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Criminal Law -- Cooper v. United States -- Constitutional Recognition for Defendant's Plea Bargaining Expectations in the Absence of Detrimental Reliance

Lawrence K. Rynning

NOTES

Criminal Law—*Cooper v. United States*—Constitutional Recognition for Defendant's Plea Bargaining Expectations in the Absence of Detrimental Reliance

Plea bargaining has long been regarded as the illegitimate child of the American criminal justice system—rarely exposed to public view but tolerated, nevertheless, as an essential member of the family.[1] In its landmark 1971 decision in *Santobello v. New York*,[2] the United States Supreme Court for the first time recognized the right of a criminal defendant to remedial relief when the government breaches its plea bargain obligation after the defendant has pled guilty.[3] The constitutional basis for that decision, however, has remained an open question, and most courts, relying on analogies to contract law, have required the entry of a guilty plea or some other form of detrimental reliance by the defendant as a prerequisite to relief from a breached plea agreement.[4] In *Cooper v. United States*,[5] however, the United States Court of Appeals for the Fourth Circuit explicitly rejected any requirement of detrimental reliance and held that a defendant's right to enforcement of a breached plea arrangement may arise "on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals."[6] Construing *Santobello* as promulgating a constitutional right of a defendant to be treated with

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1. In Santobello v. New York, 404 U.S. 257 (1971), the Supreme Court approved of the practice of plea bargaining as "an essential component of the administration of justice." *Id.* at 260. For many years plea bargaining was "shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." Blackledge v. Allison, 431 U.S. 63, 76 (1977). Critical to plea bargaining is the concept of reciprocal benefits. *See, e.g.*, People v. Collins, 21 Cal. 3d 208, 577 P.2d 1026, 145 Cal. Rptr. 686 (1978). Among these benefits are that a

> defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Blackledge v. Allison, 431 U.S. at 71.

2. 404 U.S. 257 (1971).

3. *Id.* at 262.

4. *See* notes 39-69 and accompanying text *infra*.

5. 594 F.2d 12 (4th Cir. 1979).

6. *Id.* at 18; *see* text accompanying notes 22-26 *infra*.

"fairness" throughout the plea negotiation process,[7] the *Cooper* court grounded its enforcement of a withdrawn plea proposal upon a defendant's substantive due process right to "fundamental fairness"[8] and, less directly, upon the right to effective assistance of counsel.[9]

Defendant Cooper was arrested by federal authorities and charged with two counts each of bribery of a witness[10] and obstruction of justice.[11] The criminal charges stemmed from Cooper's offer to leave the United States in return for a $10,000 payment from the defendant against whom Cooper was to testify in a narcotics trial.[12] Shortly after Cooper's arrest, at approximately 11:00 A.M. on May 11, 1977, Cooper's defense counsel met with an Assistant United States Attorney to discuss a possible plea bargain agreement.[13] After some initial negotiations, the Assistant United States Attorney proposed an agreement under which Cooper was to plead guilty to one count of obstruction of justice, remain in jail and testify on three occasions in upcoming narcotics trials.[14] In return, the prosecutor agreed to dismiss all other counts of the indictment and to bring Cooper's cooperation to the sentencing judge's attention.[15] Cooper's attorney immediately communi-

7. 594 F.2d at 16; *see* text accompanying notes 121-26 *infra*.

8. 594 F.2d at 18; *see* text accompanying notes 127-51 *infra*.

9. 594 F.2d at 18; *see* text accompanying notes 153-69 *infra*.

10. 594 F.2d at 13; *see* 18 U.S.C. § 201(e) (1976).

11. 594 F.2d at 13; *see* 18 U.S.C. § 1503 (1976).

12. 594 F.2d at 13-14. To avoid prosecution in Maryland on narcotics charges, defendant Cooper had earlier agreed to cooperate with the Federal Drug Enforcement Administration (DEA) as an undercover informer. Cooper's activities led to indictments being issued against several persons, including one Simpson, on narcotics charges. Cooper was moved from Maryland to Little Rock, Arkansas as part of the Witness Protection Program of the federal government. After a time, Cooper was to return to Maryland to testify for the government against those whose indictments he had helped secure. In a telephone call to Simpson on May 5, 1977, Cooper offered to flee to Mexico, thereby removing himself as a witness, in return for a $10,000 payment by Simpson. Simpson contacted his attorney who immediately went to Simpson's residence to monitor a second call from Cooper later that day. Simpson had been noncommittal in the first call and remained so in the second, but arrangements were made for a third call on May 6. Simpson and his attorney informed the United States Attorney for the District of Maryland and DEA agents of these contacts with Cooper. The third call was monitored and recorded by federal authorities with Simpson's permission. In return for Simpson's cooperation, it was agreed that no statements made by him during the recorded third call would be used against him in his upcoming trial. *Id.* at 14.

13. *Id.* at 15. Cooper could not be present at this meeting because he was then being held in jail awaiting trial.

14. *Id.* at 15. Cooper was also to be removed from the Witness Protection Program. *See* note 12 *supra*.

15. 594 F.2d at 15. Cooper's appellate counsel stated that the prosecutor had represented that the proposal would be held open for acceptance for one week. The court found a substantial concession of this point by the government in the record. *Id.* at 15 n.2.

It is useful to categorize the various forms that plea bargaining agreements may take. Two basic categories—"charge bargaining" and "sentence negotiation"—will suffice. *See, e.g.*, Wiley v. Commonwealth, 575 S.W.2d 166 (Ky. 1978); Beall, *Principles of Plea Bargaining*, 9 LOY. CHI.

cated this proposal to Cooper, who decided to accept its terms. At approximately 12:00 noon that same day, Cooper's defense counsel began telephoning the prosecutor to notify him of Cooper's acceptance. Before Cooper's attorney could communicate Cooper's acceptance, however, the prosecutor met with his superior, who ordered that the plea proposal be withdrawn. When Cooper's attorney finally reached the prosecutor by telephone between 2:30 and 3:30 P.M. that afternoon, the prosecutor told Cooper's attorney that the proposal had been with-

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L.J. 175 (1977). Charge bargaining connotes the defendant's tendering of a guilty plea in return for the prosecutor's commitment to reduce a charge from that originally filed, *see, e.g.*, State v. Wayne, 245 S.E.2d 838 (W.Va. 1978); dismiss other filed or pending charges, *see, e.g.*, United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106 (8th Cir. 1977); or not bring additional charges, *see, e.g.*, People v. Collins, 21 Cal. 3d 208, 577 P.2d 1026, 145 Cal. Rptr. 686 (1978). Variations of a charge bargain occur when a prosecutor purports to bind a different district to the agreement, *see, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974); a state prosecutor purports to bind a state liquor licensing authority, *see, e.g.*, Chaipis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978); or a prosecutor agrees to dismiss or reduce charges against another person, *see, e.g.*, People v. Walker, 75 Mich. App. 552, 255 N.W.2d 658 (1977).

Sentence negotiation generally involves a defendant's agreement to plead guilty if the prosecutor will recommend a certain term of years imprisonment to the trial judge, *see, e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973); stand silent at the sentencing hearing, *see, e.g.*, Santobello v. New York, 404 U.S. 257 (1971); recommend probation, *see, e.g.*, *In re* Palodichuk, 22 Wash. App. 107, 589 P.2d 269 (1978); not oppose probation, *see, e.g.*, United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973); recommend parole after a certain period of time, *see, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. denied*, 431 U.S. 911 (1977); have a particular judge preside over sentencing, *see* People v. Preciado, 78 Cal. App. 3d 144, 144 Cal. Rptr. 102 (1978); bring mitigating factors to the court's attention, *see, e.g.*, United States v. Bowler, 585 F.2d 851 (7th Cir. 1978); postpone the time of sentencing until all possible indictments are charged, *see* United States v. Thomas, 580 F.2d, 1036 (10th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); have sentences run concurrently rather than consecutively, *see, e.g.*, *In re* Williams, 21 Wash. App. 238, 583 P.2d 1262 (1978); or make a disposition other than sentencing, *see, e.g.*, Green v. United States, 377 A.2d 1132 (D.C. Cir. 1977).

A hybrid arrangement results when the prosecutor agrees that the defendant will be imprisoned in a particular facility. *See* Casebeer v. United States, 531 F.2d 949 (9th Cir. 1976) (per curiam). *See also* Lambert v. State, 338 So. 2d 915 (Fla. Dist. Ct. App. 1976).

In addition to his agreement to plead guilty, a defendant may agree to give valuable information to the police, *see, e.g.*, United States v. Boulier, 359 F. Supp. 165 (E.D.N.Y. 1972), *aff'd sub nom.* United States v. Nathan, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); testify against a third person, *see, e.g.*, State v. Neitte, 363 So. 2d 425 (La. 1978); not testify in favor of another, *see, e.g.*, Franklin v. State, 577 P.2d 860 (Nev. 1978) (against public policy); submit to a lie detector test, *see, e.g.*, United States v. Bursten, 560 F.2d 779 (7th Cir. 1977); make restitution of embezzled funds, *see, e.g.*, State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977); waive a preliminary hearing, *see, e.g.*, Courtnoy v. State, 341 P.2d 610 (Okla. Crim. 1959); not appeal his conviction, *see, e.g.*, United States v. LaVallee, 427 F.2d 328 (2d Cir. 1970) (per curiam); withdraw his appeal from conviction on other charges, *see, e.g.*, Staton v. Warden, 175 Conn. 328, 398 A.2d 1176 (1978); or leave the state permanently, *see* Rutherford v. Blankenship, 468 F. Supp. 1357 (W.D. Va. 1979) (against public policy).

Of course, any particular arrangement may have elements of both charge and sentence bargaining within it. This was the situation in *Cooper*, in which the prosecutor offered a charge bargain, dismissal of three counts leaving one standing, and a sentence recommendation, bringing defendant's cooperation to the sentencing judge's attention.

drawn.[16] Cooper's defense attorney unsuccessfully protested this action to the prosecutor, the United States Attorney and the United States District Court for the District of Maryland.[17]

After conviction at trial on all counts, Cooper took an appeal to the United States Court of Appeals for the Fourth Circuit in which he asserted three errors, two of which were quickly disposed of as being without merit.[18] In his third assignment of error Cooper argued that the terms of the government's plea proposal ought to have been and now should be specifically enforced. The court of appeals agreed with this contention, finding enforcement essential to vindicate the government's violation, by its unilateral withdrawal of the plea proposal, of Cooper's constitutional rights to "fairness"[19] and effective assistance of counsel.[20] The *Cooper* court specifically premised its holding on its factual findings that the government's plea proposal had been specific and unambiguous, made without reservations, reasonable in context, made by a prosecutor with apparent or actual authority, promptly communicated to and immediately sought to be accepted by defendant, and withdrawn not on the basis of extenuating circumstances but rather on the basis of "a superior's second-guessing of a subordinate's judgment."[21]

In finding a violation of Cooper's constitutional rights, the court of

16. 594 F.2d at 15.

