Specific Enforcement to Ensure Due Process in Plea Bargaining

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SPECIFIC ENFORCEMENT TO ENSURE DUE PROCESS IN PLEA BARGAINING

Plea bargains result from agreements by defendants to enter guilty pleas in exchange for consideration from the prosecution.\(^1\) If the prosecution fails to perform its side of the bargain, then a court may rely on principles of traditional contract law and grant specific enforcement of the bargain. These courts usually require the creation of a bargain, subsequent reliance on the agreement by the defendant, and nonperformance by the prosecution before they will enforce the agreement.\(^2\)

In *Cooper v. United States*,\(^3\) however, the Fourth Circuit moved two steps beyond precedent by granting specific performance although both agreement and reliance were absent.\(^4\) The defendant, convicted on two counts of bribing a witness and two counts of obstruction of justice, appealed the district court's refusal to compel performance of a plea bargain proposed to him through his attorney.\(^5\) The Fourth Circuit held that the government's

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3. 594 F.2d 12 (4th Cir. 1979).

4. *Id.* at 17 n.6.

5. On May 11, 1977, an Assistant United States Attorney met with Cooper's counsel to discuss a plea agreement. The government attorney proposed that Cooper cooperate with the government in the prosecution of narcotics trials in which Cooper was a chief witness and then plead guilty to one count of obstruction of justice. In return, the government would dismiss the other counts of Cooper's indictment and alert the sentencing judge to Cooper's cooperation. This offer was unequivocal and relayed no further requirement of approval by
withdrawal of the plea bargain proposal violated the constitutional standard of fairness, and thus entitled Cooper to specific performance of the proposed bargain.

The court drew no analogies to contract law, under which the defendant could have shown neither a completed agreement nor detrimental reliance on the promise. Instead, the court based its decision on the defendant's rights to substantive due process during plea negotiations and effective assistance of counsel, and held that "a constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals."

Although Cooper represents an important extension of procedural safeguards to the process of plea negotiation, the court's reliance on concepts of substantive due process seems extraordinary and unnecessary. This Comment will explain that although due process considerations and the requirement of effective counsel form an adequate basis for the court's decision, a shift in emphasis from substantive to procedural due process would have strengthened the holding. In support of this conclusion, the discussion will focus on the role of plea bargaining as a bureaucratic, administrative process in the criminal justice system and the need for an orderly, regular procedure in plea negotiations. The limited utility of the contract analogy in meeting this need, the establishment of the fairness concept in Santobello v. New York, and the importance of the defense attorney in the plea bargain process indicate that specific performance may be necessary in some situations to ensure the integrity of this process.
By 1967 an estimated ninety percent of all criminal cases nationwide were disposed of through pretrial procedures. Not until 1970, however, did the Supreme Court tacitly approve the practice of negotiating guilty pleas in exchange for benefits offered by the state. A mere two years later, the Court recognized plea bargaining as "an essential component of the administration of justice." In 1974 the Federal Rules of Criminal Procedure finally were amended to reflect the presence of plea bargaining within the federal criminal justice system. Against this background of a slowly developing law of plea bargain administration, courts turned consistently to the well-established common law principles of contract law for guidance because the very terms "plea bargain" and "plea negotiation" suggested a business transaction.

The Supreme Court and the lower courts have used contract terminology in plea bargain cases, basing decisions on offer, acceptance, performance, breach of performance, and even the parol evidence rule. Relief, when granted, often has consisted of rescission or specific enforcement. Indeed, one recent article noted in Cooper persuasively discusses the remedies for broken plea bargain in terms of "a constitutional requirement that the
contractual expectations the state creates in criminal defendants be protected." The analysis in Cooper, however, represents an important step beyond the traditional contractual mode of analysis for plea bargain controversies.

Beyond Contract Analogy

The district court rejected Cooper's motion for specific enforcement of the plea bargain proposal because under contract analysis, neither a contractual relationship creating rights and obligations nor conduct by the prosecution creating promissory estoppel on the basis of reliance were present. The Fourth Circuit considered that analysis, although contractually sound, to be misplaced, because "the temptation to take the relative certainties of established common law analysis too far in developing difficult constitutional doctrine is ever present and ever to be resisted." The rights of a participant in a plea negotiation, the court observed, are derived not from contract principles, but from a justifiable expectation that he will be treated with fairness. Citing Santobello v. New York, the court noted that "the core concept here is the existence of a constitutional right in the defendant to be treated with 'fairness' throughout the process." The government had a "fundamental duty to negotiate with scrupulous fairness," and that duty was breached by the withdrawal of a reasonable, specific, unambiguous plea proposal. Because contract law would not hold the government to the same high standards, analysis based on contract law was of limited utility.

