protection was afforded a criminal defendant whose reasonable expectations were frustrated by the prosecution's withdrawal of a plea-bargain proposal.[2] The court held that under "appropriate circumstances" constitutional safeguards of fifth amendment due process and sixth amendment right to effective assistance of counsel may prohibit the prosecution from withdrawing its proposal even though no contract has been formed between the parties and the defendant has not relied upon the proposal to his detriment.[3] Prior to *Cooper*, defendants were afforded a remedy for the withdrawal of plea proposals only in situations in which they had relied to their detriment upon the prosecutor's promise (usually by entering a guilty plea) and the prosecutor had subsequently breached the agreement.[4]

II. THE FACTS

The sequence of events in the *Cooper* plea negotiations was relatively simple. Cooper, who earlier had cooperated with the government as an informant and witness, was slated to stand trial on charges of obstruction of justice and bribery of a witness.[5] Two

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1. 594 F.2d 12 (4th Cir. 1979).
2. Plea bargaining is the negotiation process by which the prosecution and a criminal defendant arrive at a mutually acceptable compromise. Typically, in exchange for the defendant's entry of a plea other than "not guilty," the prosecution will attempt to mitigate the penalty incurred by the defendant — for example, by moving for dismissal of other charges in the case, by not prosecuting unrelated charges pending against the defendant, or by recommending to the court that less than the maximum sentence be imposed. FED. R. CRIM. P. 11(e); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.1(b) (Approved Draft 1968) [hereinafter cited as ABA PLEAS].
3. Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979).
4. *See* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978) [hereinafter cited as *Broken Plea Bargains*].
5. Cooper was charged with having offered to remove himself as a witness in a drug violation case in exchange for $10,000. Cooper v. United States, 594 F.2d 12, 14 (4th Cir. 1979).

months before the scheduled trial, his defense counsel entered into plea negotiations with an Assistant United States Attorney. On the morning of May 11, 1977, these negotiations resulted in a plea proposal in which the prosecutor offered to bring Cooper's cooperation to the judge's attention and to dismiss all but one of the indictments in exchange for Cooper's plea of guilty to a count of obstruction of justice, his continued incarceration and cooperation with the government, and his testimony at other trials.[6] With this proposal in hand, defense counsel went immediately to see Cooper and, by noon of the same day, had his assent to the proposal and called the office of the Assistant United States Attorney to notify him of Cooper's acceptance. Defense counsel was unable to reach the prosecuting attorney until about 3:00 that afternoon.[7] In the interim, the Assistant United States Attorney was advised by his superior to withdraw the proposal. When defense counsel finally spoke with the prosecutor he was informed of the withdrawal of the proposal before he could convey Cooper's acceptance. Protest of this action to the United States Attorney's office was unavailing, and the district court denied the defendant's motion to enforce the proposal. Cooper was subsequently convicted on all counts and sentenced to fifteen years imprisonment.[8] This appeal to the Fourth Circuit followed.

III. THE LEGITIMATION OF PLEA BARGAINING

Today, over ninety percent of criminal prosecutions are disposed of through guilty pleas.[9] Of those cases, a substantial number are the result of plea bargains.[10] Administratively, due to crowded dockets and limited prosecutorial resources, plea bargaining has become a "bureaucratic necessity"[11] upon which the criminal justice system depends.[12] Despite the frequent use of plea bargaining, the technique remained until recently a "sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges."[13] For only a short time has plea

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6. *Id.* at 15.
7. *Id.*
8. *Id.*
9. ABA PLEAS, *supra* note 2, note at 60; Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).
10. ABA PLEAS, *supra* note 2, note at 60.
11. Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 774 (1973) [hereinafter cited as *Legitimation of Plea Bargains*].
12. *Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 281 (1974) (see note to amend. FED. R. CRIM. P. 11(e)).
13. Blackledge v. Allison, 431 U.S. 63, 76 (1977).

bargaining been recognized as "an acceptable and even desirable part of the administration of criminal justice."[14]