17. At a pre-trial hearing, the district court denied Cooper's motion to compel enforcement of the plea proposal. *Id.*

18. Cooper first argued that the recorded conversation with Simpson on May 6 was inadmissible. *See* note 12 *supra*. The rule is that consent of one party to a wire communication makes interception lawful. 18 U.S.C. § 2511(2)(c) (1976). Cooper did not contest the giving of consent but instead challenged the voluntariness of that consent. The court rejected Cooper's contention that Simpson's consent was coerced by a grant of immunity, citing United States v. Dowdy, 479 F.2d. 213, 229 (4th Cir. 1973), which had rejected the same contention. Moreover, the court indicated that the record did not support Cooper's contentions that Simpson's will had been overborne by his attorney's influence and that Simpson's consent had not been intelligently given. 594 F.2d at 14.

Cooper's second asserted error was that Simpson's attorney should have been sequestered as a witness, under Rule 615 of the Federal Rules of Evidence, during Simpson's testimony about the May 5 telephone conversations, particularly the second call that Simpson's attorney had overheard. *See* note 12 *supra*. Cooper argued that the May 5 conversations were critical to proof of solicitation of a bribe because of ambiguities in the recorded May 6 conversation. Despite recognition that exclusion is ordinarily a matter of right, the court, citing L.S. Ayres & Co. v. NLRB, 551 F.2d 586, 588 (4th Cir. 1977), found that the trial court did not abuse its discretion in failing to sequester Simpson's attorney. The court stated that Simpson's attorney fell within an exception to Rule 615 as a person whose presence was necessary to protect Simpson's need for counsel during his testimony. 594 F.2d at 14-15.

19. 594 F.2d at 18; *see* text accompanying notes 70-95 *infra*.

20. 594 F.2d at 18; *see* text accompanying notes 108-20 *infra*.

21. 594 F.2d at 19.

appeals expressly rejected the need for a guilty plea to support remedial relief.[22] The court also rejected analogies to substantive and remedial contract principles, often utilized by courts to define appropriate relief,[23] as too narrow to define the limits of the constitutional right of a defendant to be treated with "fairness" throughout the plea negotiation process.[24] In so holding, the *Cooper* court adopted the view that a defendant's expectations of a proposal's fulfillment are constitutionally entitled to protection[25] "under appropriate circumstances . . . before any technical 'contract' has been formed."[26]

To remedy the constitutional violations found in *Cooper*, the court

22. *Id.* at 16. The law surrounding remedial relief for defendants who are aggrieved by prosecutorial breach of a plea agreement is exhaustively analyzed in Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978). *See also* Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AMER. CRIM. L. REV. 771 (1973).

23. *See* text accompanying notes 34-54 *infra*.

24. 594 F.2d at 16-18. It is interesting to note that *Cooper* may have created a conflict with the United States Court of Appeals for the Fifth Circuit, which stated, albeit in dictum, that mere expectation would not support enforcement of a plea agreement. *See* Johnson v. Beto, 466 F.2d 478 (5th Cir. 1972). Said the Fifth Circuit in *Beto*:

> Plea bargaining is an accepted folkway of our criminal jurisprudence onto which some, but not all, contract criteria have been superimposed. Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective, not subjective, standards.

Id. at 480. The Fifth Circuit recently reaffirmed the *Beto* approach in *In re* Geisser, 554 F.2d 698 (5th Cir. 1977), in which the court viewed plea bargaining as contractual in nature, with enforcement dependent upon detrimental reliance on the agreement by the defendant.

25. "[A] constitutional right to enforcement of plea proposals may arise . . . on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." 594 F.2d at 18. This constitutional protection for a defendant's expectations, said the *Cooper* court, flows from the recognition that courts have implicitly protected a defendant's expectations through directing enforcement of breached plea agreements. *Id.* at 16-18, 18 n.8. The court drew heavily upon the premise advanced by Westen and Westin that the ordering of specific enforcement of breached plea agreements in earlier cases could be explained only if the right protected extends from the expectations of a defendant that his bargained for benefits will be secured to him through the fulfillment of a proposal. *Id.* at 18 n.8; *see* Westen & Westin, *supra* note 22, at 512-28. Westen and Westin apparently recognized, however, that such expectations had been supported by the defendant's guilty plea or some other act done in reliance upon the agreement. *Id.* at 524-28. In *Cooper*, neither a guilty plea nor any other form of detrimental reliance was present.

26. 594 F.2d at 18. To justify this extension, the court cited the holding of the United States Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977). 594 F.2d at 17 n.7. In *Brewer*, defense counsel and the police agreed that the defendant would not be interrogated while being transported in the absence of counsel. In fact, while being transported, the defendant was prompted to disclose incriminating information. The Supreme Court held that the defendant had been improperly interrogated without waiving his right to the presence of counsel. The state sought to distinguish this protection for the defendant on the ground that the agreement not to interrogate was not enforceable. In response to the state's argument, the Supreme Court said, "[W]e deal here not with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law." 430 U.S. at 401 n.8.

of appeals directed the district court to accept[27] and specifically enforce the plea proposal by allowing Cooper to plead guilty to one count of obstruction of justice in return for dismissal of the remaining three counts.[28] Because Cooper could no longer fulfill certain terms of the plea proposal, the court stated that the government would be relieved of any sentence recommendation obligations.[29]

Although plea bargaining has been widely accepted as a necessary evil in an overburdened judicial system,[30] its constitutional integrity was not recognized by the United States Supreme Court until its 1970 decision in *Brady v. United States*.[31] One year later, in *Santobello v. New York*, this recognition was reinforced when the Supreme Court ordered the enforcement of a state prosecutor's agreement to stand silent at a defendant's sentencing hearing after defendant had entered a guilty plea.[32] Both before and after *Santobello*, however, courts have recognized the right of a defendant to remedial relief when a prosecutor has breached a plea agreement.[33] The contractual concepts of offer,

27. Under FED. R. CRIM. P. 11(e)(2), the district court ordinarily has discretion to accept or reject a plea agreement. *See, e.g., In re* Yielding, 599 F.2d 251 (8th Cir. 1979) (judge may refuse to consider any plea agreement); United States v. Stamey, 569 F.2d 805 (4th Cir. 1979). *See also* United States v. Griffin, 462 F. Supp. 928 (E.D. Ark. 1978). The *Cooper* court did not view this condition precedent to all plea agreements as prohibiting a direction that this proposal be enforced. 594 F.2d at 20; *accord*, United States v. Lieber, 473 F. Supp. 884 (E.D.N.Y. 1979) (defendant suffered prejudice). Contrary state authority views this requirement of judicial acceptance as crucial to denial of enforcement in situations similar to that presented in *Cooper*. *See* text accompanying notes 55-69 *infra*.

28. 594 F.2d at 21.

29. *Id.* Presumably, Cooper did not testify for the government at the narcotics trials as had been proposed. *See* text accompanying note 14 *supra*. Therefore, there could be no cooperation to bring to the sentencing judge's attention. *See* text accompanying note 15 *supra*.

30. It has been estimated that nontrial adjudication, largely the result of plea bargaining, accounts for the disposition of more than 90% of all criminal cases, D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966), and the Supreme Court has remarked that "[p]roperly administered, [plea bargaining] is to be encouraged," Santobello v. New York, 404 U.S. at 262. *See also* Note, *supra* note 22.

31. 397 U.S. 742 (1970).

32. 404 U.S. at 262. Defendant in *Santobello* had agreed to enter a guilty plea in return for the prosecutor's promise to make no sentencing recommendation. While defendant performed his part of the agreement, the prosecutor inadvertently failed to do so. A prosecutor other than the one with whom the defendant had made the agreement recommended the maximum sentence. The Supreme Court held this to be a breach of the agreement and declared that the "interests of justice and appropriate recognition of the duties of the prosecution" required enforcement of the agreement, through resentencing before a different judge or vacatur of the defendant's guilty plea at the discretion of the state appellate court. *Id.* at 262-63. On remand, specific performance was ordered even though the defendant had requested vacatur. People v. Santobello, 39 A.D.2d 654, 331 N.Y.S.2d 776 (1972). This occurred despite Justice Douglas' admonition that the defendant's preference ought to be given "considerable, if not controlling, weight." Santobello v. New York, 404 U.S. 257, 267 (Douglas, J., concurring).

33. *See generally* Westen & Westin, *supra* note 22; Note, *supra* note 22; Annot., 43 A.L.R.3d 281 (1972); Annot., 66 A.L.R. 3d 902 (1975).

acceptance, consideration and performance have provided useful analogies to courts reviewing prosecutorial breach of plea agreements.[34] Courts generally will not enforce a breached plea agreement unless an agreement has been entered into,[35] the defendant has fulfilled his part of the agreement[36] and the prosecution has failed to perform its obligations under the agreement.[37] Courts will, however, enforce a breached plea agreement when a defendant can properly invoke principles of promissory estoppel or detrimental reliance.[38]

Promissory estoppel applies when the prosecutor fails to perform his obligations under the plea agreement after the defendant has entered a guilty plea or performed some other act of detriment to himself[39] or benefit to the prosecution[40] in reliance upon the agreement, and the injustice resulting from this detrimental reliance can be avoided only through enforcement of the agreement.[41] When the prosecutor breaches the plea agreement upon which the defendant has detrimentally relied, the prosecutor secures benefits to the government

34. *See, e.g.*, Cooper v. United States, 594 F.2d 12, 15-17 (4th Cir. 1979); Westen & Westin, *supra* note 22, at 528-39; Note, *supra* note 22.

35. *See, e.g.*, United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975); United States v. Battle, 467 F.2d 569 (5th Cir. 1972) (no enforceable bargain arising from prosecutor's promises of leniency).

36. *See, e.g.*, United States v. Simmons, 537 F.2d 1260 (4th Cir. 1976) (government's obligation arises only after defendant has fully disclosed promised information). *See also* United States v. Boulier, 359 F. Supp. 165 (1972), *aff'd sub nom.* United States v. Nathan, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) (defendant who refused to disclose promised information in no position to protest prosecutor's nonperformance).

37. *See, e.g.*, United States v. Brown, 500 F.2d 375 (4th Cir. 1974) (defendant entitled to resentencing when prosecutor's sentence recommendation only "half-hearted"); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (enforcement ordered even though prosecutor's promise not legally fulfillable at time made).

38. *See, e.g.*, State v. Mustain, 32 Or. App. 339, 574 P.2d 674 (1978) (prosecutor's promise to dismiss charges if proceedings in another state ended in conviction not enforced because defendant failed to prove sufficient reliance to invoke promissory estoppel); State v. Wayne, 245 S.E.2d 838, 840 (W.Va. 1978) (specific performance of breached agreement unavailable unless reliance demonstrated and defendant cannot be restored to position held prior to agreement). *See* authorities cited note 55 *infra*. *See generally* Westen & Westin, *supra* note 22, at 512-38; Note, *supra* note 22, at 783-85.

39. *See, e.g.*, People v. Carter, 73 Misc. 2d 1040, 343 N.Y.S.2d 431, *aff'd*, 41 A.D.2d 905, 343 N.Y.S.2d 580 (1973) (agreement not enforced when defendant suffered no prejudice through detrimental reliance and guilty plea not entered).

