

# BROKEN GOVERNMENT PROMISES: A CONTRACT-BASED APPROACH TO ENFORCING PLEA BARGAINS

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## I. INTRODUCTION

When the government charges an individual or entity with a crime, it is highly probable that the parties will resolve the case by plea agreement rather than trial. Plea agreements take numerous forms and often involve many different types of concessions by both the government and the defendant. For example, the prosecutor, on behalf of the government, may offer to reduce or dismiss charges, make a favorable sentence recommendation, or perhaps refrain from making any recommendation at all. The defendant, on the other hand, may offer to plead to a charge or charges or may offer to cooperate with or provide information to the government on unrelated cases.

Regardless of form, plea bargaining offers immeasurable benefits to the government, not the least of which is the tremendous savings of resources that would otherwise be expended in trying every criminal case. Given the benefits that flow to the government, it is important to ensure the integrity of the plea bargaining system in order to guarantee its continued use and the continued flow of benefits to the government and to society more generally.

However, despite these benefits, the government compromises the integrity of the system when it makes promises as part of a plea bargain and then reneges on those promises, often after obtaining from the defendant the very benefit for which it bargained. This negative impact is magnified when the government reneges without good cause due to its own negligence or even bad faith. When courts refuse to hold the government to its end of the bargain, the courts encourage further similar behavior.

Courts have applied various bodies of law when dealing with broken prosecutorial promises, including the American Bar Association (ABA) Standards for Criminal Justice, the U.S. Constitution, and civil contract law. Unfortunately, the results have been inconsistent and unreliable. Of these three bodies of law, however, contract law provides the best and most comprehensive framework for the enforcement of plea agreements. In fact, the only reason for its ineffectiveness to date is the misapplication of its principles. However, the proper and consistent application of contract law principles—including principles such as the bilateral contract, the irrevocable offer, and the capacity to contract—will restore integrity and reliability to the plea bargaining process and will ensure its future use and continued benefits.

Part II of this Article defines the term “plea agreement,” provides common examples of plea agreements, and discusses the importance of, and the benefits that flow from, the plea bargaining system. Part III provides case law illustrations of the negligent and bad faith reasons that prosecutors offer in their attempts to renege on plea bargain promises. Part IV discusses the bodies of law that have been applied to broken government promises and explores the problems with each, concluding

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that contract law is the preferred approach. Part V shows that the ineffectiveness of contract law to date lies not in the legal doctrine itself, but in its application, and highlights the courts' inconsistent and biased rulings. Part VI proposes a consistent application of contract law, including the recognition and correct application of fundamental contract law principles. Part VII concludes the Article.

## II. PLEA BARGAINING BASICS

This Article argues for a contract-based approach to the enforcement of plea agreements. Before discussing the proposed framework, however, it is necessary to address two fundamental questions. First, what exactly is a plea agreement? Second, why is it important to enforce plea agreements?

### A. Definition and Examples of Plea Agreements

The vast majority of criminal litigation today is resolved by plea bargain rather than by trial.<sup>1</sup> In fact, “[c]urrent Department of Justice estimates indicate that in excess of 95 percent of all federal convictions are resolved via a guilty plea.”<sup>2</sup> Regardless of the reasons for these statistics,<sup>3</sup> the reality is that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>4</sup>

A plea bargain is defined as “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service in exchange for more lenient treatment by the prosecutor.”<sup>5</sup> Further, because of the varying labels and terminology employed across or even within jurisdictions,<sup>6</sup> the principle of substance over form must govern in examining plea bargains. “A ‘plea bargain,’ by any other name, remains a plea bargain. It is the substance of the agreement, not the name it is given, to which we look in order to determine whether a pact was struck.”<sup>7</sup>

As this broad definition suggests, plea agreements take numerous forms. Concessions or inducements from the prosecutor may include a reduction in the number or nature of the pending charges against a defendant<sup>8</sup> or even the outright dismissal of all pending charges.<sup>9</sup> In other cases, the prosecutor may promise to make a specific recommendation to the court regarding the defendant’s sentence.<sup>10</sup> Conversely, the

1. See Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 729 (2005) (discussing plea bargains in federal criminal cases).

2. Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004).

3. *Id.* at 899–900 (arguing that prosecutors, judges, public defenders, and private defense attorneys all prefer plea resolutions to trial, each for different reasons but all at the expense of defendants).

4. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

5. *State v. Thompson*, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981).

6. For example, in this Article the terms “plea bargain” and “plea agreement” are used interchangeably, as are the terms “state,” “government,” and, in some circumstances, “prosecutor.”

7. *Thompson*, 426 A.2d at 16.

8. See, e.g., *People v. Navarroli*, 521 N.E.2d 891, 892 (Ill. 1988).

9. See, e.g., *In re Kenneth H.*, 95 Cal. Rptr. 2d 5, 6 (Cal. Ct. App. 2000).

10. See, e.g., *State v. Wills*, 523 N.W.2d 569, 570 (Wis. Ct. App. 1994) (In exchange for a plea, the state agreed to “recommend that [the defendant’s] eligibility for parole be determined by the parole commission...and not by the trial court.”).

prosecutor may promise to refrain from making any recommendation at all.<sup>11</sup> Depending upon the timing of plea negotiations, the prosecutor may promise to forego the filing of charges altogether.<sup>12</sup> Many of these inducements may also be offered in combination. For example, the prosecutor may promise to reduce the number of charges and make a specific sentence recommendation.