Judicial recognition of the legality of plea bargains first occurred in *Brady v. United States*.[15] In that case, the defendant, prompted in part by the prosecution's promise to recommend that the death sentence not be imposed, entered a plea of guilty. After his conviction, he challenged the constitutionality of the plea bargain on fifth amendment grounds, asserting that fear of the death penalty had caused him to incriminate himself. The Supreme Court upheld the constitutionality of the plea bargain, stating "we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State."[16] The Court stressed, however, that a guilty plea is a "grave and solemn act,"[17] and therefore must be entered voluntarily[18] and intelligently.[19] A defendant's overestimation of the strength of the state's case or the potential severity of his sentence, however, was held not to vitiate the intelligence and voluntariness of his guilty plea.[20] In *Brady*, plea bargaining received the approbation of the judiciary, opening the door to scrutiny of the technique by the courts.

Cases subsequent to *Brady* have developed four criteria by which the validity of plea bargains and subsequent guilty pleas is assessed. In addition to the requirements of intelligence and voluntariness, fairness must be present throughout the entire negotiation process,[21]

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14. *Legitimation of Plea Bargains, supra* note 11, at 771–72. The reasons offered for judicial acceptance of this once clandestine procedure include: prompt disposition of cases; shortening of pretrial confinement; protection of the public from criminals released on bail; shortening of the time between the charge and the disposition; enhancement of rehabilitative prospects; lessening of defendant's exposure to the criminal process and potentially severe penalties; and conservation of scarce judicial and prosecutorial resources. Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 752 (1970); State v. Brockman, 277 Md. 687, 693, 357 A.2d 376, 380–81 (1976).
15. 397 U.S. 742 (1970). *Accord*, McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). For a discussion of the historical origins of plea bargaining, see Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979). *See also* Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).
16. Brady v. United States, 397 U.S. 742, 753 (1970).
17. *Id.* at 748.
18. *Id.* at 755.
19. *Id.* at 756.
20. *Id.* at 757.
21. Santobello v. New York, 404 U.S. 257, 261 (1971); State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) (state's breach of a plea agreement described by the court as "nothing less than an intolerable violation of our time-honored fair play norm, and accepted professional standards"); State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 382–83 (1976) (the standard "applied to plea negotiations is one of fair play and equity under the facts and circumstances of the case").

and a defendant must be represented by competent counsel.[22] In applying these criteria during the post-*Brady* era, the courts have had difficulty safeguarding defendants' constitutional rights while, at the same time, protecting society's interest in safety and crime prevention.

The failure to satisfy any one of these four criteria may result in the plea bargain being found invalid. For example, a plea given inadvertently, or without a full understanding of the consequences, is invalid,[23] as would be a bargain arising from secret offers made by the prosecution and accompanied by threats that the defendant not discuss them with his attorney.[24] Similarly, relief will be afforded a defendant if a prosecutor lacking authority breaches a promise he cannot fulfill.[25] On the other hand, courts have held that a valid offer may be structured so as to encourage the defendant to plead guilty.[26]

IV. THE *COOPER* RATIONALE

The *Cooper* court was faced with a situation in which the prosecutor's actions did not constitute a breach under traditional contract analysis. Even so, in providing the defendant a remedy, the court relied on *Santobello v. New York*, [27] a Supreme Court decision

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22. While this is not yet a unanimous conclusion, there is growing recognition among courts of the importance of counsel during the plea negotiations. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 at 611 (1975) (commentary). *See* Walker v. Johnston, 312 U.S. 275 (1941) (where the Court found that if the prosecutor deceived the defendant into entering a guilty plea, this would be a deprivation of the defendant's constitutional rights); Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963) (plea bargain negotiated without counsel struck down); *cf.* Brewer v. Williams, 430 U.S. 387 (1977).

    The Court discussed the importance of counsel when the defendant is alone with the police for extended lengths of time. Justice Stevens in concurrence stated: "[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this [*sic*] lawyer." *Id.* at 415.