40. *See, e.g.*, United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975) (giving information to government); State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974) (giving testimony and making restitution); Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979) (taking lie detector test, which defendant passed).

41. *See* authorities cited note 38 *supra*. *See generally* J. MURRAY, CONTRACTS §§ 91-93 (2d rev. ed. 1974); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

without giving the defendant his expected benefits in return.[42] This inequity is particularly apparent when the prosecutor breaches an agreement after the defendant, by entering a guilty plea, has waived his constitutional rights to a jury trial, to confront his accusers, to present witnesses in his defense and to be convicted by proof beyond a reasonable doubt.[43] In such a situation, the doctrine of promissory estoppel is utilized to ensure that a defendant's expectations are effectuated by enforcing the agreement.[44] Although entry of a guilty plea is the most common form of detrimental reliance supporting the application of promissory estoppel, courts have granted relief on the basis of conduct constituting detrimental reliance prior to the entry of a guilty plea.[45] Providing information to government authorities,[46] testifying for the government,[47] confessing guilt,[48] returning stolen property,[49] making monetary restitution,[50] failing to file a motion to have charges presented to a grand jury,[51] submitting to a lie detector test[52] and waiv-

42. *See, e.g.*, People v. Collins, 21 Cal. 3d 208, 577 P.2d 1026, 145 Cal. Rptr. 686 (1978). *See also* note 15 *supra*.

43. *See* Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring). Moreover, a guilty plea is an admission of guilt as well as the basis for a judgment of conviction. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970). For these reasons, numerous protections have arisen to safeguard the voluntariness and accuracy of a guilty plea. *See generally* Barkai, *Accuracy Inquiries for all Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977). This concern for defendants who enter a plea of guilty may itself explain awards of remedial relief for prosecutorially breached plea agreements. *See* Westen & Westin, *supra* note 22, at 512.

44. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971) (remedy ensures defendant what is "reasonably due" under the circumstances); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (enforcement ordered even when defendant detrimentally relied on legally unfulfillable promise). *See also* authorities cited in Westen & Westin, *supra* note 22, at 536-37 n.239. An alternative to enforcement of the agreement is to allow vacatur of defendant's guilty plea on the ground that it was involuntarily made. *See, e.g.*, People v. Dothit, 51 Ill. App. 3d 758, 366 N.E.2d 955 (1977). *See generally* Westen & Westin, *supra* note 22, at 477-511.

45. *See, e.g.*, United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975); United States v. Lieber, 473 F. Supp. 884, 894 (E.D.N.Y. 1979); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976).

46. *See, e.g.*, United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975); Chiapis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978).

47. *See, e.g.*, State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976); Chiapis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978) (liquor licensing board must give strong consideration to defendant's agreement with prosecutors that liquor license would not be revoked). *But see* People v. Tobler, 91 Misc. 2d 69, 397 N.Y.S.2d 325 (1977) (no prejudice because defendant's testimony not used against him).

48. *See, e.g.*, United States v. Lieber, 473 F. Supp. 884 (E.D.N.Y. 1979) (affidavits of admission and facts to support guilty plea); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976) (self-incriminatory testimony); State v. Hoopes, 534 S.W.2d 26 (Mo. 1976) (signing affidavit of facts to support entry of guilty plea).

49. *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977).

50. *See, e.g.*, State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974).

51. *See, e.g.*, Mooney v. Cahn, 79 Misc. 2d 703, 361 N.Y.S.2d 118 (1974).

52. *See, e.g.*, State v. Davis, 188 So. 2d 24 (Fla. Dist. Ct. App.), *cert. denied*, 194 So. 2d 621

ing certain procedural guarantees[53] have all been held to constitute acts made in detrimental reliance upon a prosecutor's breached promises. Detrimental reliance prior to entry of a guilty plea will not, however, require enforcement if the prosecutor did not breach the agreement, but the court, in its discretion, refused to accept the bargain.[54]

Several state jurisdictions considering situations similar to that presented in *Cooper*, in which defendant had not detrimentally relied on the plea proposal prior to withdrawal by the prosecutor, have uniformly rendered decisions contrary to the Fourth Circuit's holding.[55] Perhaps closest on the facts is *People v. Heiler*,[56] in which the Michigan Court of Appeals held judicial acceptance of a plea agreement or some form of detrimental reliance by the defendant to be an essential prerequisite to enforcement of a plea agreement.[57] In *Heiler*, an assistant prosecuting attorney proposed to reduce the charge against defendant

(Fla. 1966); People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975). *But see* People v. Martin, 38 Ill. App. 3d 209, 347 N.E.2d 200 (1976). In these lie detector cases the prosecutor attempted to withdraw from the agreement after results of the tests proved favorable to the defendant. In a recent case, Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), the prosecutor refused to drop charges, as agreed, after defendant obtained favorable results on two independent tests. On appeal, the Kentucky Supreme Court held that concepts of fair play and substantial justice required dismissal of the charges against the defendant. *Id.* at 207.

53. *See, e.g.*, Courtney v. State, 341 P.2d 610 (Okla. Crim. App. 1959) (preliminary hearing). *But see* People v. Carter, 73 Misc. 2d 1040, 343 N.Y.S.2d 431, *aff'd*, 41 A.D.2d 905, 343 N.Y.S.2d 580 (1973) (waiver of preliminary hearing not sufficiently meaningful to cause prejudice). *See also* United States v. Thalman, 457 F. Supp. 307 (E.D. Wis. 1978) (loss of speedy trial not prejudicial under circumstances).

It has been held that the "economic and emotional adversities" and "adverse publicity" suffered by a defendant would not constitute sufficient detriment. *Id.* at 310.

54. *See, e.g.*, United States v. Bean, 564 F.2d 700, 704-05 (5th Cir. 1977).

55. Parham v. State, 555 S.W.2d 943 (Ark. 1977); Shields v. State, 374 A.2d 816 (Del. Super.), *cert. denied*, 434 U.S. 893 (1977); State v. Reasbeck, 359 So. 2d 564 (Fla. Dist. Ct. App. 1978); Bullock v. State, 397 N.E.2d 310 (Ind. App. 1979); State v. Edwards, 279 N.W.2d 9 (Iowa 1979) (expressly rejecting *Cooper*); People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977); People v. Carter, 73 Misc. 2d 1040, 343 N.Y.S.2d 431 (1973); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979) (expressly rejecting *Cooper*); State v. Mustain, 32 Or. App. 339, 574 P.2d 674 (1978); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979); State v. McClure, 242 S.E.2d 704 (W. Va. 1978); *cf.* People v. Tobler, 91 Misc. 2d 69, 397 N.Y.S.2d 325 (1977) (defendant not prejudiced when prosecutor unilaterally determined that defendant's cooperation not sufficient to satisfy agreement).

56. 79 Mich. App. 714, 262 N.W.2d 890 (1977).

57. *Id.* at 719-20, 262 N.W.2d at 895. The court stated:

> To hold the prosecutor bound by the agreement [in the absence of judicial acceptance or detrimental reliance] would, we believe, actually inhibit the dispositional use of plea bargaining by placing the prosecutor at an absolute disadvantage. This, too, violates our fundamental sense of fair play. Absent any showing or allegation of prejudice to the defense resulting from the prosecutor's breach of faith, we decline to permit judicial intrusion upon the function of his office.

Id.

in return for a guilty plea and defendant's promise to provide information in an unrelated criminal investigation.[58] After discussing the proposal with his defense counsel, defendant promptly informed the prosecutor of his acceptance.[59] Prior to formal entry of defendant's guilty plea, however, the prosecutor's office withdrew from the agreement because the proposal violated the prosecutor's charging policy.[60] The trial court granted defendant's motion to compel enforcement of the agreement, believing that fairness required enforcement of the prosecutor's withdrawn proposal.[61] The Michigan Court of Appeals, however, rejected the trial court's determination, holding that defendant could not compel enforcement because the prosecutor could withdraw from the agreement, absent prejudice through detrimental reliance by defendant, at any time prior to the trial court's acceptance of the agreement.[62] Judicial acceptance, noted the court, is a condition precedent that underlies all plea proposals.[63] Until judicial acceptance of a plea proposal has taken place, the agreement has not come to "fruition" and, therefore, is not binding on the prosecutor.[64] Because defense counsel should be aware of the possibility of trial court rejection of the proposed agreement, the court in *Heiler* reasoned that defendant had no right to rely on the proposal prior to trial court approval.[65]

In another fact situation similar to that presented in *Cooper*, the Supreme Court of Delaware, in *Shields v. State*,[66] mirrored the holding

58. Defendant in *Heiler* was originally charged with armed robbery and possession of a firearm during the commission of a felony. The proposal was for defendant to plead guilty to the reduced charge of attempted armed robbery and the same degree of possession of a firearm during the commission of a felony. *Id.* at 716-17, 262 N.W.2d at 892.

59. *Id.* Defense counsel communicated defendant's acceptance to the prosecutor.

60. *Id.* This apparently meant little more than that the assistant prosecutor's superior disagreed with the advisability of the agreement.

61. The trial court ordered reinstatement of the plea bargain, stating that "the Prosecutor must show more good faith and be held to a higher standard than someone who is in the ordinary market place." *Id.* (citing People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975)).

62. *Id.* at 718-20, 262 N.W.2d at 894-95; *accord*, State v. Reasbeck, 359 So. 2d 564 (Fla. Dist. Ct. App. 1978).

63. 79 Mich. App. at 717-19, 262 N.W.2d at 893-94. *See also* People v. Orin, 13 Cal. 3d 937, 942, 533 P.2d 193, 197, 120 Cal. Rptr. 65, 69 (1975) (plea bargain contemplates negotiated agreement approved by the court).

64. 79 Mich. App. at 718-19, 262 N.W.2d at 894. The *Heiler* court stated, "[S]uch agreements [lacking judicial approval or detrimental reliance] are not binding upon the prosecutor . . . any more than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach)." *Id.* at 720, 262 N.W.2d at 895.

65. *Id.* at 718-20, 262 N.W.2d at 894-95. This determination rests on the principle that a trial judge can refuse to allow dismissal, pursuant to a plea agreement, of originally filed charges. *Id.* at 717-20, 262 N.W.2d at 893-94. Also involved is the rule that a trial judge need not accept a prosecutor's sentencing recommendation. *See, e.g.*, People v. Davis, 74 Mich. App. 624, 254 N.W.2d 335 (1977).