A major problem with contractual analysis of plea negotiations is that although contract law may strive to create "minimally fair dealing in the market place," fairness is not its only concern.

14. Westen & Westin, supra note 2, at 473 (emphasis original).
15. 594 F.2d at 16 n.5.
16. Id. at 17 (footnotes omitted). Despite this explicit rejection of "common law analysis," one district court, citing Santobello and Cooper, recently used contractual analysis to find offer, acceptance, and binding agreement in a case posing problems similar to those raised in Cooper. See United States v. Hubbard, No. 78-401 (D.D.C. Oct. 8, 1979).
17. 594 F.2d at 16-17.
18. Id. at 16.
19. Id. at 19.
20. Id. at 17. This concern for minimal standards rather than absolute fairness reflects Professor Fuller's opinion that law is closely related to the morality of duty: "[T]he morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is
Many elements of contract law are designed simply to achieve the pragmatic ends of certainty and order in complicated commercial transactions. These ends often are achieved by the application of mechanical rules or even by the outcome of fortuitous circumstances. As the court cautioned, however, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals."

The Fourth Circuit determined that contract law provided a useful and fairly reliable "inclusive test" for the constitutionality of government action in plea negotiations, but not an "exclusive test." Actions that contract law principles would hold unfair almost certainly would fall within the range of constitutionally unacceptable plea bargain practices. On the other hand, actions that contract law would countenance under its standard of "minimally fair dealing," such as the withdrawal of an offer before it is accepted, would not always meet the standards of constitutional fairness. Thus, contract law does not provide an "exclusive test" in determining the existence of rights within the plea bargaining process; that determination must depend on concepts of fairness.

**Fairness as a Core Concept**

The court in *Cooper* justified its decision by invoking "the right to fundamental fairness embraced within due process guaran-
part of the “general constitutional framework of substanti
tive due process.” The court’s concern with the elusive concept
of fairness was based upon its interpretation of Santobello v. New York. In Santobello, the defendant was arrested for two felony
counts of gambling activities. He agreed to plead guilty to one
lesser included offense, provided that the government would make
no sentencing recommendations. After entry of the guilty plea
and before sentencing, Santobello changed counsel and moved
to suppress evidence, to inspect the grand jury minutes, and to
withdraw the guilty plea. The motions were denied and sentencing
followed several weeks later.

At sentencing, a prosecutor who had not been involved in the
original negotiations recommended the maximum sentence per-
mitted by law. Nothing in the record had revealed the existence
of a bargain concerning sentencing recommendations and the trial
judge noted that Santobello’s record would have indicated the
maximum sentence regardless of the recommendation. The de-
fendant unsuccessfully appealed his conviction and sentence in the
New York courts and eventually sought and received certiorari to
the United States Supreme Court.

The Supreme Court decision focused on the adminstrative
aspects of plea bargaining, noting that plea bargaining should be
encouraged when “[p]roperly administered,” but openly criti-
cizing the record in Santobello as “another example of an un-
fortunate lapse in orderly prosecutorial procedures.” The Court
also stated that the considerations justifying the recognition of
plea bargaining “presuppose fairness in securing agreement be-
tween an accused and a prosecutor.” The decision thus implicitly
distinguished the process of negotiation from the implementation
of the results, but nevertheless required fairness in both parts of
the process. This distinction was emphasized further when the
Court noted that “[t]his phase of the process of criminal justice,
and the adjudicative element inherent in accepting a plea of guilty,

28. Id. at 18.
29. Id. at 19.
30. For a thorough discussion of Santobello, see Westen & Westin, supra note 2. See also
Fischer, Beyond Santobello—Remedies for Reneged Plea Bargains, 2 U. SAN. FERN. V.L.
Rev. 121 (1973).
31. 404 U.S. at 260.
32. Id.
33. Id. at 261 (emphasis supplied).
must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." 34

The Supreme Court thus identified two distinct aspects of the plea bargain: the administrative aspect, which includes the negotiations; and the adjudicative aspect, which includes the entry and acceptance of the guilty plea. Constitutional safeguards, however, attach to both. Although this due process requirement was not explained fully, proper administration and orderly procedures clearly require, at a minimum, "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." 35 Specifically, in Santobello, the Court could not excuse the breach of an agreement merely because it was the unintentional result of poor intraoffice communications. 36

Although these considerations enabled the Court to grant relief, it remanded the final disposition of the case to the state court, which better could decide whether the circumstances of the case required "specific performance of the agreement on the plea," 37 or whether the petitioner should be granted permission to withdraw his plea. This disposition of the case created a confusing precedent. 38 Due process and fairness clearly require relief for breach of a specific promise made to a defendant who has relied upon that promise; the parameters of the Court's decision, however, were undefined. Questions concerning the application of specific performance as a remedy, especially under circumstances that indicate no gross unfairness to defendant, and the extent to which the Court's decision was based on an assumption that the defendant was injured, remain unanswered. The Santobello decision alone therefore provides an inadequate explanation of the

34. Id. at 262 (emphasis supplied).

35. Id. Whether this statement limits further application of the holding to instances in which a guilty plea has been entered or merely demonstrates one part of the Court's larger concern for the fair administration of plea bargains is unclear.

36. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach was inadvertent does not lessen its impact." Id.

37. Id. at 263.

38. See Westen & Westin, supra note 2, at 476. Also, the Court did not address in Santobello whether the enforcement of plea bargain agreements is constitutionally required. See 23 WAYNE L. REV. 1129, 1141 n.111 (1977).
fairness concept upon which the Fourth Circuit based its decision in Cooper. The concern for fair treatment and orderly process can be explained only within a larger framework of the development of due process.

**DUE PROCESS AND PLEA BARGAINING**

Constitutional scholars have characterized the judicial development of due process, as guaranteed by the fifth and fourteenth amendments of the Constitution, as "an evolving process punctuated by vague generalizations and declarations of broad, overarching principles." The references in Cooper to "fairness" and "substantive due process" fit this description well. Neither the Constitution nor the Bill of Rights explicitly addresses the court's concern that a defendant in a plea negotiation be treated fairly or that the government keep its word once given; therefore, these constitutional rights must have as their source something other than a direct textual reference.

Due process provides protection for those substantive or natural rights to which everyone is entitled. This concept evolved from

39. "No person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V
40. "No State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. IV
42. The court of appeals created a near tautology by referring to "the right to fundamental fairness embraced within substantive due process guarantees." 594 F.2d at 18. Defining "fairness" in terms of "due process" accomplishes little. Unfortunately, a court rarely clarifies these principles when it bases its decision on considerations of "fairness."

"Fairness" generally denotes one of three concepts: that the outcome of a case is appropriate to the circumstances; that like persons in like circumstances will be treated equally; or that the court will use regular, orderly, and nonarbitrary procedures in decision making and outcome determination. See Casper, Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment, 12 LAW & SOC'Y REV. 237 (1978). The interest in fairness represented by Cooper tends more toward the third alternative, though these categories are not mutually exclusive.

43. One article notes that Santobello must have been constitutionally based, because the Court did not identify the federal statute that conferred jurisdiction to review the state court conviction. The authors therefore concluded that jurisdiction was based on 28 U.S.C. § 1257 (1970), which provides for review of final state court judgments only if constitutional rights are asserted. Westen & Westin, supra note 2, at 476 n.16.
44. J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 385 (1978) [hereinafter cited as J. Nowak]. The concept of "due process" presents the same definitional problems as "fairness," see note 42 supra, as when due process is linked to "fundamental fairness," the deprivation of which is "shocking to the universal sense of justice." Betts v. Brady, 316 U.S. 455, 462 (1942).
seventeenth and eighteenth century political thought that determined that “a higher or natural law limited the restrictions on liberty that a temporal government could impose on an individual.” Typical of this concern for a “higher law” was Justice Frankfurter’s description of due process as embodying “a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.”

Substantive due process seeks to protect those “individual rights which do not have a specific textual base in the Constitution or its Amendments.” Because it protects those rights by imposing constraints upon the exercise of power it may be a positive agent within constitutional law that is manifested only negatively. Thus, due process requires the following: that a prisoner not be coerced to confess or to enter a guilty plea; that a defendant not be convicted without the aid of counsel; that a defendant not be convicted on less than proof beyond a reasonable doubt or through the use of false evidence; and that a waiver of constitutional rights not be accepted unless made voluntarily and knowingly. The constraining nature of due process has had an important influence on the development of plea bargaining. In particular, the due process guarantees associated with guilty pleas have provided foundation for judicial analysis of plea bargains.

When pretrial negotiations lead to the entry of a guilty plea in court, the plea is not only an admission of guilt but also a waiver of important constitutional rights. A guilty plea constitutes “waiver of the fundamental rights to a jury trial, to confront one’s accusers,

45. J. NOWAK, supra note 44, at 385.
47. J. NOWAK, supra note 44, at 417-18.
51. Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in any case in which imprisonment is imposed); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in state felony cases); Powell v. Alabama, 287 U.S. 45 (1932) (right to appointed counsel in state capital cases). This progression demonstrates the increased concern for due process safeguards that has characterized constitutional criminal procedure in the last half-century.
to present witnesses in one’s defense, to remain silent, and to be convicted beyond all reasonable doubt.” Thus, substantial safeguards must accompany the entry of a guilty plea in order to ensure against the unjust denial of the defendant’s rights.