23. Kercheval v. United States, 274 U.S. 220, 224 (1927).
24. Machibroda v. United States, 368 U.S. 487, 493 (1962).
25. Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977). For a discussion of *Palermo*, see Note, 13 WAKE FOREST L. REV. 842 (1977). *See also* United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975).
26. *Broken Plea Bargains, supra* note 4, at 480. A graphic illustration is the case of Bordenkircher v. Hayes, 434 U.S. 357 (1978). In a five-to-four decision, the Supreme Court found that a prosecutor's threat to reindict the defendant under a Habitual Criminal Act if he did not plead guilty to the one count he was being charged with did not constitute retaliation when it was later carried out. The Court found that in the " 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. That the defendant truly possessed "freedom" to reject the prosecution's offer was rigorously questioned by the four dissenting Justices. *Cf.* Sweetwine v. State, 42 Md. App. 1, 12, 398 A.2d 1262, 1269 (1979) (discussion of the detrimental reliance by defendants on a bargained plea, citing with approval *Bordenkircher v. Hayes*).
27. 404 U.S. 257 (1971).

involving facts in which the prosecutor's actions did constitute a breach under contract theory. In *Santobello*, the defendant withdrew a previous not guilty plea to two felony counts and pleaded guilty to a lesser, not-included offense in exchange for the prosecuting attorney's promise not to recommend a sentence at trial. In the course of the proceedings, a new prosecutor was appointed to the case and, at trial, this attorney recommended the maximum sentence possible, unaware of his predecessor's promise. The defendant challenged his sentence, claiming the prosecution had breached the plea agreement. Despite the sentencing judge's assertion that he was not influenced by the prosecutor's recommendation, the Court reversed the conviction and remanded the case, stating "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 a part of the inducement or consideration, such promise must be fulfilled."[28] Thus, the detriment suffered by the defendant in waiving his constitutional rights by pleading guilty, not the prosecutor's action (because his recommendation did not influence the judge), was decisive. Also of importance to the Court was that the agreement had been reached through fair dealing.[29] The defendant's detrimental reliance and the fairness of the agreement are criteria upon which subsequent courts have also focused.[30] The *Santobello* Court noted that safeguards reasonably

28. *Id.* at 262 (emphasis added). This holding, which greatly improved the defendant's position in plea negotiations, has been universally and unquestioningly cited. *See, e.g.*, United States v. Cain, 587 F.2d 678 (5th Cir.), *cert. denied*, 440 U.S. 975 (1979); Cohen v. United States, 593 F.2d 766 (6th Cir. 1979); United States v. Bowler, 585 F.2d 851 (7th Cir. 1978); United States v. McClintic, 570 F.2d 685 (8th Cir. 1978); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Brown, 500 F.2d 375 (4th Cir. 1974); United States v. Miller, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978); State v. Neitte, 363 So. 2d 425 (La. 1978); Miller v. State, 272 Md. 249, 322 A.2d 527 (1974); State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972); Joiner v. State, 578 S.W.2d 739 (Tex. Crim. App. 1979); Brooks v. Narick, 243 S.E.2d 841 (W. Va. 1978).

29. Santobello v. New York, 404 U.S. 257, 261 (1971).

30. United States v. Bowler, 585 F.2d 851, 853 (7th Cir. 1978) (detriment in "adjudicative element" of a guilty plea would entitle defendant to dismissal of indictment upon prosecutorial breach); United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974) (defendant's reliance to his detriment upon plea agreement and subsequent breach by prosecution could be grounds for dismissal of indictment); United States v. Pavia, 294 F. Supp. 742 (D.D.C. 1969) (prejudice to the defendant required before indictment could be dismissed); State v. Reasbeck, 359 So. 2d 564 (Fla. Dist. Ct. App. 1979) (defendant allowed to withdraw his plea after detrimentally relying on the breaching prosecutor's promise); DeRusse v. State, 579 S.W.2d 224 (Tex. Crim. App. 1979) (prosecutor's withdrawal from the plea bargain before the defendant's entry of a plea was not reversible error because defendant had not shown any detrimental reliance on the bargain). *But see* State v. Edwards, 279 N.W.2d 9, 11 (Iowa 1979) ("in the absence of a finding of abuse of prosecutorial discretion and resultant prejudice to defendant, it is improper for the trial judge to undertake to impose upon the prosecutor an agreement with terms he believes to be unwise"). *See generally Legitimation of Plea Bargains*, *supra* note 11, at 784–85.