66. 374 A.2d 816 (Del.), *cert. denied*, 434 U.S. 893(1977).

of the *Heiler* court in refusing to enforce a plea agreement in the absence of a guilty plea or some other form of detrimental reliance on the part of the defendant. In *Shields*, defendant accepted an assistant prosecutor's proposal to reduce the charge against him in return for a plea of guilty.[67] Several weeks thereafter, but prior to entry of a guilty plea, the prosecuting attorney informed defendant that the proposal was being withdrawn. Prior to trial on the original charge, defendant moved the trial court for enforcement of the proposal, which motion the trial court denied. On appeal from defendant's conviction at trial,[68] defendant argued that principles of contract law as well as the prosecutor's breach of faith required enforcement of the plea proposal. Rejecting these contentions, the Supreme Court of Delaware refused enforcement and held that the prosecutor could withdraw from a plea agreement at any time prior to, but not after, the actual entry of defendant's guilty plea or other action by defendant constituting detrimental reliance.[69]

In *Cooper*, however, constitutional, rather than contract, principles were used to justify enforcement of the plea proposal.[70] The court relied primarily upon the principle that a defendant's substantive due process right to fairness[71] is violated by the prosecutor's unilateral withdrawal of the plea proposal.[72] Certain factors govern the use and application of the due process concept, which the United States Supreme Court, in *United States v. Lovasco*,[73] made apparent:

> Judges are not free, in defining "due process", to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." . . . Our task is more circumscribed. We are to determine only whether the actions complained of . . . violate those "fundamental conceptions of justice which lie at the base of our civil and

67. The documented offer stated that the state would dismiss the original first degree murder charge in return for defendant's plea of guilty to charges of second degree murder and rape. Defense counsel communicated the defendant's acceptance several days after the proposal had been delivered by the prosecution. *Id.* at 818.

68. *Id.* at 821. Defendant received a death sentence, which was reduced on appeal to a life sentence without benefit of parole. *Id.*

69. *Id.* at 820; *accord*, State v. Edwards, 279 N.W.2d 9 (Iowa 1979); State v. McClure, 242 S.E.2d 704 (W. Va. 1978). *See also* DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979); State v. Mustain, 32 Or. App. 339, 574 P.2d 674 (1978), People v. Carter, 73 Misc. 2d 1040, 343 N.Y.S.2d 431, *aff'd*, 41 A.D.2d 905, 343 N.Y.S.2d 580 (1973).

70. 594 F.2d at 18; *see* text accompanying notes 19-33 *supra*.

71. *See, e.g.*, Hampton v. United States, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring) ("Due Process in essence means fundamental fairness . . . .").

72. 594 F.2d at 18.

73. 431 U.S. 783 (1977) (lengthy investigation delay prior to indictment of defendant did not violate due process even though investigation substantially completed shortly after offenses occurred and defendant suffered prejudice because of delay).

> political institutions," . . . and which define "the community's sense of fair play and decency . . . ."[74]

In applying these fundamental factors to a defendant's claim of violation of due process rights by governmental misconduct, the Supreme Court utilizes a two-step analysis: the Court first examines the character of the government's conduct and then determines whether that conduct has violated a protected right of the defendant. Only if governmental misconduct is "outrageous" will the Court find that the character of the conduct, regardless of the existence of a protected right, is sufficient to constitute a denial of due process. An explicit illustration of this analysis is found in *Hampton v. United States*,[75] in which the Supreme Court held that the government's conduct in providing illegal narcotics to a defendant convicted of selling the same narcotics to government agents did not constitute entrapment per se because the defendant had been predisposed to engage in the crime.[76] Mr. Justice Rehnquist, writing for the plurality, stated:

> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*. . . . [T]he police conduct here [did not deprive] defendant of any right secured to him by the United States Constitution.[77]

The principle to be discerned from the Court's decision in *Hampton* is that governmental misconduct must affect a protected right of the defendant unless the government's conduct is sufficiently "outrageous" to be a denial of due process in itself.[78]

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74. *Id.* at 790 (citations omitted).

75. 425 U.S. 484 (1976).

76. *Id.* at 488-89 (Rehnquist, J., joined by Burger, C.J. and White, J.). Defendant asserted that the informer had furnished him with the narcotics. The trial court refused an instruction specifying that if the jury believed the informer had provided the narcotics then there would be entrapment as a matter of law despite defendant's predisposition to commit the crime. Defendant argued that the instruction should have been given because such conduct by the government would be "outrageous." *Id.* at 488-90.

77. *Id.* at 490-91.

78. *See, e.g.*, United States v. Leja, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 436 U.S. 948 (1978). The government's complicity in crime substantially affects a defendant's protected right to be free from entrapment. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 372 (1958) (Congress could not have intended that statutes be enforced through tempting innocent persons to violate the law).

Concurring in *Hampton*, Mr. Justice Powell, joined by Mr. Justice Blackmun, disagreed with the plurality's absolute rule that such official conduct would not constitute a denial of due process whenever defendant was shown to have a predisposition to commit the crime. Powell indicated that governmental misconduct may be sufficiently outrageous under certain circumstances to be a denial of due process despite defendant's predisposition. 425 U.S. at 492-95. In support of this position, Justice Powell cited Rochin v. California, 342 U.S. 165 (1952), in which police officials forcibly extracted narcotics from defendant's stomach after defendant had swallowed the narcotics

The two-step due process analysis requiring a finding of governmental misconduct and violation of a protected right was also applied in *Bordenkircher v. Hayes*,[79] in which the Supreme Court held that prosecutorial threats of indicting defendant for a substantially greater offense if defendant did not plead guilty to the charge on which he was originally indicted, followed by actual indictment for the greater offense because defendant did not plead guilty, did not violate defendant's due process rights because defendant had been properly chargeable on the greater offense.[80] The majority held that the prosecutor's efforts to encourage defendant to give up his right to trial, during the "give and take" of plea negotiations, were a proper exercise of discretion[81] and, therefore, constitutionally acceptable.[82]

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in the presence of the police. The Court held that such conduct by the police "shocks the conscience" and violates a defendant's due process rights. *Rochin* does not extend to nonconsensual taking of blood samples because such conduct is considered to be only a slight intrusion upon defendant's person. *See* Breithaupt v. Abram, 352 U.S. 432 (1957). *See also* Schmerber v. California, 384 U.S. 757 (1966).

Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, dissenting in *Hampton*, expressed the view that the police conduct in *Hampton* was "sufficiently offensive" to be a denial of due process. 425 U.S. at 497.

Five Justices would, therefore, recognize a violation of due process rights, under appropriate circumstances, based solely upon outrageous governmental conduct. *See* United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977).

79. 434 U.S. 357 (1977).

80. *Id.* at 363-65. Defendant in *Bordenkircher* had been indicted on a forged check charge, an offense carrying a term of two to ten years imprisonment. The prosecutor offered to recommend a five-year term if defendant would plead guilty. At the outset of plea negotiations the prosecutor threatened to indict defendant as an habitual criminal, an offense carrying a mandatory life sentence, if defendant did not plead guilty to the forged check charge. Defendant could have been properly charged with the offense because conviction on the forgery charge would have provided the required third felony. Defendant refused to plead guilty, the prosecutor filed the habitual criminal charge, and defendant was subsequently convicted and received the mandatory life sentence. *Id.* at 358-59.

81. *See* text accompanying notes 96-107 *infra*.

82. 434 U.S. at 364-65. Mr. Justice Powell, in dissent, argued that the prosecutor's conduct had been consciously directed at discouraging and then severely penalizing defendant's exercise of his constitutional right to trial. *Id.* at 368. Therefore, said Justice Powell, such conduct was not a constitutionally permissible exercise of discretion. *Id.* at 373. Mr. Justice Powell stated that the peculiar facts of the case supported his conclusion. The more serious offense to which defendant was subject was the habitual criminal statute that required three felony convictions before it could be implemented. Defendant had not served a prison term for his previous two felonies. Defendant's third felony charge involved a forged check in the amount of $88.30 and was an offense carrying a potential sentence of 2 to 10 years. The prosecutor offered to recommend a five-year term if defendant would plead guilty. Powell observed that this "hardly could be characterized as a generous offer." *Id.* at 369. The prosecutor threatened that the habitual criminal charge would be entered should defendant decide not to plead guilty. The prosecutor conceded that the only reason for actually charging defendant with the habitual criminal offense had been defendant's refusal to plead guilty. By choosing to go to trial on the forgery charge defendant received a life sentence as an habitual criminal. Powell viewed defendant's circumstances as clearly inappropriate to apply the habitual criminal statute. *Id.* at 370-71. Mr. Justice Blackmun, also in dissent, argued that due process should have protected defendant from the prosecutorial vindictiveness displayed in *Bordenkircher*. *Id.* at 367.

Defendant in *Bordenkircher* failed to prove governmental misconduct.[83] Defendant in *Hampton* failed to show either the violation of a protected right by governmental misconduct or "outrageous" governmental misconduct.[84] In both cases the substantive due process right to fundamental fairness had been applied by the Court and found not to provide defendant with a basis for relief. *Santobello v. New York*,[85] however, met both requirements of the Supreme Court's substantive due process test. Governmental misconduct arose from the prosecutor's breach of the plea agreement.[86] Violation of a protected right arose from defendant's entry of a guilty plea, which resulted in the waiver of a number of constitutional guarantees,[87] in reliance upon the agreement.[88] With both elements of its due process analysis before it, the Court held that there was a right to remedial relief, 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 part of the inducement or consideration, such promise must be fulfilled."[89]

The determination of governmental misconduct under the Supreme Court's due process analysis, however, must be made in light of the prosecutor's discretionary control over criminal prosecutions, which has historically been exceedingly broad.[90] The prevailing rule is that the doctrine of separation of powers prohibits judicial interference with the prosecutor's discretionary decision to prosecute in a particular case.[91] Also within the prosecutor's discretionary power is the decision

83. The majority in *Bordenkircher* viewed the prosecutor's conduct as a proper exercise of discretion. The detrimental effect of that conduct upon defendant's exercise of constitutional rights would not, therefore, provide a basis for finding a violation of due process. *See* text accompanying notes 79-82 *supra*.

84. *See* text accompanying notes 75-78 *supra*. Five Justices in *Hampton* held that defendant could not claim the benefit of his protected right to be free of entrapment because his predisposition to commit the crime had been demonstrated. Two of those five Justices rejected the absolute rule, which would deprive a defendant of that protected right regardless of the character of the government's conduct. Those two justices would recognize that a defendant may, under appropriate circumstances, premise a due process violation solely upon "outrageous" governmental conduct. The three dissenting justices in *Hampton* thought that the government's complicity in crime had been sufficiently outrageous to be a denial of due process. *See* note 78 *supra*.

85. 404 U.S. 257 (1971); *see* note 30 *supra* and text accompanying notes 121-26 *infra*.

86. 404 U.S. at 262.

87. *See* text accompanying note 43 *supra*.

88. 404 U.S. at 262. Protections provided for defendants entering guilty pleas may substantially explain remedial relief in the situation presented by prosecutorial breach of a plea agreement. *See* text accompanying note 43 *supra*. *See also* Westen & Westin, *supra* note 22, at 512.

89. 404 U.S. at 262.

90. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

91. *Id. See also* United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978).

to engage in plea bargaining with a defendant[92] and the conduct of negotiations once bargaining begins,[93] within which the withdrawal of a plea proposal, once made, would appear to fall.[94] The prosecutor's broad discretionary power is, however, subject to constitutional limitations.[95] Examples are the equal protection prohibition against discriminatory enforcement of the law[96] and the due process prohibitions against prosecutorial vindictiveness in the charging decision following a defendant's successful appeal of a conviction,[97] suppression of material evidence favorable to a defendant,[98] and intentional, prejudicial delay in bringing a criminal indictment.[99] In the plea bargaining context, it has been held that the enforcement of a prosecutor's promise to dismiss certain charges when the defendant has detrimentally relied on the promise by entering a guilty plea to other charges does not infringe on the prosecutor's discretionary powers,[100] and this holding is implicit

92. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545 (1977) (prosecutor need not plea bargain if he prefers to go to trial); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (not violative of due process for prosecutor to refuse identical plea offer to equally guilty co-defendant); Brown v. Parratt, 419 F. Supp. 44 (D. Neb. 1976), *aff'd*, 560 F.2d 303 (8th Cir. 1977) (plea bargaining "unquestionably" a constitutional form of prosecutorial discretion); State v. Jackson, 223 Kan. 554, 575 P.2d 536 (1978) (prosecutor need not extend plea offer, even if one made to co-defendant).

93. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1977); McMillan v. United States, 583 F.2d 1061 (8th Cir.), *cert. denied*, 99 S. Ct. 727 (1978) (no right violated by prosecutor offering co-defendant a "better deal" than defendant).

94. *See, e.g.*, People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977). *See also* authorities cited note 55 *supra*.

95. *See, e.g.*, United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1977) ("broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise").

96. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See also* Oyler v. Boles, 368 U.S. 448 (1962). A two-step test, requiring a showing of actual selectivity and invidious discrimination or bad faith by the prosecutor, has been adopted in several of the United States Courts of Appeals. *See* United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978) (listing other United States Courts of Appeals that have adopted the test).

97. *See* Blackledge v. Perry, 417 U.S. 21 (1974) (greater indictment raises prima facie showing of retaliatory motivation); North Carolina v. Pearce, 395 U.S. 711 (1969); Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978) (balancing test that seeks to reconcile defendant's due process rights with prosecutor's broad discretionary powers).

98. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y.), *aff'd per curiam*, 565 F.2d 233 (2d Cir. 1977) (prosecutor must disclose "clearly exculpatory" evidence during plea negotiations).

99. *See* United States v. Marion, 404 U.S. 307 (1971). *See also* United States v. Lovasco, 431 U.S. 783 (1977) (investigative delay proper even though defendant prejudiced somewhat by lapse of time); United States v. Revada, 574 F.2d 1047 (5th Cir. 1978) (due process not violated unless actual prejudice results and delay purposefully designed to feign tactical advantage or harass defendant).

100. United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969). The Fourth Circuit strongly approved of *Paiva* in United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974). *See also* United States v. Lieber, 473 F. Supp. 884 (E.D.N.Y. 1979) (detrimental reliance caused prejudice, separation of powers not a bar to relief).

in the Supreme Court's decision in *Santobello*.[101]

In addition to governmental misconduct, courts finding a violation of due process have traditionally required a showing of prejudice to the defendant.[102] For example, the Supreme Court, in *United States v. Lovasco*,[103] held that a prosecutor's delay for investigative purposes in seeking an indictment was not sufficiently prejudicial to constitute a violation of defendant's right to due process. The *Lovasco* Court noted that prejudice is "generally a necessary but not sufficient element of a due process claim."[104] In *Santobello*, the existence of prejudice was implicit, arising from defendant's guilty plea in reliance upon the prosecutor's breached plea bargain promise,[105] and in other cases in which the principle of promissory estoppel has been utilized to enforce a breached prosecutorial promise,[106] detrimental reliance was the factor that indicated prejudice to a defendant.[107]

An additional constitutional consideration, the right to the effective assistance of counsel, was utilized by the *Cooper* court to justify enforcement of a withdrawn plea proposal.[108] Generally, to prevail on an ineffective assistance of counsel claim, a criminal defendant must prove that counsel's assistance either fell measurably below a standard of reasonable competence[109] or constituted a "farce or mockery" of justice[110] and that such ineffective assistance prejudicially affected the

101. *See* text accompanying notes 30-44 *supra*.

102. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21 (1974) (vindictive reindictment on greater charges following successful appeal); Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (statements in closing argument); United States v. Marion, 404 U.S. 307 (1971) (lengthy pre-indictment delay); Brady v. Maryland, 373 U.S. 83 (1963) (suppression of material evidence favorable to the accused). *See also* Fambo v. Smith, 433 F. Supp. 590, 596-600 (W.D.N.Y.), *aff'd*, 565 F.2d 233 (2d Cir. 1977) (prosecutor's failure to disclose clearly exculpatory evidence during plea negotiations "reprehensible" but no prejudice to defendant under all the circumstances).

103. 431 U.S. 783 (1977), *rehearing denied*, 434 U.S. 881 (1978).

104. *Id.* at 790.

105. *See* text accompanying notes 33-44 *supra*. The United States Court of Appeals for the Fourth Circuit, in United States v. Carter, 454 F.2d 426 (4th Cir. 1972), expressly required prejudice through detrimental reliance to support enforcement of a breached plea agreement. *Id.* at 428. The *Cooper* court recognized *Carter* but characterized it as involving contract analogies that should be rejected as too narrow to define appropriate relief. 594 F.2d at 16-18. Thus, the lack of detrimental reliance, a contract principle in the court's view, would not militate against awarding relief to the defendant. *Id.* at 18.

106. *See* text accompanying notes 39-54 *supra*.

107. *See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972). *See also* authorities cited note 55 *supra*.

108. 594 F.2d at 18-19.

109. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978). *See generally* Annot., 26 A.L.R. Fed. 218 (1976).

110. *See, e.g.*, United States v. Ramirez, 535 F.2d 125 (1st Cir. 1976). *See generally* Annot., 26 A.L.R. Fed. 218 (1976).

outcome of defendant's case.[111] A defendant may also prevail on an ineffective assistance claim through a showing that he was deprived of the intervention and advice of counsel during a critical stage in the criminal proceedings against him without his voluntary and intelligent waiver.[112] During plea negotiations a defendant is entitled to the intervention and advice of defense counsel,[113] unless voluntarily and intelligently waived,[114] because plea bargaining contemplates the entry of a guilty plea.[115] Thus, defendants who have had the advice of counsel during plea negotiations have traditionally been able to attack their subsequent guilty pleas only by a showing that counsel's assistance was not within the range of competence demanded of attorneys in criminal cases[116] or constituted a "farce or mockery" of justice.[117] Counsel's advice to enter a guilty plea pursuant to an agreement with the prosecution[118] or counsel's estimate of possible sentence, even though exceeded after defendant enters a guilty plea,[119] generally have not been held to constitute a denial of effective assistance of counsel. When defense counsel negligently or falsely advises that a plea bargain has been negotiated when, in fact, no such agreement was made, and defendant enters a guilty plea in reliance on the nonexistent agreement, however, courts will generally allow defendant to withdraw his plea as involun-

111. *See, e.g.*, United States v. Decoster, No. 72-1283, slip op. at 20-1 (D.C. Cir., July 10, 1979). *See also* Marzullo v. Maryland, 435 U.S. 540 (1978) (White, J., dissenting from denial of certiorari) ("the federal courts of appeals are in disarray" as to the proper standard).

112. *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977). *See generally* Strazzella, *Ineffective Identification Counsel: Cognizability Under the Exclusionary Rule*, 48 TEMPLE L.Q. 241 (1975). An ineffective assistance of counsel claim may also arise from a conflict of interest presented by counsel's representation of co-defendants. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475 (1978).

113. *See, e.g.*, Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963); Davis v. State, 308 So. 2d 27 (Fla. 1975). *See also* Fambo v. Smith, 433 F. Supp. 590, 596-600 (W.D.N.Y.), *aff'd*, 565 F.2d 233 (2d Cir. 1977) (prosecutor must disclose clearly exculpatory evidence during plea negotiations so that defense counsel can render competent, informed advice). *See generally* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PLEAS OF GUILTY, Proposed Standard 14-3.1 (2d ed. tentative draft 1978) (prosecutor may engage in plea discussions with defense counsel or defendant if counsel waived); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1976).

114. *See, e.g.*, Judge v. United States, 379 A.2d 966 (D.C. App. 1977).

115. *See, e.g.*, Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963). *See also* Finer, *supra* note 113.

116. *See, e.g.*, McMann v. Richardson, 397 U.S. 759 (1970) (guilty plea entered on the reasonably competent advice of counsel is an intelligent plea not open to attack on that ground); United States v. Thomas, 470 F. Supp. 968 (E.D. Pa. 1979); Simmons v. State, 578 S.W.2d 12 (Ark. 1979).

117. *See, e.g.*, Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y.), *aff'd*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1973).

118. *See, e.g.*, Gilmore v. California, 364 F.2d 916 (9th Cir. 1966), *aff'd*, 419 F.2d 379 (9th Cir.), *cert. denied*, 397 U.S. 1078 (1969); Perez v. Craven, 314 F. Supp. 867 (C.D. Cal. 1970).

119. *See, e.g.*, United States v. Horton, 334 F.2d 153 (2d Cir. 1964).

tarily made on the ground of ineffective assistance of counsel.[120]

In utilizing the substantive due process principle as a ground for enforcement of a withdrawn plea proposal, the *Cooper* court derived defendant's right to fairness, present throughout the plea negotiation process, from the decision of the United States Supreme Court in *Santobello v. New York*.[121] In *Santobello*, the Supreme Court held that the "interests of justice and appropriate recognition of the duties of the prosecution" required enforcement of a plea agreement breached by the prosecutor after the defendant fulfilled his part of the agreement by entering a guilty plea.[122] Although the *Santobello* Court determined that the "interests of justice" dictated relief, the Court did not explain the nature of this right to relief and specified no constitutional grounds in support of its decision.[123] The Court did, however, declare that substantive considerations affecting the practice of plea bargaining, "presuppose fairness in securing agreement between an accused and a prosecutor."[124] Moreover, said the Court, the practice of plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[125] The court of appeals in *Cooper* interpreted these general statements on the need for fairness in plea bargaining to find a right to enforcement of a plea proposal, even though no detrimental reliance has occurred, based on the concept of

120. *See, e.g.*, Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y.), *aff'd*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1972). *But see* People v. Cowen, 68 Misc. 2d 660, 328 N.Y.S.2d 111 (1971) (court inquired, when plea entered, into defendant's understanding of possible maximum sentence; defendant denied that any promise was made to him; relief denied). Because a guilty plea entered on the basis of reasonably competent advice of counsel is a voluntary and intelligent plea, Tollett v. Henderson, 411 U.S. 258 (1973), courts have allowed vacatur of guilty pleas entered in reliance upon incompetent advice on the ground of involuntariness. *See, e.g.*, Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967).

121. 594 F.2d at 15-16. Defendant in *Santobello* had agreed to enter a guilty plea in return for the prosecutor's promise to make no sentence recommendation. After defendant entered his guilty plea, the prosecutor inadvertently breached his part of the agreement by recommending the maximum sentence.

122. 404 U.S. at 262-63; *see* note 30 *supra*.

123. Mr. Justice Douglas, however, in a concurring opinion, viewed *Santobello* as being grounded in the constitutional right to due process of law because the case involved the conduct of a state prosecutor, which is not within the Supreme Court's supervisory powers. 404 U.S. at 266-67 (Douglas, J., concurring). *See* Westen & Westin, *supra* note 22, at 476. Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Stewart, concurring in part and dissenting in part, found a constitutional violation in the prosecutor's undercutting of the basis of defendant's waiver of constitutional rights implicit in a guilty plea. 404 U.S. at 268 (Marshall, J., concurring in part, dissenting in part). *See* text accompanying note 43 *supra*.