The safeguards are concerned primarily with the defendant’s state of mind when he enters the plea. Regardless of whether the defendant enters the plea as part of a plea bargain, he must reach his decision voluntarily, knowingly, and with full understanding of the consequences and alternatives. An affirmative showing on


56. Most procedural rights, after all, are designed to protect innocent defendants from being falsely convicted. Accordingly, whenever the state allows a defendant to waive all his procedural rights by pleading guilty, it runs the risk that an innocent defendant will be falsely convicted. With respect to spontaneous or noninduced pleas, the risk can be minimized by requiring the prosecution to present a “factual basis” for the plea and by relying on the defendant to look to his own self interest to avoid false self-condemnation. With induced or negotiated pleas, on the other hand, the factual basis requirement and the defendant’s self interest both become less reliable, because if an inducement to plead guilty is attractive enough even an innocent defendant may perceive it to be in his self interest to make a false confession of guilt.

Westen & Westin, supra note 2, at 497 (footnotes omitted). Thus, safeguards are intended to prevent a guilty plea when the defendant does not believe that the plea is in his best interest, or when the inducement to plead guilty seems sufficiently attractive to warrant pleading guilty to avoid the travails of a trial even though the defendant is not guilty.

The high “implicit race of non-conviction” that accompanies an increase in plea bargain activity demonstrates the need to protect defendants from themselves. See Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 Harv. L. Rev. 293, 295 (1975). Finkelstein studied conviction rates in 29 federal districts during 1970-74 and estimated that as many as 69% of those who plead guilty under marginal circumstances would be acquitted at trial, with an estimated average of 51%. Id. at 308.


58. Brady v. United States, 397 U.S. at 748 (holding that guilty plea as a waiver of constitutional rights “must be [a] knowing, intelligent [act] done with sufficient awareness of the relevant circumstances and likely consequences”); see Henderson v. Morgan, 426 U.S. 637 (1976) (holding that guilty plea cannot be voluntary when not intelligently made).

59. But see United States v. Timmreck, 99 S. Ct. 2085 (1979), in which the Supreme Court held that failure to apprise the defendant of a special mandatory parole term required for certain narcotics offenses will not invalidate the plea unless the defendant can show actual prejudice.

60. Hamilton v. Alabama, 368 U.S. 52 (1961) (concluding that defendant must be aware of defenses in order to plea intelligently); Moore v. Michigan, 355 U.S. 155, 160 (1957) (holding guilty plea invalid when unrepresented defendant could not have understood technically difficult defenses).
the record,61 including direct questioning of the defendant,62 must establish the fulfillment of these requirements. In federal courts, the judge also must indicate the factual basis for the plea on the record.65 The requirements that vindictiveness play no part in the prosecutor's actions64 and that promises or agreements made by the prosecution to induce guilty pleas be fulfilled65 complete the due process requirements for plea bargaining as established by the Supreme Court.

The lower courts gradually have shaped the skeletal guidelines provided by the Supreme Court and the Federal Rules of Criminal Procedure, although the results have not been uniform. The lower courts have established that the plea agreements of a federal or state prosecutor in one district may bind his counterparts elsewhere,68 but a prosecutor's promises do not bind a judge.67 Moreover, although a prosecutor's statements to a defendant about the likelihood of his receiving a prison sentence may constitute promises,68 a judge's comments under similar circumstances may not.69 Furthermore, a halfhearted sentence recommendation may not fulfill a plea bargain in one circuit,70 whereas in another, that recommendation would qualify as adequate performance.71 Of particular relevance to Cooper are those cases dealing with the specific enforcement of "unfulfillable promises."

Specific Enforcement of the Unfulfillable Promise

The Supreme Court noted in Brady v. United States72 that a guilty plea may be invalid on the basis of the due process

68. Id. at 330-31.
69. United States ex rel. Selikoff v. Commissioner of Corrections, 524 F.2d 650 (2d Cir. 1975), cert. denied, 425 U.S. 951 (1976). The judge was precluded by statute from making any unconditional promises at the time the guilty plea was entered.
71. Bergman v. Lefkowitz, 569 F.2d 705, 714-16 (2d Cir. 1977).
voluntariness requirement if the prosecution induced the plea by misrepresentations including unfulfillable promises. Generally, a promise is unfulfillable if its fulfillment would be contrary to law, if the promisor does not have the authority or power necessary to ensure fulfillment, or if the promise would not produce the anticipated results even if fulfilled. In Cooper, the promise became unfulfillable because the assistant prosecutor allegedly lacked the authority to make it. Thus, prior decisions support the substantive due process aspects of the result in Cooper.