necessary to protect defendant's rights would vary with the circumstances.[31] Furthermore, dicta contained in the decision can be interpreted to suggest that there is a constitutional right to specific performance of plea agreements.[32]

The *Cooper* court found *Santobello's* constitutional mandate to provide a right, defined in part by contract law, to fair treatment throughout the entire plea process, from preliminary negotiations to in-court recommendations.[33] The Fourth Circuit stated that even though *Santobello* had not developed the "precise source" or "specific content" of the protected rights of the defendant, "it was plain in context that the source was constitutional."[34] This, the court believed, was authority to go beyond contract analysis in a situation in which this type of analysis would not have protected the defendant adequately. The court found that conduct that would be unfair in the market place would always be constitutionally unfair, but that the converse did not necessarily follow, because contract law is not concerned solely with fairness.[35] Stressing that plea bargaining involves the "barter" of constitutional rights, rather than the "barter" of goods or services, the *Cooper* court concluded that the "fortuities of communication" should not govern negotiations for the exchange of such invaluable rights.[36] Nonetheless, the Fourth Circuit declined to stipulate at what point, short of some tangible reliance by the defendant upon the plea proposal, the right to specific performance arises.[37]

Although the *Cooper* court did not establish a general rule, it did employ a well-reasoned, three-step analysis in making its determination. First, it identified the source of the defendant's rights. Second, it examined the facts of the case to determine whether these rights had been abridged or denied. Finally, it tested the rights against a standard of constitutional reasonableness. The source of the defendant's rights was found to be "the right to fundamental fairness embraced within substantive due process guarantees," and the sixth amendment "right to effective assistance of counsel."[38] The court

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31. Santobello v. New York, 404 U.S. 257, 262 (1971).
32. *Broken Plea Bargains, supra* note 4, at 515–21.
33. Cooper v. United States, 594 F.2d 12, 16 (4th Cir. 1979).
34. *Id.* at 15.
35. *Id.* at 17. The Maryland courts, although not yet adopting the *Cooper* view, have found that "rigid application of contract law to plea bargains would be incongruous." State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 382–83 (1976). Strict application would be incongruous because the trial court usually is not bound by the plea agreement and a defendant could never be specifically forced to plead guilty. *Id.*
36. Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979).
37. *Id.* at 18.
38. *Id.*

found the relevance of fundamental fairness to plea bargaining "too plain to require discussion."[39] Regarding the abridgement of the defendant's sixth amendment right to effective assistance of counsel, the court found that when a defendant learns of a government proposal through his attorney, subsequent withdrawal of that proposal by the government will erode the defendant's confidence in defense counsel's capability and professional integrity.[40] Sixth amendment considerations should contribute to "a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."[41] That defense counsel had been replaced before the trial was a strong indication to the court that the defendant had lost confidence in his first counselor.[42]

In the final step of its analysis, keeping in mind the statement in *Santobello* that a defendant is entitled only to that which is "reasonably due under the circumstances," the *Cooper* court tested the remedy of specific performance against this "reasonableness" standard. In reaching its determination on this issue, the court noted seven factors that it believed made specific performance appropriate: the proposal was made without any reservations as to approval; its content was reasonable; the prosecutor had apparent authority to make such a proposal; the offer was promptly communicated to the defendant; the defendant assented promptly and unequivocally; his counsel promptly communicated his answer to the prosecutor; and no extenuating circumstances existed.[43] Weighed against these factors were the practical burdens that a decree of specific performance would place upon the government. The court found the defendant's rights to be of greater weight for two reasons. First, the right to specific performance could arise only when an authorized prosecutor, rather than the defendant, voluntarily opened plea negotiations. Second, the court believed that requiring the prosecutors' office to "keep the left hand informed of the right's doing" was the mere imposition of a duty, rather than a burden, and therefore should not be weighed in the balance.[44] Finding constitutional protection of the defendant's expectations reasonable under the circumstances,[45] the court remanded the case for specific enforcement of the government's proposal.