The government, through the prosecutor, would not make such concessions unless it gained something of value from the defendant in return. The nature of the consideration offered by a defendant can be equally, if not more, diverse than that offered by the government. Most commonly, a defendant may agree to forfeit numerous constitutional rights and plead guilty or no contest to one or more criminal charges, rather than pursue a trial. Additionally, a defendant may offer to forfeit statutory and other rights, such as the right to pursue certain pretrial motions,<sup>13</sup> the right to a preliminary hearing,<sup>14</sup> or the right to any potential appeal of the trial court's rulings.<sup>15</sup>

In other cases, a defendant may agree to provide highly valuable information to police or prosecutors to assist in their prosecution of more culpable individuals,<sup>16</sup> or even of individuals in completely unrelated cases.<sup>17</sup> Along this same line, a defendant may also offer to provide sworn testimony for the government at another defendant's trial or in a deposition.<sup>18</sup> In other instances, a defendant may agree to pay for and pass a polygraph examination in order to prove to the prosecutor's satisfaction the defendant's truthfulness or even innocence.<sup>19</sup> In short, the consideration sought by the government and provided by a defendant is limited only by the needs of the government and the creativity of the parties.

### *B. The Importance of Plea Agreements*

Now that plea bargains have been defined and illustrated, the next step is to establish the importance of plea bargains, without which there would be little basis for their legal enforcement, at least from a utilitarian perspective.<sup>20</sup> The reality is that the prosecutor, the government, and society in general reap tremendous benefits

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11. See, e.g., *Santobello v. New York*, 404 U.S. 257, 262 (1971).

12. See, e.g., *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986); see generally William M. Ejzak, Note, *Plea Bargains and Nonprosecution Agreements: What Interests Should Be Protected When Prosecutors Renege?*, 1991 U. ILL. L. REV. 107 (1991) (discussing the enforceability of plea bargain agreements when prosecutors renege).

13. See, e.g., *State v. Beckes*, 300 N.W.2d 871, 872 (Wis. Ct. App. 1980) (requiring the acceptance of a plea agreement before the preliminary hearing, which would necessarily preclude the filing of most pretrial motions).

14. See, e.g., *People v. Macrander*, 756 P.2d 356, 358 (Colo. 1988).

15. See, e.g., *State v. Bembenek*, 724 N.W.2d 685, 689 (Wis. Ct. App. 2006); see generally Ali N. Ketchum, Comment, *Bargaining for Freedom: Kansas Allows Criminal Defendants to Avoid Plea Agreement Sentences but Binds the State to Its Deals* [*State v. Boley*, 113 P.3d 248 (Kan. 2005)], 45 WASHBURN L.J. 467, 486–88 (2006) (discussing the advantages and disadvantages of appeal waivers as part of plea bargains).

16. See, e.g., *People v. Navaroli*, 521 N.E.2d 891, 892 (Ill. 1988).

17. See, e.g., *People v. Heiler*, 262 N.W.2d 890, 892 (Mich. Ct. App. 1977).

18. See, e.g., *State v. Brockman*, 357 A.2d 376, 378–79 (Md. 1976).

19. See, e.g., *In re Kenneth H.*, 95 Cal. Rptr. 2d 5, 6 (Cal. Ct. App. 2000).

20. See Ejzak, *supra* note 12, at 114–16 (discussing the utilitarian basis for the enforcement of plea bargains).

from plea bargaining,<sup>21</sup> not including the obvious benefit of a guaranteed conviction.

First, with the sheer volume of cases resolved by plea agreements rather than costly and time-consuming jury trials, state and federal governments save vast resources that can be better utilized both inside and outside of the criminal justice system. These resources include the economic costs of court facilities, judges, prosecutors, expert and lay witnesses, jurors, court personnel, and court appointed defense counsel, to name only a few. If cases were not routinely resolved by plea bargain, “every case [would entail] a full-scale trial, state and federal courts would be flooded, and court facilities as well as personnel would have to be multiplied many times over to handle the increased burden.”<sup>22</sup>

Second, as previously indicated, plea agreements often include concessions by a defendant other than a plea of guilty. “One function of plea bargaining is to allow law enforcement authorities to secure information from criminal defendants who otherwise would have very little incentive to cooperate.”<sup>23</sup> In many of these cases, defendants provide information that results in convictions for far more serious criminal behavior of co-actors, or even of individuals in unrelated cases. In short, the benefits flowing to the government from the plea bargaining system are numerous, far reaching, and incredibly valuable.<sup>24</sup>

In order to preserve these benefits, it is important to maintain the integrity of the plea bargaining process itself. The integrity of this process, however, is compromised when prosecutors renege on their promises with impunity, causing defendants to lose confidence in the system. “If a defendant cannot place his faith in the State’s promise, this important component [plea bargaining] is destroyed.”<sup>25</sup> Consequently, if plea bargaining were destroyed, the financial and informational benefits that flow to the government would also be destroyed.