The Fourth Circuit first addressed an unfulfillable plea bargain promise in United States v. Carter. The defendant Carter had pleaded guilty to a stolen check charge in the District of Columbia after allegedly receiving promises from the Assistant United States Attorney that he would not be prosecuted for any crimes divulged if he cooperated in the apprehension and conviction of other suspects and pleaded guilty to a single charge. Carter later was indicted and convicted in Virginia on charges that arose, in part, from the same activities covered by the District of Columbia prosecution. He appealed, assigning as error the district court's denial of his motion to dismiss the indictments. The Fourth Circuit held that Carter was entitled to an evidentiary hearing to determine the truth of his allegations with dismissal of the indictments as a possible outcome.

The court cited United States v. Pawa, a decision by the District Court for the District of Columbia, as support for the proposition that if a defendant relies on prosecutorial promises to his prejudice, then a promise not to indict on other charges must be honored. This promise also requires curtailing the right to prosecute in other judicial districts:

The United States government is the United States government throughout all of the states and districts. If the United States

73. Id. at 755.
74. Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (statute required imposition of sentence of minimum length).
75. In re Geisser, 554 F.2d 698 (5th Cir. 1977) (attempt to bind State Department to course of action on extradition request); Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976) (promise to arrange parole).
76. Correale v. United States, 479 F.2d at 948. In Correale, any sentence would have prevented the denied result of concurrent federal parole eligibility.
government in the District of Columbia, acting through one of its apparently authorized agents, promised that the sole prosecution against the defendant would be the misdemeanor charge in that jurisdiction, and defendant relied on the promise to his prejudice — we will not permit the United States government in the Eastern District of Virginia to breach the promise. ⁷⁹

Although the court in Carter emphasized the defendant’s reliance on the promise as a basis for its decision, the holding established an important precedent: under appropriate circumstances, an assistant prosecutor may commit the government to a course of action regardless of his authority to do so. Furthermore, the court stressed that possible prejudice to the government’s best interests in a case would not allow a result unjust to the defendant. The court stated:

If there be fear that an United States Attorney may unreasonably bargain away the government’s right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. ⁸⁰

Thus, in 1972 the Fourth Circuit adumbrated the concern shown in Cooper for proper administration of plea negotiations. ⁸¹ Although the court did not discuss due process explicitly, the decision reflects a basic concern for fairness that extends beyond the interests of a particular defendant. The court was concerned with “the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice

—-⁷⁹ 454 F.2d at 428.
—-⁸⁰ Id.
—-⁸¹ The court in Cooper offered the following suggestions as to how the United States Attorney could establish an appropriate procedure:

Once plea discussions are underway, it clearly lies with these agencies of government, among other things, to keep the left hand informed of the right’s doing; to withhold or limit the actual, and circumscribe the apparent, authority of subordinates if this be considered necessary; to incorporate reservations relating to higher level approval routinely in all proposals or specially in some; and, if thought necessary, to protect against perjured testimony of the making and acceptance of proposals by routine requirements of signed memoranda.

594 F.2d at 20 (footnote omitted).
in a federal scheme of government,”82 the same concerns that permeated Cooper

The second Fourth Circuit unfulfillable bargain case, United States v. Hammerman,83 involved a defendant who had cooperated in the investigation that eventually led to the prosecution of Spiro Agnew. The defendant had pleaded guilty to obstruction of the enforcement of tax laws after receiving assurances from an assistant prosecutor that the court had indicated a willingness to follow prosecution recommendations that Hammerman not receive a prison sentence.84 The court noted that although the assurances were merely predictions,85 they were “likely to inculcate belief and reliance,” and therefore constituted an important part of the plea agreement.86 The prosecution had no power to implement such assurances; thus, they were unfulfillable promises87 and the defendant was entitled to relief.

The court decided that the proper remedy under the circumstances was to allow Hammerman to withdraw his guilty plea.88 It distinguished those cases in which the prosecution offered a bargain normally within its power to fulfill, as in Carter, from the circumstances presented in Hammerman in which the defendant was given no assurances that the prosecution would fulfill the bargain.