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39. *Id.*
40. *Id.* Defense counsel must be able to make firm assurances to the defendant. A plea, based on a contingency, which the defendant thought to be a firm offer may be invalid if the defendant's belief is reasonable. *See* United States v. Frontero, 452 F.2d 406 (5th Cir. 1971).
41. Cooper v. United States, 594 F.2d 12, 19 (4th Cir. 1979).
42. *Id.* at 19 n.9.
43. *Id.*
44. *Id.* at 20.
45. *Id.*

V. STRENGTHENING DEFENDANTS' POSITION

In redefining defendants' rights and remedies in plea negotiations, *Cooper* builds upon *Santobello*[46] by explicitly identifying the constitutional source of these rights and by expanding defendants' remedies. Cases decided after *Brady*[47] but before *Santobello* had, for the most part, defined defendants' rights as contractual and had offered only one remedy — withdrawal of the guilty plea upon a prosecutorial breach.[48] The *Santobello* Court broadened defendants' remedies for breach by suggesting upon remand to the state court that either withdrawal of the plea or specific enforcement of the proposal could be considered. At that time specific performance was a remedy offered by only a small minority of courts. Although the Court's opinion did not explicitly state the constitutional source of the remedy of specific performance, the concurring opinions of four Justices indicate the nature of these underlying constitutional considerations. Justice Douglas, in his concurrence stated:

> I . . . favor a constitutional rule for this as well as for other pending or incoming cases. Where the "plea bargain" is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go on trial on the original charges.[49]

Three other Justices, Marshall, Brennan, and Stewart, partially concurred with the majority, stating that "when a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea."[50] The unequivocal acceptance by the majority of jurisdictions[51] of the validity of the constitutional

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46. 404 U.S. 257 (1971).
47. 397 U.S. 742 (1970).
48. J. Bond, Plea Bargaining and Guilty Pleas § 7.19[2] (1978). *See also* Neely v. Pennsylvania, 411 U.S. 954, 956 n.4 (1973); United States v. Lester, 247 F.2d 496, 501 (2d Cir. 1957); Sweetwine v. State, 42 Md. App. 1, 4–6, 398 A.2d 1262, 1265 (1979).
49. Santobello v. New York, 404 U.S. 257, 267 (1971).
50. *Id.* at 268.
51. *See, e.g.*, Cohen v. United States, 593 F.2d 766 (6th Cir. 1979); United States v. Cain, 587 F.2d 678 (5th Cir.), *cert. denied*, 440 U.S. 975 (1979); United States v. Bowler, 585 F.2d 851 (7th Cir. 1978); United States v. McClintic, 570 F.2d 685 (8th Cir. 1978); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Brown, 500 F.2d 375 (4th Cir. 1974); United States v. Miller, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978); State v. Neitte, 363 So. 2d 425 (La. 1978); Miller v. State, 272 Md. 249, 322 A.2d 527 (1974); State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972); Joiner v. State, 578 S.W.2d 739 (Tex. Crim. App. 1979); Brooks v. Narick, 243 S.E.2d 841 (W. Va. 1978).

considerations underlying the Court's decision in *Santobello* indicates a movement in the direction of providing stronger constitutional safeguards for defendants' government-induced expectations.[52]

Cooper is the most recent decision broadening defendants' rights in the context of plea negotiations. Earlier stages in this trend were marked by courts' growing acceptance of specific performance as an appropriate remedy[53] when the prosecution breaches a plea agreement, and by courts' increasing willingness to find that a defendant has a right *either* to withdraw his plea *or* have it specifically enforced.[54] The *Cooper* court, by declining to circumscribe defendants' rights by employing traditional contract theory, and by grounding those rights firmly in the Constitution, takes an important further step.