124. 404 U.S. at 261. For excellent discussions of the interplay between the prosecutor, defense counsel and the accused, see Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter cited as *Defense Attorney's Role*]; Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 UNIV. CHI. L. REV. 50 (1968); Beall, *supra* note 15.

125. 404 U.S. at 262.

fairness embodied in the constitutional guarantee of due process.[126]

To satisfy the Supreme Court's two-step due process analysis requiring governmental misconduct and violation of a protected right,[127] the *Cooper* court described defendant's protected right as the right to be treated with fairness throughout the plea negotiation process.[128] This merely begs the question, however, because characterizing defendant's right as one of fairness means only that there is a right to be free from governmental misconduct. To discover the protected right necessary to due process analysis requires closer scrutiny. Defendant's protection against deprivation of liberty without due process of law, embodied in the fifth amendment,[129] could provide a sufficient protected right. In fact, it was the quantum of liberty deprivation—defendant's exposure to a greater sentence through conviction on the original four counts in comparison to the sentence he would have received as a result of his guilty plea on one count pursuant to the plea proposal—that apparently provided the basis for the decision in *Cooper*.[130] This theory, however, must be premised on the argument that a defendant has a constitutional right to expect that his case will be settled through a favorable plea bargain arrangement. This argument is implicit in the *Cooper* court's admission that "defendant . . . 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"[131] and in its conclusion that "a constitutional right to enforcement of plea proposals may arise . . . on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals."[132]

The *Cooper* court's protection of plea bargain expectations without a showing of detrimental reliance directly conflicts, however, with

126. 594 F.2d at 15-16. *But see* State v. Edwards, 279 S.W.2d 9 (Iowa 1979) (*Cooper* expressly rejected because *Santobello* does not extend to defendant who has not detrimentally relied on plea proposal).

127. *See* text accompanying notes 75-95 *supra*.

128. 594 F.2d at 16-17.

129. U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

130. *See* text accompanying notes 14 & 15 *supra*.

131. 594 F.2d at 16.

132. *Id.* at 18. Recognition of a protection for defendant's expectations flows from the *Cooper* court's rejection of contract law analogies as exclusive principles to support remedial relief. *Id.* The facts in *Cooper* required this rejection because the principle of "promissory estoppel," *see* text accompanying notes 39-54 *supra*, was unavailable because defendant had neither entered a guilty plea nor performed any other act in detrimental reliance upon the government's plea proposal. 594 F.2d at 16. Moreover, no traditional contract had been formed because the prosecutor had withdrawn the proposal prior to defendant's communication of acceptance. *Id.*

the holding of the Supreme Court in *Weatherford v. Bursey*[133] that defendants are not constitutionally entitled to engage in plea bargaining.[134] Apparently recognizing this difficulty, the *Cooper* court distinguished *Weatherford* on the ground that plea negotiations in *Weatherford* had not yet commenced, whereas in *Cooper* the prosecutor had voluntarily commenced negotiations and offered a plea proposal.[135] In *DeRusse v. State*,[136] however, the Texas Court of Criminal Appeals rejected a similar distinction in denying enforcement of a withdrawn plea proposal.[137] The *DeRusse* court refused to enforce the withdrawn plea proposal because defendant had no right to demand that the prosecutor enter into a plea bargain[138] and because defendant was in the same position as if no agreement had been made since the withdrawal occurred prior to entry of a guilty plea.[139] The reasoning of the *Cooper* court, therefore, must be regarded as a distinction without a difference because a prosecutor's withdrawal of a plea proposal, in the absence of detrimental reliance, leaves a defendant in the same objective position as if no plea proposal had been made.

The *Cooper* court also failed to properly assess the character and effect of the government's conduct, as required by the Supreme Court's two-step due process analysis.[140] The court of appeals merely characterized the government's withdrawal of the plea proposal as unfair.[141] Although one can certainly empathize with the defendant in *Cooper* in viewing the prosecutor's actions as unfair, it is questionable whether

133. 429 U.S. 545 (1976).

134. *Id.* at 560-61 ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *accord*, State v. Jackson, 223 Kan. 554, 575 P.2d 536 (1978) (no constitutional right to a plea offer even if co-defendant extended an offer); People v. Venable, 46 A.D.2d 73, 361 N.Y.S.2d 398 (1974), *aff'd*, 37 N.Y.2d 100, 371 N.Y.S.2d 471 (1975) (no constitutional duty or right in regard to existence of plea bargaining); Williams v. State, 491 S.W.2d 862 (Tenn. 1973) (no obligation to offer benefit to defendant in exchange for guilty plea); Morano v. State, 572 S.W.2d 550 (Tex. Crim. App. 1978) (statute sanctioning plea bargaining gives defendant no right to plea bargain).

135. 594 F.2d at 19-20. It had been argued in *Weatherford* that defendant had been unconstitutionally deprived of *opportunity* to engage in plea negotiations. 429 U.S. at 560-61. The *Cooper* court reasoned that once plea negotiations commence, however, the prosecution must conduct negotiations fairly. 594 F.2d at 20.

136. 579 S.W.2d 224 (Tex. Crim. App. 1979).

137. *Id.* at 236. *See also* State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979) (expressly rejecting *Cooper*).

138. *Id.*; *see* Morano v. State, 570 S.W.2d 550 (Tex. Crim. App. 1978). *See also* State v. Collins, 44 N.C. App. 141, 145, 260 S.E.2d 650, 653 (1979) (citing *Weatherford*).

139. 579 S.W.2d at 236. *See also* State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979) (no detrimental reliance).

140. *See* text accompanying notes 75-89 *supra*.

141. 594 F.2d at 17.

such conduct rises to the level of a constitutional violation.[142] The prosecutor's withdrawal of the plea proposal fell within his broad discretionary authority,[143] which strongly supports a finding that the prosecutor's action did not constitute misconduct,[144] and that defendant suffered no prejudice through detrimental reliance on the withdrawn plea proposal.[145] While the *Cooper* court expressly limited the prosecutor's discretionary power to withdraw a plea proposal, it did not adequately explain why this discretion should be limited when a defendant has suffered no prejudice through reliance on the plea proposal.[146] Instead, the court obscured this issue by characterizing detrimental reliance as a contract concept that should be rejected as too narrow to define appropriate relief.[147] This characterization fails to perceive the fundamental role that detrimental reliance plays in providing the basis for a finding that a defendant suffered prejudice, as a result of the prosecutor's withdrawal of the plea proposal,[148] sufficient to restrict a prosecutor's traditionally broad discretion in deciding whether to enter and fulfill a plea agreement.[149] The *Cooper* court conceded the lack of detrimental reliance by defendant but held that such a showing was unnecessary to provide relief under due process principles.[150] It must be concluded, therefore, that the court rejected prejudice to a defendant as a requirement of a substantive due process claim when a prosecutor withdraws a plea proposal that a defendant desires to accept. The *Cooper* court's failure to address specifically the question why prejudice is unnecessary, outside of the court's focus on the prosecutor's obligation of fairness, raises a substantial ground for questioning the court's finding of a due process violation because prejudice has traditionally been required, either implicitly or explicitly, to trigger the

142. *See* authorities cited note 55 *supra*.

143. *See* text accompanying notes 96-107 *supra*.

144. *See, e.g.*, People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977). *See also* Bullock v. State, 397 N.E.2d 310 (Ind. App. 1979) (court refused to exercise "chancellor's foot" veto over executive branch in absence of a violation of defendant's rights; dissent argued *Cooper* should control).

145. *See* text accompanying notes 39-54 *supra*.

146. The *Cooper* court merely stated that it hesitated to give judicial approval to a practice with possibilities for abuse even though there was no suggestion of deliberate abuse in *Cooper*. 594 F.2d at 20.

147. *Id.* at 15-18; *see* text accompanying notes 22-26 *supra*.

148. *See* authorities cited notes 39-55 *supra*.

149. *See, e.g.*, Bullock v. State, 397 N.E.2d 310 (Ind. App. 1979); People v. Heiler, 79 Mich. App. 714, 262 N.W.2d 890 (1977).

150. 594 F.2d at 18 (right to enforcement may arise "on the basis alone" of defendant's expectations of fulfillment).

right to substantive due process relief.[151] Moreover, the cases that have applied contract analogies in determining whether to enforce a withdrawn plea proposal, although admittedly not based on constitutional considerations, are consistent with this principle of due process in that prejudice, through detrimental reliance on a breached plea agreement, is required to support restriction of a prosecutor's broad discretionary authority to withdraw a plea proposal.[152]

In further justifying enforcement of the withdrawn plea proposal in *Cooper*, the court of appeals utilized the sixth amendment right to the effective assistance of counsel in a dubious manner. The court pointed out that Federal Rule of Criminal Procedure 11(e)(1), which requires prosecutors to conduct plea negotiations through defense counsel,[153] necessarily results in defense counsel communicating the prosecutor's proposals to the defendant.[154] Because of defense counsel's intervention in plea negotiations, the court expressed concern that a defendant's confidence in his attorney's integrity and capability might be jeopardized by the prosecutor's withdrawal of a previously communicated plea proposal.[155] In support of these contentions, the court relied upon the observation of Mr. Justice Stevens, concurring in *Brewer v. Williams*,[156] that "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 [that interrogation would not take place in counsel's absence] to [defendant's] lawyer."[157]

Utilization of the effective assistance of counsel principle to justify enforcement of the withdrawn plea proposal in *Cooper*, however, is questionable. Two inquiries are involved here—whether an accused is

151. *See* text accompanying notes 102-07 *supra*.

152. *See* text accompanying notes 39-54 *supra*.

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

154. 594 F.2d at 18.

155. *Id.* at 18-19. At the very least, said the court, these sixth amendment considerations create a greater prosecutorial obligation to negotiate with fairness in seeking guilty pleas. The court saw evidence of such a loss of confidence in *Cooper* because the attorney involved in plea negotiations had been replaced prior to trial. *Id.* at 19 n.9.

156. 430 U.S. 387 (1977). In *Brewer*, defense counsel and the police agreed that defendant would not be interrogated while being transported in the absence of counsel. Nevertheless, the police did prompt defendant to disclose incriminating information. The majority held that defendant had been improperly interrogated without having waived his right to the presence of counsel, thus requiring exclusion of defendant's tainted confession. *Id.* at 404-06.