That an assistant prosecutor may bind the prosecutorial forces of the United States to a specific sentence but cannot bind a court in the same way seems inconsistent; this distinction, however, is supported by other courts89 and reflects a general respect for the exclusive power of the court to impose sentences. In addition,

82. 454 F.2d at 428.
83. 528 F.2d 326 (4th Cir. 1975).
84. Id. at 329-30.
85. Id. at 330, 330 n.12.
86. Id. at 330.
87. “It does not matter that the prediction or promise was made in good faith; what matters is it was probably relied upon, was not fulfilled and was unfulfillable.” Id. at 331; see Correale v. United States, 479 F.2d at 947 (“Prosecutorial misrepresentations, though made in good faith, even to obtain a just, and here a mutually desired end, are not acceptable.”).
88. “[T]he district court promised Hammerman nothing. There is thus no bargain which can be enforced.” 528 F.2d at 322; cf. Gallejors v. United States, 466 F.2d 740, 741 (5th Cir. 1972) (holding that the bargain is “either specifically enforceable between the parties or the plea is void”).
89. See, e.g., Palermo v. Warden, 545 F.2d 286, 296 (2d Cir. 1976) (sentencing is totally within the court's discretion).
defense lawyers are aware that prosecutors cannot commit a judge to a specific sentence, although a pledge not to prosecute generally is within the power of the prosecutor. Thus, the nature of the unfulfillable promise is a basis on which to judge the reasonableness of the expectation created by the defendant, which in turn affects the remedy to be awarded.

*Carter* and *Hamerman* provide the substantive principles that directed the outcome in *Cooper*. If a prosecutor makes a promise that is normally within the range of prosecutorial discretion, than that promise must be honored, even if it later proves to be an unfulfillable promise because it exceeded the prosecutor's powers. Alternatively, if a plea is induced by a promise not within the usual powers of the prosecution, the court may invalidate the plea, but specific enforcement is not required.

The decision in *Cooper* followed the above analysis and protected both the defendant's substantive right to enter a guilty plea voluntarily and intelligently and the right to receive fair treatment. The assistant prosecutor's proposal required Cooper's cooperation as a witness in ongoing narcotics trials and entry of a guilty plea to one count of obstruction of justice in exchange for the dismissal of other counts and favorable recommendations to the judge at sentencing. This proposal was unambiguous and reasonable, and the attorney who made the offer conveyed no reservations as to the proposal's acceptability. Furthermore, the proposal promised only actions normally within the discretion of the prosecution.

Under these circumstances, specific enforcement of the proposal might have been appropriate, except that the absence of the reliance element emphasized in *Hamerman* and *Carter* would seem to have precluded this form of relief. Furthermore, although the Fourth Circuit ascertained that Hammerman's due process rights were protected adequately by allowing him to withdraw his guilty plea, it granted more drastic relief to Cooper, who had not

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90. The result might have been different in *Hamerman* had the defendant changed his position materially and unalterably. In *Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976), for example, a prosecutor's promise regarding parole, not within his power to fulfill, was specifically enforced because the defendant had been serving a prison sentence that already had extended beyond the entire promised sentence and parole.

91. *See* notes 56-60 *supra* & accompanying text.

92. *See* notes 17-19 & 31-33 *supra* & accompanying text.
changed his position to his prejudice. Principles of substantive due process therefore do not explain fully the decision in Cooper; the court should have based its decision on the defendant's procedural due process rights.

**Procedural Due Process in Plea Negotiations**

Procedural due process[^93^] safeguards the rights and interests of parties affected by governmental action outside of the courtroom and whenever abbreviated judicial processes are used. In such instances, due process consists primarily of the requirements of adequate notice[^94^] and a proper hearing[^95^], founded on the basic principle that when life, liberty, or property is at stake, the individual is entitled to a regular, orderly, and nonarbitrary process[^96^]. Although courts formerly distinguished between privileges benefits extended at the government's discretion, and rights, which merited greater protection because they did not depend on government largesse[^97^], this distinction has disappeared in the last ten years[^98^]. Procedural due process now dictates that when-

[^93^]: Procedural due process differs from substantive due process in that the former ensures only the "fairness" of the decision-making process; the latter guarantees the quality of the court's decision. Procedural due process therefore measures the third definition of "fairness," see note 42 supra, which requires regular, orderly, and nonarbitrary procedures.

[^94^]: One commentator, in developing a concept of "process values," suggested that "procedural rationality, humanity, and regard for dignity and privacy" are valuable in themselves without regard for the results of the process. Summers, Evaluating and Improving Legal Processes—A Plea for "Process Values", 60 CORNELL L. REV. 1, 2 (1974). Concern for "humanity" and "dignity" within plea bargaining procedures might support the development of "procedural rationality," including notice; a fair hearing; published, understandable, and noncontradictory rules; constancy through time; and congruence between the announced rules and their administration. See L. FULLER, supra note 20, at 39. Accordingly, the decision in Cooper might reflect the court's unarticulated, heightened concern for "process values."