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21. For a discussion of the value of the general freedom to contract, see Scott & Stuntz, *supra* note 4, at 1913 (“Parties who are denied either freedom to contract or freedom to exchange entitlements suffer unnecessary constraints on their choices, constraints that undermine the value of the entitlements themselves.”).

22. *Brockman*, 357 A.2d at 380. One could certainly argue, however, that without the ability to plea bargain away nearly every complaint it files, the government would be forced to be choosier about the type of behavior it prosecutes. This may even be preferable given the relatively recent explosion of criminal statutes and the ever-expanding types of behavior the government classifies as criminal. Therefore, one could argue that the plea bargaining system itself gives rise to the very costs it purportedly saves. However, the purpose of this Article is not to debate the over-criminalization of behavior. For our purposes, this Article assumes that the government purposely prosecutes the type of behavior that it does because it believes it is in society’s best interest to do so. Given that, it necessarily follows that without plea bargaining, the government would be forced to either prosecute fewer types of behavior and fewer individuals or expend vastly more resources to maintain its current level of prosecutions. In either case, the government, and society more generally, would be far worse off without plea bargaining as a means to resolve its cases.

23. *People v. Navaroli*, 521 N.E.2d 891, 897–98 (Ill. 1988) (Clark, J., dissenting).

24. Despite its benefits, plea bargaining is not without its critics. *See, e.g.*, Cook, *supra* note 2, at 866; Scott & Stuntz, *supra* note 4, at 1913 (discussing and examining the criticisms of the plea bargaining process, including the possible presence of “[f]orce, fraud, and even distributional unfairness”). However, these topics are beyond the scope of this Article. Instead, this Article accepts the reality of plea bargaining within our criminal justice system and proposes a contract-based framework for the enforcement of plea agreements in order to preserve those benefits that flow from our current system.

25. *Navaroli*, 521 N.E.2d at 897 (Clark, J., dissenting) (quoting *People v. Starks*, 478 N.E.2d 350 (Ill. 1985)); *see also Ex parte Yarber*, 437 So. 2d 1330, 1335 (Ala. 1983) (“If we allow the state to dishonor at will the agreements it enters into, the result could only serve to weaken the plea negotiating system.”).

The loss of financial benefits is obvious. If defendants cannot trust the plea bargaining process, they will not participate in the process and will instead demand costly and time consuming trials. The loss of informational benefits, while less obvious, is equally important. If defendants do not participate in the plea bargaining process, the government would not have the benefit of their valuable cooperation and information that often leads to the prosecution of far more serious offenders. “The availability and usefulness of this strategy could be substantially neutralized if the prosecutor’s promise is perceived to be unreliable.”<sup>26</sup>

Finally, there is more at stake than the financial and informational benefits of plea bargaining. “At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.”<sup>27</sup> As one court observed, “[t]he state’s integrity is at stake. It is less evil that [a defendant] may escape execution than that the state’s integrity be compromised.”<sup>28</sup> When a prosecutor makes a promise as part of a plea bargain, that promise “is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond.”<sup>29</sup> Moreover, “the Supreme Court has made repeated references to the importance of preserving public confidence in this arena. The import of this objective should not be discounted, for it is critical to the effective functioning of the system that its processes be fair in fact, as well as in appearance.”<sup>30</sup>

### III. BROKEN PROMISES: WHY PROSECUTORS RENEGE

With the tremendous benefits the government reaps from the plea bargaining system, one might assume that the system would operate essentially by self-monitoring and self-enforcement. In other words, one would expect that prosecutors would not lightly renege on their promises, as such behavior could seriously jeopardize the very system from which they derive so many benefits.<sup>31</sup> In reality, however, prosecutors are too often short-sighted, due in part to the competitive and political nature of the prosecutorial function.<sup>32</sup> As a result, they lose sight of the harm they can cause in the long run, including harm to themselves, by renegeing on plea agreements. This is painfully evident when examining the common excuses

26. *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986).

27. *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)).

28. *Commonwealth v. Reyes*, 764 S.W.2d 62, 66 (Ky. 1989).

29. *Bowers*, 500 N.E.2d at 204.

30. *Cook*, *supra* note 2, at 917–18 (citation omitted).

31. See Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 512 (1978) (discussing the importance of respecting defendants’ expectation interests “in order to encourage defendants to enter into negotiation,” thereby allowing the state to continue resolving cases by plea agreements rather than costly jury trials).

32. For an excellent example of the competitive and political nature of the prosecutorial function, see Dorothy Rabinowitz, *The Michael Nifong Scandal*, WALL ST. J., Jan. 11, 2007, at A15. In the article, Ms. Rabinowitz discusses “the Duke University scandal,” where Durham, North Carolina District Attorney Michael Nifong charged and prosecuted three Duke lacrosse players for an alleged sexual assault. Ms. Rabinowitz argues that the district attorney’s aggressive prosecution and numerous ethical violations, in the face of overwhelming evidence of innocence, were motivated by political factors and his reelection campaign. *Id.* Ms. Rabinowitz also asserts that “Mr. Nifong is no anomaly—merely a product of the political times” and that he “quickly grasped the career possibilities open to him with such a case and proceeded accordingly.” *Id.*

that prosecutors offer when renegeing on plea agreement promises. Unfortunately, these reasons are typically rooted in prosecutorial negligence or even bad faith and are frequently offered without regard for their long-term, negative impact on the system. The most common of these excuses are discussed in detail in the following sections.