The court could do no less. A defendant's guilty plea after striking a plea bargain is tantamount to consent to the entry of a judgment of conviction without benefit of trial.[55] It is a waiver of almost every fundamental constitutional right afforded a defendant in criminal proceedings.[56] Safeguards sufficient for dealings in the marketplace are ineffective when dealing with such precious constitutional guarantees as the privilege against self-incrimination, trial by jury, confrontation of one's accusers, presentation of defense witnesses, and conviction by proof beyond a reasonable doubt.[57]

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52. One author has suggested that criminal defendants possess an emerging constitutional right to protection of reasonable expectations engendered by plea negotiations with the government. *Broken Plea Bargains, supra* note 4, at 528. His basis for asserting the existence of this emerging right is threefold: the analysis clarifies judicial interpretations of *Santobello*, satisfies our perceptions of fundamental fairness, and comports with other expectation interests which warrant constitutional protection (for example, double jeopardy or the contract clause of the Federal Constitution). *Id.* at 526. The author further suggests that this is the interpretation that state and lower courts have adopted. *Id.* at 513–14, 518.
53. *Broken Plea Bargains, supra* note 4, at 519. *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296–97 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974); United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974); Commonwealth v. Zakrzewski, 460 Pa. 528, 533, 333 A.2d 898, 900 (1975); State v. Tourtellotte, 88 Wash. 2d 579, 583, 564 P.2d 799, 802–03 (1977). *See also Legitimation of Plea Bargains, supra* note 11, at 793–94.
54. *See, e.g.*, United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978); United States v. Thomas, 580 F.2d 1036 (10th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); State v. Brockman, 277 Md. 687, 699, 357 A.2d 376, 384 (1976). *But see* Government of Virgin Islands v. Scotland, 614 F.2d 360 (3d Cir. 1980).
55. Brady v. United States, 397 U.S. 742, 748 (1970).
56. Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).
57. *See* Boykin v. Alabama, 395 U.S. 238, 242–44 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); Davis v. State, 278 Md. 103, 110, 361 A.2d 113, 117 (1976) (quoting McCarthy v. United States, 394 U.S. at 466). *See also* Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 871–72 (1964).

Finding that constitutional rights arise at an earlier stage in the plea bargaining process than would contractual rights, the *Cooper* court held that specific enforcement of a prosecutor's proposal is compelled by the right to fundamental fairness found in the fourteenth amendment, and by the right to effective assistance of counsel found in the sixth amendment.[58]

In affording defendants protection throughout the entire plea negotiation process, the *Cooper* decision recognizes that the plea bargaining setting is a strange hybrid. It entails bargaining techniques from the open market, yet the "goods" being bartered are invaluable constitutional guarantees. Although both the defendant and prosecutor have bargainable assets with which to negotiate, they do not deal at arm's length.[59] The defendant is negotiating for freedom; the prosecutor for administrative convenience and a reduced work load. The stakes are much higher for the defendant because he or she must choose between certain incarceration and trial with the possibility of a more severe penalty. In contrast, the prosecutor will simply be adding another case to an already heavy caseload. Because the two parties are bartering with commodities of disproportionate values, a state's promise to a criminal defendant in exchange for the waiver of fundamental rights should be subjected to a particularly high standard.[60] Waivers of constitutional rights should not be made to depend upon such fortuitous circumstances as who speaks first in a telephone conversation. A defendant cannot be asked to waive these rights without being able to rely upon receiving what has been offered in exchange. The burden of scrupulous fairness upon the state is ot unreasonable. Due process has always mandated such a requirement: "[T]his burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair."[61]

Aside from the constitutional issues, policy considerations also support the *Cooper* court's decision. Enforcement of prosecutorial promises by the courts will have advantages for prosecutors as well as for defendants. One of the reasons the courts have accepted plea bargaining is to ease the severe overcrowding in the criminal justice

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58. Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979).
59. *Cf.* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors"). For a discussion of this case, see Note, 66 CALIF. L. REV. 875 (1978).
60. *See* Martinez v. Mancusi, 455 F.2d 705 (2d Cir.), *cert. denied*, 409 U.S. 959, 962 (1972) (Justices Marshall and Douglas dissenting from denial of certiorari); *Broken Plea Bargains, supra* note 4, at 524. In this situation, the state's extraordinary power and the critical nature of the proposals concerning criminal consequences to the defendant should place a higher standard upon the state. *Id.*
61. Moore v. Illinois, 408 U.S. 786, 809–10 (1972).