[^97^]: J. NOWAK, supra note 44, at 477.

ever the government extends a benefit, orderly procedures must be followed before that benefit is withdrawn.99

The courts already have applied this concept to criminal procedure by mandating a hearing prior to the revocation of parole100 or probation.101 In *Morrissey v. Brewer,*102 which extended due process to the parole revocation process, the Supreme Court noted that although the parolee's liberty was only a qualified liberty, it nevertheless

includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.103

This same liberty value demands protection in plea bargain negotiations.104 Although parole revocation affects a government benefit previously extended and although plea negotiations are prospective in effect, plea bargaining so profoundly affects the liberty interests of criminal defendants that its administration also "calls for some orderly process."105 Despite the absence of a constitutional right to plea bargain106 and the availability of full constitutional protection at trial, the realities of the criminal justice system dictate more orderly procedures in plea bargaining.

Plea bargaining is not merely a part of the criminal justice system; for the overwhelming majority of defendants, it is the criminal justice system. As noted earlier, an estimated ninety

99. Graham v. Richardson, 403 U.S. 365, 374 (1971). The Court noted, "[T]his Court has now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.*
102. 408 U.S. 471 (1972).
103. *Id.* at 482.
104. "The essential guarantee of the due process clause is that the government may not imprison or otherwise physically restrain a person except in accordance with fair procedures." J. Nowak, *supra* note 44, at 483.
105. 408 U.S. at 482. Regularity in procedures is preferable, because irregularity often becomes oppressive. L. Tribe, *supra* note 41, at 475.
percent of all criminal cases are disposed of through pretrial negotiations.107 The adversary model of criminal adjudication no longer is an accurate reflection of the movement of a defendant through the criminal justice system.108 Justice is dispensed informally in five- and ten-minutes negotiations under circumstances in which the opportunity for abuse of prosecutorial discretion is great.

Plea bargaining offers direct, tangible, and important benefits to defendants and the government.110 If the Supreme Court mandates safeguards for the liberty interests of those already convicted, a logical, necessary step would extend procedural safeguards to the process through which most defendants are convicted. Although a defendant has no right to demand the opportunity to negotiate a favorable plea agreement, once the government begins such negotiations, the demise of the right-privilege distinction should require that the defendant's interests be protected rigorously as if plea bargaining were an enforceable right.

Within the context of procedural due process, the decision in Cooper represents the imposition of order and fairness on a process too often beset by unbridled discretion. To accomplish this objective, specific performance of the agreement was necessary; no other remedy would have forced the district attorney to institute and follow orderly procedures. If the courts imposed no sanctions for disorderly negotiation procedures before entry of a guilty plea,

108. Id.
110. The benefits of plea bargaining to the government are obvious. Plea bargaining reduces the caseload in already overburdened courts and leads to a reasonably prompt disposition of cases. In addition, some defendants who were guilty but who would have been acquitted at trial because of weaknesses in the government's case arguably will be drawn within the corrections system. The benefits to the defendants are more difficult to define. Although an average plea negotiation may reduce the original charge by two "steps," see id. at 700, prosecutors may "overcharge" originally in order to enhance their bargaining positions. One recent study, however, found a strong correlation between the method of conviction and the type and length of sentence received. Those who were convicted by jury trial were much more likely to receive prison sentences and were likely to draw longer terms. Although other factors were considered in the analysis, the researchers maintained that the method of conviction was a significant predictor of sentencing practices. UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, U.S. DEP'T OF JUSTICE, VARIATIONS IN FEDERAL CRIMINAL SENTENCES 9-11 (1978). These results suggest that plea bargaining offers benefits to both sides of the bargain.
the process of negotiation would remain beyond the reach of judicial supervision except for the most outrageous abuses. That result would contravene the interest of the courts in achieving and maintaining proper administration of the plea bargaining process.

The Right to Effective Assistance of Counsel

The sixth amendment guarantee of the right to counsel also supports the Cooper decision, especially in light of the requirement in Cooper of standardization of the plea negotiation process. Defense counsel must be included within the negotiating process unless the defendant is proceeding pro se, and his participation must be effective. Because a guilty plea must be made voluntarily, knowingly, and with full understanding of the consequences, the assistance of an attorney is invaluable. Although a defendant may plead guilty without the advice of an attorney, such pleas often are subject to collateral attack because an unrepresented defendant generally cannot understand the complexities of the criminal process.