#### A. *The Mistake Excuse*

Under commercial law, parties who enter into agreements are almost always bound by the promises they make, even when they enter into an agreement under a mistake of fact or law.<sup>33</sup> In plea bargaining, however, after the government enters into agreements with defendants, it freely and routinely offers the “mistake excuse” as justification to renege on its promises.

For example, in *State v. Bourland*,<sup>34</sup> the defendant agreed to plead guilty to the sole charge in the complaint against him in exchange for an eighteen-month sentence recommendation.<sup>35</sup> After entering into the agreement, the state attempted to renege, arguing that it was mistaken about the number of the defendant’s prior convictions.<sup>36</sup> It was undisputed, however, that the defendant never misrepresented his prior convictions, and in fact the prosecutor had the accurate information in his possession but likely “did not look at the file until after he proposed the original plea bargain.”<sup>37</sup> Despite this—and although it appeared that “the prosecutor should have known”<sup>38</sup> the defendant’s prior criminal record before entering into the agreement—the prosecutor refused to honor his promise and successfully moved to withdraw from the plea agreement.<sup>39</sup>

Similarly, prosecutors will also rely on a mistake of law as a reason to withdraw from plea bargains. For example, in *Jackson v. Schneider*,<sup>40</sup> the state induced the defendant to plead to a misdemeanor charge, apparently with the assumption that the defendant could receive lifetime probation for his crime.<sup>41</sup> The trial court sentenced the defendant on the misdemeanor; however, a term of lifetime probation was illegal and consequently void.<sup>42</sup> Even though “[t]he State is presumed to have known the law in existence at the time it negotiated the plea agreement,”<sup>43</sup> and the defendant negotiated in good faith, pled guilty, and served the legally maximum term of probation, the state still attempted, unsuccessfully, to withdraw from the agreement.<sup>44</sup>

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33. Cf. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §§ 9.26–9.28 (5th ed. 2003) (discussing how a mistake can be used to avoid the transaction).

34. 116 N.M. 349, 862 P.2d 457 (Ct. App. 1993).

35. *Id.* at 350, 862 P.2d at 458.

36. *Id.*

37. *Id.* at 351, 862 P.2d at 459.

38. *Id.* at 350, 862 P.2d at 458.

39. *Id.*

40. 86 P.3d 381 (Ariz. Ct. App. 2004).

41. *Id.* at 384.

42. *Id.* at 383–84.

43. *Id.* at 384.

44. *Id.* (holding that after the court accepts the defendant’s plea, “the State may not withdraw from the plea because double jeopardy attaches”).

These so-called mistakes of fact or law are usually nothing more than prosecutorial negligence in not reviewing relevant facts in their possession or not reading relevant law that they are presumed to know and to which they have access.<sup>45</sup> Unfortunately, these excuses are usually accepted by the courts, especially when they are offered *before* the defendant has the chance to enter a plea, and prosecutors are allowed to renege freely on their obligations. Interestingly, these mistake excuses could not be used by a private party to escape a civil contract,<sup>46</sup> or even by a defendant when defending against some types of criminal allegations.<sup>47</sup>

### B. Blaming Other Prosecutors

Another common excuse for refusing to honor plea obligations is to blame something or someone within the prosecutor's own office. This tactic can take several forms. In *State v. Edwards*,<sup>48</sup> for example, the state charged the defendant with a felony.<sup>49</sup> After plea negotiations, the *first* assistant district attorney assigned to the case agreed to resolve it for a plea to a misdemeanor.<sup>50</sup> A few days later, however, a *second*, newly assigned assistant district attorney successfully reneged on the agreement, stating that yet a *third* assistant district attorney decided he did not like the plea deal.<sup>51</sup> This *second* assistant successfully reneged on the agreement despite the basic agency law principle that "[p]rosecutors are agents of the State, and it is the State rather than the individual prosecutor which is bound by the agreement."<sup>52</sup>

Similarly, in *State v. Scott*,<sup>53</sup> the state charged the defendant with multiple counts and threatened to bring additional charges.<sup>54</sup> After lengthy plea negotiations, a *second* assigned assistant district attorney agreed to resolve the case for several pleas in exchange for a recommendation of concurrent sentences.<sup>55</sup> At sentencing, however, the *first* assigned assistant district attorney reappeared and attempted, unsuccessfully, to renege on the agreement after the defendant had already entered his plea.<sup>56</sup> The *first* assistant argued that the *second* assistant allegedly did not have "approval" to make a concurrent sentence recommendation.<sup>57</sup> Of course, it is well-established law that all assistant district attorneys are agents of the state and have the apparent and actual authority to bind the state.<sup>58</sup>

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45. See, e.g., *id.* ("After all, it is the State that is in the best position to know the law.")