157. *Id.* at 415 (Stevens, J., concurring). Mr. Justice Stevens noted that defense counsel fulfills the role of intermediary between the government and the accused in criminal proceedings: "At this stage [of criminal proceedings]—as in countless others in which the law profoundly affects the life of an individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen." *Id.*; *see* 594 F.2d at 18-19. The majority opinion, however, made no direct reference to such a consideration.

entitled to the intervention and advice of counsel during the plea negotiation process[158] and whether counsel's involvement in plea negotiations constituted ineffective assistance of counsel.[159] The *Cooper* court confused these inquiries in that it utilized *Brewer*—a precedent supporting the first inquiry—to support its finding on the second inquiry that defendant had been denied effective assistance of counsel.[160] The question whether a defendant is entitled to the presence of counsel during particular stages of criminal proceedings, such as plea negotiations, is clearly distinct from the question whether a defendant is denied effective assistance of counsel when counsel is present and rendering advice.[161] When counsel is involved in the proceedings, the applicable standard is an objective one based on the range of competence demanded of attorneys in criminal cases[162] or whether counsel's assistance constituted a "farce or mockery of justice."[163] In *Cooper*, there is no indication that defense counsel's advice fell short of the objective standard of reasonable competence.[164] Rather than judge the competence of counsel's advice under this objective standard, which carries a heavy burden of proof,[165] the *Cooper* court assessed counsel's competence in the plea negotiations in the context of defendant's subjective perception of his attorney's capabilities after defendant had been informed that the plea proposal had been withdrawn.[166] This is a novel approach and a difficult one to apply should a number of other disappointments suffered by a defendant during the criminal process be transformed into a finding of ineffective assistance through the defendant's perception of defense counsel's capabilities. A subjective standard measured by a defendant's perception of his attorney's

158. *See* text accompanying notes 112-15 *supra*.

159. *See* text accompanying notes 116-20 *supra*.

160. 594 F.2d at 18. In *Brewer*, the Supreme Court held only that defendant had a right to the *presence* of counsel during interrogation, which had not been voluntarily and intelligently waived. 430 U.S. at 401. The *Cooper* court's quotation from the concurring opinion of Justice Stevens in *Brewer*, *see* text accompanying note 157 *supra*, therefore, must be regarded as one taken out of context.

The *Cooper* court also cited Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963), in support of its finding of ineffective assistance of counsel. 594 F.2d at 18. The *Anderson* court, however, held only that an accused is entitled to the *presence* of counsel during plea negotiations unless that right is waived. 221 F. Supp. at 934-35. Like *Brewer*, therefore, *Anderson* must be regarded as support for the first, rather than the second, inquiry.

161. *See* text accompanying notes 109-120 *supra*.

162. *See* text accompanying note 109 *supra*.

163. *See* note 110 *supra*.

164. The Fourth Circuit has adopted the "reasonable competence" standard. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied* 435 U.S. 1011 (1978).

165. *Id.* at 544.

166. 594 F.2d at 19, n.9.

capabilities, particularly when that perception arises out of circumstances beyond counsel's control, is not doctrinally sound.[167] In addition, it is hard to understand how the failure of defense counsel to obtain a plea bargain[168] can be utilized to support an ineffective assistance of counsel claim when defendants are not constitutionally entitled to plea bargain.[169] The *Cooper* court's use of the right to effective assistance of counsel to support its enforcement of a withdrawn plea proposal, therefore, is even more unfounded than its application of the right to due process.

A further basis for questioning the holding in *Cooper* is the failure of the court of appeals to explain why it disagreed with the rationale of

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167. *See, e.g.*, United States v. Beaver, 524 F.2d 963, 965 (5th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976) ("[W]e cannot hold that mere subjective lack of confidence in the attorney by a defendant is sufficient to render the assistance provided by counsel ineffective . . . ."); *cf.* United States v. Mancusi, 275 F. Supp. 508, 517 (E.D.N.Y. 1967) ("Certainly, no procedure can prevent many defendants from believing that they were unfairly treated. Whatever the circumstances, many of them, brooding in their cells, will ultimately be convinced of their own purity and the impropriety of society in dealing with them.").

168. Defendant's damaged perception of his attorney's capabilities necessarily flows from counsel's failure to secure the prosecutor's plea proposal.

169. *See, e.g.*, Crow v. Coiner, 323 F. Supp. 555 (N.D. W. Va. 1971) (failure of defendant to get "best deal" not evidence of ineffective assistance of counsel); text accompanying notes 133-35 *supra*. A further question is presented by the court's failure to address the view that advice to engage in plea bargaining may not be in the defendant's best interests. For example, the United States District Court for the Eastern District of Arkansas, in *United States v. Griffin*, stated:

> It is the Court's opinion, probably a minority opinion, that the process of negotiating pleas has a tendency to demean all participants: the attorneys, the defendant, and even the Court. . . .
>
> Perhaps only trial judges fully understand the pervasiveness of the "fear of trial" experienced by even excellent attorneys. Although good lawyers will not permit this fear to rise to the level of a conscious factor in plea negotiations, it must often remain subconsciously at work in the process, encouraging acceptance of a negotiated plea on some basis other than the merits . . . .
>
> . . . .
>
> [T]here must be more than a lingering concern, when a negotiated plea is heard, that an innocent defendant has been prevailed upon, or has chosen to "play the odds," rather than to staunchly maintain his innocence.

United States v. Griffin, 462 F. Supp. 928, 930-32 (E.D. Ark. 1978). This sentiment finds strong support in Professor Alschuler's excellent discussion of the plea bargaining process:

> [T]he plea bargaining system is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships. This system subjects defense attorneys to serious temptations to disregard their client's interests—temptations so strong that the invocation of professional ideals cannot begin to answer the problems that emerge. Today's guilty plea system leads even able, conscientious and highly motivated attorneys to make decisions that are not really in their clients' interest.

Defense Attorney's Role, *supra* note 124, at 1180.

In *Cooper*, defendant was confronted with strong incriminating evidence in the form of a properly admitted recording of the third telephone call to Simpson and Simpson's testimony. *See* note 12 *supra*. Therefore, even had Cooper entered a guilty plea to the original charges, he probably could not have attacked defense counsel's advice as ineffective. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258 (1973) (advice to enter plea effective even though grand jury selection procedures open to successful challenge); McMann v. Richardson, 397 U.S. 759 (1970) (advice to enter plea effective even though defendant's confession probably inadmissible in evidence). *See also* United States v. Thomas, 470 F. Supp. 968 (E.D. Pa. 1979).

Heiler and *Shields*.[170] The *Heiler/Shields* approach refuses to enforce a withdrawn plea proposal in the absence of prejudice to a defendant through detrimental reliance, judicial acceptance of the plea agreement, or entry of a guilty plea.[171] Although the court of appeals in *Cooper* recognized *Heiler* and *Shields*, it failed to explain adequately its rejection of these cases.[172] The only factual distinction that can be made between *Heiler* and *Shields*, on the one hand, and *Cooper*, on the other, is the unfavorable one that the former cases did offer a contractual basis for enforcement in that each defendant had accepted the prosecutor's plea proposal, whereas, in the latter case, a traditional contract had not been formed because the defendant had not communicated his acceptance of the plea proposal prior to the prosecutor's withdrawal.[173] *Heiler* rests upon the principle that no reasonable expectation of benefit can arise from a plea proposal, and thus that a defendant can suffer no prejudice as a result of withdrawal of the proposal, until the trial court accepts the agreement because that acceptance is a condition precedent to all plea arrangements.[174] In the federal courts, trial court acceptance is also a condition precedent to all plea arrangements.[175] *Shields* viewed defendant's entry of a guilty plea

170. *See* text accompanying notes 55-69 *supra*.

171. *Id.* The *Heiler* court explained that, absent prejudice to the defendant resulting from the prosecutor's withdrawal from an agreement, judicial enforcement of a proposal would intrude on the power of the executive branch of government, thereby violating the constitutional separation of powers principle. 79 Mich. App. at 720-21, 262 N.W.2d at 895.

172. 594 F.2d at 19 n.10.

173. In *Cooper*, the proposal had been offered to defendant and subsequently withdrawn within approximately a four hour period. *See* text accompanying notes 13-16 *supra*. In *Heiler*, the plea proposal had been offered, accepted and withdrawn within a period of approximately forty-eight hours. 79 Mich. App. at 717-18, 262 N.W.2d at 892. In *Shields*, the proposal had been withdrawn several weeks after acceptance by defendant. 374 A.2d at 818. In both *Heiler* and *Shields* defense counsel played an integral role in advising the defendant and communicating with the prosecutor. *See* notes 59 & 67 *supra*.

In a footnote, the *Cooper* court recognized that the absence not only of detrimental reliance but also a traditional contract took it "not one but two steps beyond" the Fourth Circuit's earlier cases, 594 F.2d at 17 n.6, which, like *Heiler* and *Shields*, had required both a contractual basis and detrimental reliance for enforcement of a withdrawn plea proposal, *see, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972).

174. *See* text accompanying notes 56-71 *supra*.

175. In the federal courts any plea agreement can be rejected by the trial judge if the defendant is given an opportunity to withdraw his plea of guilty. FED. R. CRIM. P. 11(e)(4). *See, e.g.*, United States v. Stamey, 569 F.2d 805 (4th Cir. 1978). If the proposal had not been withdrawn in *Cooper* but had later been rejected by the district court, Cooper would have been permitted to withdraw his guilty plea and could not have been heard to complain. *See, e.g.*, United States v. Wagner, 529 F.2d 518 (4th Cir. 1976). Because any agreement can be rejected, judicial acceptance is an implied condition precedent to all plea agreements in the federal courts. One must question why enforcement is necessary if the defendant can be placed in the same position he would have been in had the trial judge refused to accept the agreement. In DeRusse v. State, 579 S.W.2d 224,

as the point in time at which a plea proposal becomes binding upon the prosecutor.[176] In *Cooper*, no guilty plea had been entered. Although both *Heiler* and *Shields* recognized exceptions when a defendant could show prejudice through some form of detrimental reliance upon the agreement,[177] the court of appeals in *Cooper* viewed the lack of reliance as having no consequence.[178] The *Cooper* court's failure to explain this rejection of *Heiler* and *Shields*, however, must be viewed as a fundamental shortcoming because the *Heiler/Shields* approach offers a well-reasoned means for balancing the prosecutor's discretionary powers with defendant's rights by requiring a showing of prejudice to defendant as a predicate to enforcement of a withdrawn plea proposal.[179]

The *Cooper* court's dubious use of the rights to due process and effective assistance of counsel to support its enforcement of a withdrawn plea proposal, and the court's failure to explain its rejection of the *Heiler/Shields* approach,[180] make adoption of the *Cooper* decision by other jurisdictions highly unlikely.[181] It remains, however, the controlling authority in the Fourth Circuit. The question arises, therefore, of what effect *Cooper* may have on future plea bargaining practices.

An important limitation of *Cooper* specified by the court of appeals itself is that the prosecutor's office can condition any or all plea proposals on a superior's approval of the agreement.[182] This would avoid the problem presented in *Cooper* of a prosecutor improperly "second-guessing" a subordinate's judgment.[183] The *Cooper* court apparently felt that a defendant's expectations are not injured when a proposal containing such a reservation is withdrawn prior to entry of a

236 (Tex. Crim. App. 1979), the court utilized this reasoning to deny enforcement of a plea proposal. The court stated: "[Defendant] was in the same position he would have been in had no agreement been made, or had the trial court indicated that it would not follow the agreement and [defendant] withdrawn his plea." *Id.* In *DeRusse*, the prosecution withdrew from the agreement just prior to defendant's entry of a guilty plea, but the court held that any prejudice had been cured by giving defendant a two-month continuance to prepare for trial. *Id.*

176. *See* text accompanying note 69 *supra*.