system.[62] If the state cannot insure the benefit of plea bargains, defendants will be reluctant to enter into negotiations.[63] Moreover, until recently, plea bargaining was viewed as a less than acceptable practice. Even now, the technique does not enjoy unanimous acceptance,[64] and the judicial approbation it has earned will be jeopardized should its use occasion prosecutorial abuse.[65] Repudiation of promises through negligence or bad faith, deliberate harassment, and use of the plea proposal as a means of testing a defendant's confidence in his or her case are several of the abuses that could occur absent constitutional protection of a defendant's reasonable expectations.[66] Such misconduct lends support to critics' arguments condemning plea bargaining and will erode whatever respectability the technique has gained. Furthermore, a prosecutor compromises professional integrity and weakens the state's case by breaching a plea agreement.[67] As stated by the Fourth Circuit in *United States v. Carter*, in addition to the defendant's interest, of critical importance is the "honor of the government[,] public confidence in the fair

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62. *See Legitimation of Plea Bargains, supra* note 11, at 772.
63. *Broken Plea Bargains, supra* note 4, at 512.
64. U.S. DEPT. OF JUSTICE, REPORTS OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS *Courts* §§ 46-49 (1973). In calling for the abolition of all plea bargaining, the Commission found the major vices of the technique to be "reduced rationality" in the criminal process, a higher risk of convicting innocent defendants, and an increase in defendants' burden to exercise their constitutional rights — that is, to stand trial. *Id.* at 610–11. The Commission stated that the disposition of criminal cases should not be "a contest where the government's success is necessarily measured by the number of convictions it obtains, regardless of the methods used." Neely v. Pennsylvania, 449 Pa. 3, 295 A.2d 75 (1972), *cert. denied*, 411 U.S. 954, 958 (1973) (Justices Douglas, Stewart, and Marshall dissenting from denial of certiorari). *See also Legitimation of Plea Bargains, supra* note 11, at 774; Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).
65. "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). *See also* Cooper v. United States, 594 F.2d 12, 20 (4th Cir. 1979) ("[A] failure to find a constitutional right and violation in this case would necessarily give judicial approval to a practice whose possibilities for easy abuse, or at least the appearance of abuse, are abundantly clear.").
66. *See* United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978); *In re* Palodichuk, 22 Wash. App. 107, 110, 589 P.2d 269, 271 (1978); *Broken Plea Bargains, supra* note 4, at 526. Published guidelines for plea negotiations do exist. *See* ABA PLEAS, *supra* note 2, at § 3.1; ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 (1975); FED. R. CRIM. P. 11(e). These guidelines are only skeletal, however, and leave much to the discretion of the prosecutor.
67. State v. Edwards, 279 N.W.2d 9, 12 (Iowa 1979). Even though the *Edwards* court rejected the *Cooper* holding, it did state that "we do not condone hasty plea proposals or casual withdrawals." The court did not, however, suggest how such casual withdrawals should be remedied when there has been no tangible detrimental reliance.

administration of justice, and the efficient administration of justice."[68]

The expansion of defendants' rights in plea negotiations effected by *Cooper* makes it increasingly important that prosecutors revise their plea bargaining tactics. The prosecutor's office must act as a unit, rather than "an amalgam of separate entities. [It] is an entity and as such it is the spokesman for the Government."[69] When an offer has been made, it is reasonable for the defendant to rely on the apparent authority of the prosecutor as a representative of the government, if not in the classic contract sense, then at least psychologically.[70]

A prosecutor's apparent authority should be enough to bind the government to its proposal; disagreements between a prosecutor and his superior after a proposal is offered should have no effect.[71] Admittedly, prosecutors' offices are notoriously overworked and understaffed, but even that is not sufficient reason to compromise defendants' constitutional rights. Defendants should be clearly advised whenever a prosecutor's proposal is conditional pending approval of a superior.[72] An inadvertent breach occasioned by a lack of communication among prosecutors has the same effect on the defendant as an intentional breach.[73]

Rules and procedures[74] established in each prosecutor's office would help to eliminate uncertainties that might result in the

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68. United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) (if such a promise existed, the promise of federal agents in Washington, D.C., that no other prosecutions would be brought against the defendant elsewhere would be enforced).