46. PERILLO, *supra* note 33, § 9.28, at 371.

47. See, e.g., *State v. Jadowski*, 680 N.W.2d 810 (Wis. 2004) (holding the defendant criminally liable for sexual contact with a minor despite his reasonable but mistaken belief that the minor was nineteen years old based on her affirmative misrepresentation of her age as well as her possession of a state-issued, but counterfeit, identification card).

48. 279 N.W.2d 9 (Iowa 1979).

49. *Id.* at 10.

50. *Id.*

51. *Id.*

52. *State v. Scott*, 602 N.W.2d 296, 305 (Wis. Ct. App. 1999).

53. 602 N.W.2d 296.

54. *Id.* at 298.

55. *Id.* at 299.

56. *Id.*

57. *Id.*

58. See *id.* at 305 ("Courts should not vacate plea agreements merely because the State, at a later time, concludes the agreement was unwise.")

Other variations of this blame game include blaming a department policy or rule that was somehow previously unknown to the assistant prosecutor who entered into the agreement. For example, in *State v. Wheeler*,<sup>59</sup> after the prosecutor and the defendant reached a plea agreement, the prosecutor successfully reneged by announcing “a new departmental policy of personally reviewing all of the evidence in difficult cases and deciding whether ‘manifest injustice’ would occur if an agreement were allowed to stand.”<sup>60</sup> Despite the obvious question of why such a review wouldn’t be done *before* making an offer in every “difficult case,” the prosecutor seemingly had no problem with imposing this previously unannounced policy on the defendant who had negotiated in good faith.<sup>61</sup>

Similarly, in *People v. Heiler*,<sup>62</sup> the state agreed to reduce a charge, and in exchange the defendant agreed to plead guilty and cooperate with police on an unrelated matter.<sup>63</sup> The prosecutor successfully reneged on the plea agreement, however, because he decided that the resolution was somehow “contrary to the prosecutor’s charging policy.”<sup>64</sup> Aside from the obvious question of how a plea *resolution* could possibly be contrary to a policy on *charging*, the state reneged on its obligation without embarrassment, and certainly without any good faith reason for doing so.

These excuses, which unfortunately succeed far too frequently, have no legal or logical foundation. Furthermore, permitting the state to renege at will, and for any or no reason, frustrates the plea bargaining process and “only serve[s] to weaken the plea negotiating system.”<sup>65</sup>

### C. Blaming the Defendant

An even more alarming tactic used to renege on plea agreements is to falsely claim that the defendant breached the agreement and is therefore not entitled to the benefit of his bargain. One version of this tactic is to argue that the defendant refused to perform under the agreement after the prosecutor had taken steps to prevent such performance. An excellent example is *State v. Brockman*,<sup>66</sup> where the state agreed to reduce the severity of one charge, dismiss other charges, and cap its sentence recommendation to the court.<sup>67</sup> In exchange, the defendant agreed to provide a sworn deposition and testify on the state’s behalf at his co-defendant’s trial.<sup>68</sup>

Well into the deposition, and well after the defendant’s sworn testimony fully incriminated himself and his co-defendants, the state stopped the deposition and declared, “There is no deal... Everything is off.”<sup>69</sup> The state then chose not to call

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59. 631 P.2d 376 (Wash. 1981).

60. *Id.* at 378.

61. *See id.*

62. 262 N.W.2d 890 (Mich. Ct. App. 1977).

63. *Id.* at 892.

64. *Id.*

65. *Ex parte Yarber*, 437 So. 2d 1330, 1335 (Ala. 1983).

66. 357 A.2d 376 (Md. 1976).

67. *Id.* at 378.

68. *Id.*

69. *Id.* at 380.



the defendant to testify at a co-defendant's trial, despite the defendant being ready, willing, and able to testify.<sup>70</sup> When it came time for the state to reduce one charge and dismiss the remaining charges, it refused to do so because, it argued, the defendant did not fully perform his end of the bargain.<sup>71</sup> Therefore, the state reasoned, the defendant was not entitled to any performance by the state.<sup>72</sup>

The state argued this position although it had already received the benefit for which it bargained; in fact, the defendant answered questions for over an hour and fully incriminated himself and his co-defendants.<sup>73</sup> Further, the only reason the defendant did not fully perform by completing the deposition and testifying at a co-defendant's trial was that the state actively prevented him from doing so.<sup>74</sup> Although a split court ultimately enforced the agreement,<sup>75</sup> the alarming aspect of this case is the prosecutor's creativity in attempting to escape the plea agreement after the state reaped the benefits for which it bargained. This tactic goes beyond the mere negligence of using the mistake excuse or blaming other prosecutors and crosses the line into bad faith.

Variations on this prosecutorial tactic can also take less obvious forms. For example, in *State v. Beckes*<sup>76</sup> the defendant was charged with two criminal counts.<sup>77</sup> The parties reached an agreement in which the defendant would plead to one count, and the state would dismiss the other count.<sup>78</sup> The state later reneged by arguing that the defendant breached the plea agreement when the defendant filed a request for the substitution of the assigned judge.<sup>79</sup>

The plea agreement, however, was silent as to whether the defendant could exercise his right to substitute judges.<sup>80</sup> The agreement did specifically require that the defendant accept it before the preliminary examination, which he did, thereby precluding him from filing most motions, including suppression motions.<sup>81</sup> Despite the defendant's acceptance and full compliance with the terms, the state nonetheless claimed that the defendant breached, and the state was ultimately released from the agreement.<sup>82</sup> This tactic, although seemingly less calculated than the government's strategy in *Brockman*, is equally disingenuous and also damages the integrity of the plea bargaining process.<sup>83</sup>

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70. *Id.* at 380 n.1.