177. *See* text accompanying notes 62 & 69 *supra*.

178. 594 F.2d at 16-17.

179. The Supreme Court of Iowa, in State v. Edwards, 279 N.W.2d 9 (Iowa 1979), expressly rejected *Cooper*, in favor of the *Heiler/Shields* approach. In *Edwards*, the court held that the unilateral withdrawl of a plea proposal by the prosecutor's office in the absence of a guilty plea or some other detrimental reliance by the defendant, provided no legal basis for enforcement of the plea proposal. *Id.* at 12. In rejecting *Cooper*, the *Edwards* court explained that "we do not believe *Santobello* may logically be extended to control a situation in which defendant has neither pled guilty nor detrimentally relied on a plea arrangement." *Id.* at 11-12.

180. *See* text accompanying notes 121-70 *supra*.

181. *See, e.g.*, State v. Edwards, 279 N.W.2d 9 (Iowa 1979); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979).

182. 594 F.2d at 20.

183. *See* text accompanying note 21 *supra*.

guilty plea or performance of other acts in reliance on the agreement because the defendant is aware that the prosecutor's superior may not approve the agreement. It is difficult to understand, however, why reservation of a condition should be the dividing line between "fairness" and "unfairness." A defendant's expectations that the agreement will be fulfilled, which *Cooper* purportedly protects under appropriate circumstances,[184] are raised substantially regardless of whether the proposal is conditioned upon a superior's approval because a defendant probably believes that the proposal would not have been made were it not the superior's policy to approve such proposals. Moreover, it is hard to distinguish the condition precedent of a superior's approval from the condition precedent of judicial acceptance that the *Cooper* court implicitly rejected as a bar to enforcement of a withdrawn plea proposal.[185] Finally, if conditioning a plea proposal on a superior's approval is sufficient to avoid *Cooper*, its ambitious holding will be drained of any practical effect as prosecutors perfunctorily insert such reservations in all plea proposals.

A second important limitation of the *Cooper* decision is the court's suggestion that "extenuating circumstances," which were absent in *Cooper*, could justify the government's withdrawal of a plea proposal.[186] Although the court did not attempt to describe these circumstances, choosing instead to leave development to a case-by-case evolution,[187] existing case law provides some indication of the type of "extenuating circumstances" that might justify withdrawal of a plea proposal. Circumstances that do not appear sufficiently extenuating to justify the government's withdrawal include dissatisfaction with the disposition by a defendant's victims,[188] a defendant's receipt of a more lenient sentence from the judge than had been contemplated by the agreement,[189] the judge's admonition to the defendant that the court is not bound by the prosecutor's sentencing recommendation,[190] employment of a defendant by the person against whom he had agreed to tes-

184. *See* text accompanying notes 19-33 *supra*.

185. The conclusion that the *Cooper* court rejected the condition precedent of judicial acceptance as a bar to enforcement of a withdrawn plea proposal follows implicitly from its rejection of the *Heiler* decision, which denied enforcement of a withdrawn plea proposal expressly because a defendant could form no reasonable expectations of benefit from a plea proposal prior to the trial court acceptance that is a condition precedent of all binding plea arrangements. *See* text accompanying notes 174-79 *supra*.

186. 594 F.2d at 19; *see* text accompanying note 21 *supra*.

187. 594 F.2d at 18.

188. *See* State v. Tourtellotte, 88 Wash. 2d 579, 564 P.2d 799 (1977).

189. *See* State v. Lordan, 116 N.H. 479, 363 A.2d 201 (1976).

190. *See* State v. Weig, 285 N.W.2d 19 (Iowa 1979).

tify,[191] a defendant's request for an attorney when the police demand information that the defendant has agreed to provide at a later time,[192] entry of a guilty plea by the person against whom a defendant has agreed to testify,[193] unfamiliarity of the prosecutor with all material in a defendant's investigation file at the time the bargain was made,[194] the prosecutor's discovery of a defendant's prior, unfavorable parole history,[195] and the victim's death, after entry of a guilty plea to bargained charges, from injuries caused by a defendant.[196] Circumstances that appear to be sufficiently extenuating to justify the prosecutor's withdrawal from the plea agreement include a defendant's involvement in criminal activity after the agreement has been entered into,[197] a defendant's failure to provide promised information[198] or testify against another as agreed,[199] a defendant's repudiation of the agreement,[200] a defendant's appeal of his guilty plea conviction resulting in vacatur of the plea,[201] a defendant's request for a reduction in sentence after the original sentence is imposed pursuant to the plea agreement,[202] a de-

191. *See* State v. Johnson, 25 Wash. App. 490, 596 P.2d 308 (1979).

192. *See id.* (defendant entitled to reasonable time under reasonable conditions to fulfill bargain).

193. *See* State v. Neitte, 363 So. 2d 425 (La. 1978).

194. *See* State v. Lord, 109 N.J. Super. 80, 262 A.2d 244 (1970).

195. *See In re* Palodichuk, 22 Wash. App. 107, 589 P.2d 269 (1978). *But see* People v. Cummings, 84 Mich. App. 509, 269 N.W.2d 658 (1978) (defense counsel concealed defendant's prior record during plea negotiations).

196. *See* State v. Thomas, 61 N.J. 314, 320-21, 294 A.2d 57, 60 (1972) (prosecutor should have known of victim's critical condition).

197. *See* State v. Williams, 122 Ariz. 146, 593 P.2d 896 (1979) (defendant assaulted wife and mother-in-law during probation); Green v. United States, 377 A.2d 1132 (D.C. App. 1977) (defendant subsequently arrested on narcotics charges); State v. Pascall, 49 Ohio App. 2d 18, 358 N.E.2d 1368 (1972) (defendant convicted for armed robbery after entering plea bargain); State v. Giebler, 22 Wash. App. 640, 591 P.2d 465 (1979) (change in sentence recommendation justified when defendant assaulted fellow prisoner); State v. Yates, 13 Wash. App. 116, 533 P.2d 846 (1975) (defendant fled state while on release from jail for medical evaluation).

198. *See, e.g.*, United States v. Boulier, 359 F. Supp. 165 (E.D.N.Y. 1972), *aff'd sub nom.* United States v. Nathan, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). *See also* United States v. Simmons, 537 F.2d 1260 (4th Cir. 1976) (evidentiary hearing prior to prosecutor's withdrawal required).

199. *See, e.g.*, United States v. Simmons, 537 F.2d 1260 (4th Cir. 1976); Brown v. State, 367 So. 2d 616 (Fla. 1979). *But see* Franklin v. State, 94 Nev. 220, 577 P.2d 860 (1978) (holding bargain open until defendant gives testimony violates public policy).

200. *See, e.g.*, Cardillo v. United States, 476 F.2d 631 (5th Cir. 1973) (per curiam); *cf.* Hutto v. Ross, 429 U.S. 28 (1976) (per curiam) (confession given subsequent to negotiated plea agreement from which defendant withdrew not involuntarily given).

201. *See, e.g.*, Sweetwine v. State, 42 Md. App. 1, 398 A.2d 1262 (1979) (prosecutor and defendant return to "square one," entitling prosecutor to reinstate charges dismissed pursuant to bargain that had secured initial guilty plea). *But see* People v. McMiller, 389 Mich. 425, 208 N.W.2d 451 (1973).

202. *See, e.g.*, Van Meveren v. District Court, 575 P.2d 4 (Colo. 1978). *But see* State v. Spinks,

fendant's pursuit of habeas corpus proceedings,[203] and a trial court's rejection of a plea agreement or a defendant's guilty plea.[204] Judging from the existing decisional law delineating the limits of "extenuating circumstances," this exception to the holding of the court in *Cooper*, unlike that of conditioning the agreement on a superior's approval, must be considered a reasonable and necessary safety valve for the equitable administration of justice that does not thwart the broader purposes of the *Cooper* decision.

The *Cooper* court's recognition of a constitutional right to enforcement of a favorable plea proposal withdrawn, in the absence of "extenuating circumstances," because of a "superior's second-guessing of a subordinate's judgment"[205] is supported by a questionable analysis that minimizes its precedential value.[206] The court's utilization of the Supreme Court's decision in *Santobello* to support defendant's constitutional right to "fairness" in the plea negotiation process merely begs the question of why the prosecutor's withdrawal of the plea proposal violated defendant's constitutional rights because identifying a right to fairness means only that there is a right to be free from governmental misconduct in violation of a protected right of the defendant. One must discern, therefore, a more specific protected right on the part of the defendant to support use of substantive due process principles. Closer scrutiny reveals the only possible protected right to be one arising from the defendant's expectations that his case will be settled through a favorable plea bargain once the prosecutor offers an acceptable proposal. By protecting these expectations in the absence of detrimental reliance, the *Cooper* court recognizes a constitutional right of a defendant to expect ultimate disposition of his case through a plea arrangement. Constitutional protection for a defendant's plea bargain expectations conflicts, however, with the principle that defendants are not constitutionally entitled to plea bargain.[207] The *Cooper* court distinguished this principle as inapplicable to a situation in which the prosecutor has commenced plea negotiations. Such a distinction is questionable, however, when a defendant suffers no prejudice through

66 N.J. 568, 334 A.2d 23 (1975) (appellate review of excessive sentence imposed pursuant to bargain does not justify prosecutor's rejection of bargain).

203. *See, e.g.*, Doran v. Wilson, 369 F.2d 505 (9th Cir. 1966).

204. *See, e.g.*, United States v. Thalman, 457 F. Supp. 307 (E.D. Wis. 1978).

205. 594 F.2d at 19; *see* text accompanying note 21 *supra*.

206. *See, e.g.*, State v. Edwards, 279 N.W.2d 9 (Iowa 1979). *See also* State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979).

207. *See, e.g.*, Weatherford v. Bursery, 429 U.S. 545, 561 (1977).

detrimental reliance on the plea proposal because that defendant remains in the same objective position as if no plea proposal had been made.[208] Utilization of the right to effective assistance of counsel is insufficient to make up for the shortcomings of the *Cooper* court's due process analysis because that doctrine bears, at best, only a tenuous relationship to the situation presented in *Cooper*. The *Heiler/Shields* approach, denying enforcement to withdrawn plea proposals in the absence of detrimental reliance, offers a well-reasoned basis for balancing defendant's rights with the prosecutor's broad discretionary powers. The *Cooper* court's failure to explain why it disagreed with the *Heiler/Shields* approach, aside from the apparent difference in opinion as to whether relief is appropriate, creates a further basis for questioning the court's holding. Because relief in *Cooper* was not premised on the prejudice suffered by a defendant through reliance on a withdrawn plea proposal, it must be concluded that the Fourth Circuit has adopted the "novel argument" that a defendant's constitutional rights are violated by being tried.[209]

LAWRENCE K. RYNNING

208. *See, e.g.*, DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979).

209. The United States Supreme Court, in Weatherford v. Bursey, 429 U.S. 545 (1977), stated that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* at 561.