The negotiations in Cooper did not result in a guilty plea, however, and the question of the defendant's right to counsel during plea bargaining remains unanswered. The Supreme Court has established that a person has the right to counsel during any "critical stage" in the process of criminal adjudication. Thus, once the suspect becomes the focus of a police investigation that results in an interrogation, preliminary hearing, or

111. For example, a prosecutor might make a defendant an offer that was simply too good to be true, thereby offering a coercive inducement.
112. "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." U.S. CONsT. amend. VI.
114. See notes 121-29 infra & accompanying text.
117. See note 114 supra. If a defendant does not understand the charges against him or the defenses available to him, he cannot enter a guilty plea intelligently; thus, his plea is invalid.
arraignment, the right to counsel attaches. Because plea bargaining does not take place until a defendant is well within the criminal justice system, such negotiations must be recognized as a "critical stage" requiring the presence and assistance of counsel. The Supreme Court has not ruled directly on this point, but clearly has recognized "the importance of counsel during plea negotiations." The mere presence of counsel, however, is insufficient to ensure the fairness of proceedings; counsel must render effective assistance. A precise definition of the effective assistance standard is difficult to articulate because the Supreme Court has required only that counsel provide advice "within the range of competence demanded of attorneys in criminal cases," and has left the determination of that range to "the good sense and discretion of the trial courts." The Fourth Circuit, in Coles v. Peyton, suggested the following standards for evaluating the assistance of counsel:

Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are available. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

The standards of Coles, applied to plea negotiations, would suggest that the attorney must be present at the initiation of plea negotiations in order to advise the defendant effectively throughout the proceedings. The following should be included in the attorney's duties: a review of the alleged facts of the crime to determine whether the criminal charges were supported; a

125. Id.
126. 389 F.2d 224 (4th Cir. 1968).
127. Id. at 226 (footnote omitted). These standards were followed in Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977).
balancing of possible defenses against the strength of the prosecution's evidence; a consideration of the possible hazards or detriments in proceeding to trial; and a further balancing of the defendant's personal wishes and interests against the value of the offered benefit. The complexity of these considerations and the necessity of arriving at a fair agreement dictate that the relationship of attorney, client, and prosecution be free of suspicious behavior by the government.

The defense attorney serves as both counselor and medium through which the government communicates with the defendant, and therefore plays an extremely sensitive role. The mere appearance of confusion in plea negotiations could influence strongly a defendant's perception of the quality of assistance rendered and thus adversely affect the efficacy of the assistance of counsel. As noted in Cooper, the rapid proposal and withdrawal of a plea agreement could call into question "counsel's capability and professional responsibility, as well as the government's reliability." Under such circumstances, a defendant might consider the entire adjudicatory process a sham and make a decision that would be neither well advised nor truly voluntary.

The decision in Cooper thus stands as a defense to possible governmental manipulation of the attorney-client relationship and serves notice that the court will require the utmost circumspection in prosecutorial negotiations with defendants and their attorneys. Specific enforcement of the plea proposal is the best means of accomplishing the goal of regularizing the negotiation process and protecting a defendant's sixth amendment rights.


The appointment of counsel after the successful negotiation of the guilty plea and minutes before its entry was ineffective, and did not give petitioner the representation required by the Constitution. Appointed counsel could not have reviewed the facts of the crime, the possible defenses or the hazards of a trial, nor could he have evaluated the bargain offered by the prosecutor. For all practical purposes, the petitioner entered his plea without advice of counsel.


130. Cooper v. United States, 594 F.2d at 18.

131. The court in Cooper found "no suggestion of deliberate abuse," but noted that "our failure to [recognize 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." Id. at 20.
Conclusion

The negotiated guilty plea remains the keystone of the criminal justice system; without plea bargaining, the system would collapse under the weight of a tenfold increase in criminal trials. Despite the importance of plea negotiations to the system, the prosecution, and the defendant, the process through which an agreement is reached in the past was left almost entirely to the discretion of the prosecution. Courts and legislatures must recognize the need for greater controls upon the administrative processes of the negotiated plea.

In the absence of legislative action, the courts must take steps to preserve a defendant's rights when he is confronted by the byzantine workings of the criminal justice system. A defendant may not have the right to demand that he be extended a favorable plea bargain, but he does have the right to expect that the prosecution will respect his constitutional rights when negotiations have begun; the holding in Cooper is but one step to ensure the protection of those rights.

Cooper v. United States is not a radical move; it simply assures a defendant that a plea bargain is rendered enforceable by his timely assent. The holding thus represents the continued development of concern for a defendant's full panoply of constitutional rights and ensures that the prosecution must honor its "fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."\(^{132}\)

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132. Id. at 19.