71. *Id.* at 378.

72. *Id.* at 382.

73. *Id.*

74. *Id.* at 380.

75. *Id.* at 383–84.

76. 300 N.W.2d 871 (Wis. Ct. App. 1980).

77. *Id.* at 872.

78. *Id.*

79. *Id.* (although the trial court flatly rejected this reason proffered by the state, it nonetheless allowed the state to withdraw without providing any justification).

80. *See id.*

81. *See id.*; see also WIS. STAT. § 971.31(5)(b) (2005–2006) (prohibiting the defendant from bringing suppression and other motions until after the preliminary hearing and after an information is filed by the state).

82. *Beckes*, 300 N.W.2d at 872. Paradoxically, the court rejected the state's proffered reason for withdrawal (i.e., that the defendant had breached the plea agreement), yet still allowed the state to withdraw because the proffered reason, although rejected, did not rise to the level of an abuse of discretion. *Id.* at 874–75. For a more detailed discussion of *Beckes*, see Part V.A.2.

83. *Cf.* *State v. Brockman*, 357 A.2d 376 (Md. 1976); see also *supra* notes 66–75 and accompanying text.

#### D. Word Games

Finally, prosecutors have also been linguistically creative in their attempts to avoid obligations under plea agreements. For example, in *State v. Thompson*,<sup>84</sup> the state agreed to “stet,” or dismiss without prejudice, the defendant’s case in exchange for the defendant providing information to the state about unrelated cases it was prosecuting.<sup>85</sup> Furthermore, once the defendant “fulfilled his part of the bargain, the stet for all intents and purposes would have remained in effect. The case would have never been recalled and would have just died its natural death.”<sup>86</sup>

After the defendant performed his end of the bargain, however, the state attempted to renege on the agreement.<sup>87</sup> The state argued that the plea agreement was not enforceable because, technically, it did not require the defendant to plead to any crime.<sup>88</sup> Therefore, the state argued, it was a “stet” agreement, not a “plea agreement” and should not be enforced.<sup>89</sup> While the court called this argument “novel but unavailing,”<sup>90</sup> the interests of justice and the integrity of the plea bargaining process would have been better served if the court would have called it what it was—the state’s bad faith and frivolous attempt to renege on its obligation to the defendant.

Perhaps the government’s most telling moment came in *In re Kenneth H.*,<sup>91</sup> where the state dictated the terms of a plea agreement and induced the defendant, a minor, to pay for and take a polygraph examination.<sup>92</sup> Under the agreement, if the minor failed the examination he would admit the charge against him and forfeit his right to trial.<sup>93</sup> If he passed, however, the state would move to dismiss the juvenile proceeding against him.<sup>94</sup> The minor passed the polygraph examination.<sup>95</sup>

After the minor fulfilled all of *his* obligations under the agreement, the state, unhappy that the minor had passed the polygraph test, refused to dismiss the proceeding as *it* was required to do under the agreement.<sup>96</sup> Instead, the state forged ahead with the prosecution.<sup>97</sup> The state argued that “the only enforcement mechanism [was] the integrity of the parties,” and because the plea bargain had not yet been approved by the court, it was unenforceable.<sup>98</sup>

The trial court agreed with the state and, citing a “miscommunication” between the parties, allowed the state to withdraw from the agreement.<sup>99</sup> On appeal, however, the appellate court held that the state must fulfill its plea bargain promise

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84. 426 A.2d 14 (Md. Ct. Spec. App. 1981).

85. *Id.* at 14–15.

86. *Id.* at 15 (internal quotations omitted).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. 95 Cal. Rptr. 2d 5 (2000).

92. *Id.* at 6.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 8.

99. *Id.* at 8 n.1.

and move to dismiss the case,<sup>100</sup> yet the appellate court also crafted an escape route for the trial court and the prosecutor.<sup>101</sup> Instead of simply ordering that the case be dismissed, the appellate court remanded the case to the trial court, requiring the *prosecutor* to move for dismissal, as he was obligated to do under the agreement, but allowing the *trial court* to choose to deny the prosecutor's motion to dismiss, as long as it was not "for the reason previously stated by the [trial] court."<sup>102</sup> This explicit roadmap gave the trial court and the prosecutor (both of whom shared a common goal) an end-run around the state's plea bargain obligations.

These examples illustrate how prosecutors' attempts to renege on plea agreements are often rooted in negligence or even bad faith. The next section discusses the legal doctrines that courts may apply in deciding whether prosecutors will succeed in their attempts.

#### IV. THE MEANS OF ENFORCING PLEA AGREEMENTS

The negligent and even bad faith behavior of prosecutors discussed in the previous section makes it painfully obvious that the integrity of the parties, in particular that of the government, is insufficient to govern the enforcement of plea bargains.<sup>103</sup> Instead, a formal, legal enforcement mechanism is required.<sup>104</sup> At least three mechanisms have been employed by the courts in their attempts to address this issue: the ABA Standards for Criminal Justice, the Constitution, and contract law.