69. Moore v. Illinois, 408 U.S. 786, 809–10 (1972) (quoting S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), and Giglio v. United States, 405 U.S. 150 (1972)).

70. *Broken Plea Bargains, supra* note 4, at 526. This type of reliance is as injurious as tangible reliance because of the serious consequences and the greater resources and expertise arrayed against the defendant.

71. Cooper v. United States, 594 F.2d 12, 19 (4th Cir. 1979).

72. The proposal should include any reservations as to performance or approval, including judicial approval. *See* FED. R. CRIM. P. 11(e)(2)-(4).

73. *See* Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

Many courts addressing plea bargain breaches have found the actual effect of the breach irrelevant. They assert that the defendant's reliance and the breach itself are of greater importance. *See* Santobello v. New York, 404 U.S. at 262 (breach found even though the trial judge stated that he had been unaffected by the prosecutor's actions); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173, 1174 (4th Cir. 1975) (prosecutor's failure to make a recommendation to the court held a breach even though the recommendation would not bind the court); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) (for prosecutor just to go through the motions honoring a promise not sufficient to fulfill the promise).

74. *See* ALI MODEL CODE OF PRE-ARRAINGMENT PROCEDURE § 350.3, note at 613; *Legitimation of Plea Bargains, supra* note 11, at 799. *See also* United States v. Fischetti, 475 F. Supp. 1145, 1151 (D.N.J. 1979).

eventual repudiation of a plea bargain, as occurred in *Cooper*. An agreement, once reached, should be reduced to writing.[75] In addition, any contingency subjecting the proposal to a superior's final approval should be made a part of the written agreement so as to avoid any misunderstandings.[76] Only attorneys who are trusted to offer reasonable proposals should be allowed to negotiate. Certainly, an assistant attorney and the attorney's superior should discuss limits on the proposal before negotiations are begun.

A further step, and one which is already required by the Federal Rules of Criminal Procedure,[77] is the disclosure of the plea agreement in court, on the record.[78] A written agreement would facilitate this objective. In *Cooper*, there was a misunderstanding as to acceptance and approval.[79] Quite possibly a firm written proposal would have eliminated that misunderstanding.

Overall, the intention should be to make all negotiations open and above board. Subterfuge and secrecy can only hinder negotiations and create confusion. If the "left hand" is to know what the "right" is doing, closer supervision of plea proposals is needed.

VI. CONCLUSION

Cooper will promote further acceptance of plea bargaining. The constitutional protection afforded defendants by this decision and the growing openness of plea bargaining will help to remove the tarnish that this practice has acquired over the years. It is appropriate that a process that entails waiver of constitutional rights be scrutinized using constitutional standards. More courts must come to the same conclusion as did the court in *Cooper* if full protection is to be afforded defendants in plea negotiations.[80]

Judith A Wood

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75. *Legitimation of Plea Bargains, supra* note 11, at 799.
76. See note 71 *supra*.
77. FED. R. CRIM. P. 11(e)(2).
78. *See* FED. R. CRIM. P. 11 (notes appended to 1974 amendments); *Legitimation of Plea Bargains, supra* note 11, at 799.
79. Cooper v. United States, 594 F.2d 12, 15 n.2 (4th Cir. 1979).
80. *But see* Government of Virgin Islands v. Scotland, 614 F.2d 360 (3d Cir. 1980). In this recent case, the Third Circuit did not agree with the Fourth Circuit decision in *Cooper*, although it is unclear whether the *Scotland* court expressly rejected *Cooper*. The *Scotland* court noted that the factual situation before it was very similar to that in *Cooper*, but rejected the *Cooper* court's argument even though noting that the government's actions had been far from exemplary. The major point of the *Scotland* opinion was that trial itself is an adequate remedy for a repudiated proposal, and that a *Cooper*-type rule was an unwarranted intrusion into prosecutorial discretion.