##### A. ABA Standards for Criminal Justice

The ABA Standards for Criminal Justice state that "[a] prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other *extenuating circumstances* are present."<sup>105</sup> Ideally, this standard—and comparable ethical standards in state codes of professional conduct—would be taken seriously by prosecutors and enforced when needed by the courts, and there would be no need for any additional enforcement mechanism. Unfortunately, however, some prosecutors choose not to follow these standards of conduct and the courts have not uniformly enforced these standards, even when they are part of a formal code of attorney conduct.

For example, in *State v. Edwards*, an assistant district attorney reneged on a plea offer made by a previous assistant district attorney and accepted by the defendant because yet another assistant district attorney decided not to honor the agreement.<sup>106</sup> The court acknowledged the ABA standard, and stated:

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100. *Id.* at 9.

101. *See id.*

102. *Id.*; *cf.* Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986) (citing IND. CODE § 35-34-1-13, which reads, "Upon motion of the prosecuting attorney, the court *shall* order the dismissal of the indictment or information.") (internal quotation marks omitted).

103. *See supra* note 98 and accompanying text.

104. Of course, there are many prosecutors who honor their plea offers and do not attempt to renege except in the rarest of cases. However, the problem arises with enough frequency that a formal enforcement mechanism is required.

105. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-4.2(c) (1992), available at [http://www.abanet.org/crimjust/standards/pfunc\\_toc.html](http://www.abanet.org/crimjust/standards/pfunc_toc.html) (emphasis added).

106. *See State v. Edwards*, 279 N.W.2d 9, 10 (Iowa 1979); *supra* notes 48–51 and accompanying text.

[W]e do not condone hasty plea proposals or casual withdrawals after they are advanced. In this jurisdiction the justice system routinely operates on counsel's oral promises based upon thoughtful reflection and a pride in performing professional representations. A prosecutor or defense counsel who makes unauthorized offers or reneges on representations made limits his or her professional effectiveness and adversely impacts judicial proceedings.<sup>107</sup>

These words, however, proved to be completely hollow. Although the defendant did not breach the agreement, and the state did not show any good cause, the court still allowed the prosecutor to renege, finding "no valid legal basis" to enforce the agreement.<sup>108</sup> Unfortunately, this outcome is far too common. Other courts have similarly recited empty admonitions while doing nothing to enforce the plea agreement or protect the integrity of the plea bargaining process.<sup>109</sup>

Without the means or the desire to enforce the ABA standard, the standard becomes, at best, meaningless. Additionally, the standard may also have the perverse effect of actually encouraging the very behavior it purports to condemn—in this case, prosecutors' unrestricted withdrawal from plea agreements. That is, these admonitions by courts without meaningful sanctions might be seen by some prosecutors as badges of honor.

This phenomenon is evident in related areas of the law, such as the courts' attempts to regulate prosecutorial misconduct in jury trials. The standards and rules governing a prosecutor's trial conduct essentially have no enforcement mechanism, other than mere admonitions by the court. The result, which was observed by at least one court, is that continued, empty warnings to prosecutors actually encourage their continued misconduct.<sup>110</sup>

Similarly, the ABA Standards for Criminal Justice have been equally ineffective in addressing the problem of broken prosecutor promises in the context of plea bargaining. Consequently, another enforcement mechanism is needed.

### B. *The Constitution*

In contrast to the ABA Standards for Criminal Justice, the U.S. Constitution has provided defendants with some meaningful protection from prosecutorial bad faith and broken promises. In *Santobello v. New York*,<sup>111</sup> the Supreme Court acknowledged that plea bargaining "is an essential component of the administration of justice,"<sup>112</sup> and the "[d]isposition of charges after plea discussions is not only an

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107. *Edwards*, 279 N.W.2d at 12 (citations omitted).

108. *Id.*

109. *See, e.g.*, *People v. Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977) ("[W]e do not condone the conduct of the prosecutor's office in this case...."); *State v. Beckes*, 300 N.W.2d 871, 875 (Wis. Ct. App. 1980) ("We urge prosecutors to use their power to withdraw from a plea bargain sparingly."); *State v. Collins*, 265 S.E.2d 172, 176 (N.C. 1980) ("We do not approve of the prosecutorial conduct in the case before us....").

110. *See, e.g.*, Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 123 (1999) (citing *People v. Congious*, No. B020709 (Cal. Ct. App. Dec. 4, 1987) (discussing how a prosecutor took pride in the court's continued admonitions for her repeated prosecutorial misconduct)).

111. 404 U.S. 257 (1971).

112. *Id.* at 260.

essential part of the process but a highly desirable part for many reasons.”<sup>113</sup> The Court also held that a defendant is entitled to constitutional protection during this phase of the criminal process.<sup>114</sup> Plea bargaining “must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.”<sup>115</sup> Furthermore, “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.”<sup>116</sup>

Although the Court in *Santobello* did not declare the exact origin of the constitutional protection,<sup>117</sup> or even the proper remedy for the prosecutorial breach, subsequent case law has shaped the scope of the protection. Unfortunately, the courts have interpreted the Constitution to provide no protection or, at the most, very limited protection until the point in time where the defendant actually enters a plea on the record in open court. For example, in *Mabry v. Johnson*,<sup>118</sup> the Court held that “[a] plea bargain standing alone is without constitutional significance.... It is the *ensuing guilty plea* that implicates the Constitution.”<sup>119</sup>

Similarly, in *United States v. Papaleo*,<sup>120</sup> the court stated that “when the court approves a plea of guilty pursuant to a plea agreement, thus depriving a defendant of his or her liberty without a trial, the constitution is implicated.”<sup>121</sup> Additionally, the court held that “[i]n the case before us, [the defendant] did not enter a guilty plea” and “[t]herefore, even if [the defendant] had accepted the government’s plea agreement offer, such an act, alone, would not have created a *constitutional* right to have that bargain enforced.”<sup>122</sup>

Some courts, however, have at least hinted that a defendant may have a constitutional right to enforcement of a plea agreement even before the actual plea is entered. The court in *Papaleo* stated that “[d]ue process concerns may also arise prior to the entry of a guilty plea when the defendant detrimentally relies upon the government’s promise.”<sup>123</sup> However, the court tempered this language by acknowledging another court’s holding that a defendant was “not justified in relying substantially on [a] plea agreement until [the] agreement and guilty plea are accepted by the court.”<sup>124</sup> The conclusion of this circular logic, of course, is that a defendant has no constitutional protection unless and until a plea is entered.

Other courts have gone a step further, however, and have actually extended the constitutional protection to a point prior to the entry of a plea. In *Cooper v. United States*,<sup>125</sup> the court held that a defendant’s due process rights were violated when the government withdrew an offer early, after it had agreed to keep it open for one week

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113. *Id.* at 261.

114. *See id.* at 265–67 (Douglas, J., concurring).

115. *Id.* at 262.

116. *Id.*

117. *See* Ejzak, *supra* note 12, at 116 (discussing the possible sources of the constitutional right).

118. 467 U.S. 504 (1984).

119. *Id.* at 507–08 (emphasis added).

120. 853 F.2d 16 (1st Cir. 1988).

121. *Id.* at 18 (citing *Mabry*, 467 U.S. at 507–08).

122. *Id.* at 18–19.

123. *Id.* at 18.

124. *Id.* (citing *United States v. McGovern*, 822 F.2d 739 (8th Cir. 1987)).

125. 594 F.2d 12 (4th Cir. 1979).

and after the defendant attempted to accept it.<sup>126</sup> Because the government's proffered reason for reneging "had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but lay simply in a superior's second-guessing of a subordinate's judgment," the government was required to honor its promise.<sup>127</sup>

Further, the *Cooper* court found a constitutional basis for its ruling both in the Fifth Amendment guarantee of substantive due process, and also indirectly in the Sixth Amendment guarantee of effective assistance of counsel.<sup>128</sup> The court reasoned that, "[t]o the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility...[is] necessarily jeopardized and the effectiveness of counsel's assistance easily compromised."<sup>129</sup>

Unfortunately, the court's holding and reasoning in *Cooper*, although both fair and logical, has largely been rejected by other courts. For example, in *State v. Beckes*, the court specifically declined to follow *Cooper*, finding its reasoning unpersuasive.<sup>130</sup> Instead, the court held that the Constitution does not protect a defendant from "shattered expectations"<sup>131</sup> and further, that in order to enforce a plea agreement prior to the entry of a plea, the defendant has the burden of proving prosecutorial abuse of discretion.<sup>132</sup> More specifically, the defendant would have to show that the prosecutor was withdrawing plea offers "as a means of testing the wills and confidence of defendants and their counsel or of deliberate harassment."<sup>133</sup> Of course, absent a confession by the prosecutor, this would be nearly impossible to prove, especially in light of the courts' willingness to accept virtually any reason for plea withdrawal proffered by the government.

Similarly, in *State v. Wheeler*, the court stated, "we reject the *Cooper* analysis"<sup>134</sup> and reasoned that because a defendant "does not have a constitutional right to plea bargain,"<sup>135</sup> the state therefore has no obligation under the Constitution to bargain in good faith.<sup>136</sup> Likewise, in *State v. Edwards*, the court also declined to follow *Cooper* for similar reasons.<sup>137</sup> Further, the court in *Commonwealth v. Reyes*<sup>138</sup> stated that "[t]he prosecutor's right to withdraw [an offer] is equal to his right to withhold an offer. No defendant has a constitutional right to plea bargain."<sup>139</sup>

As the above cases indicate, the Constitution is simply not effective, or even applicable, in the great number of cases where the prosecutor breaches a plea

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126. *Id.* at 13, 15.

127. *Id.* at 19.

128. *Id.* at 18.

129. *Id.* at 18–19.

130. *State v. Beckes*, 300 N.W.2d 871, 873 (Wis. Ct. App. 1980).

131. *Id.* at 874.

132. *Id.*

133. *Id.* (quoting *Cooper*, 594 F.2d at 20).

134. *State v. Wheeler*, 631 P.2d 376, 379 (Wash. 1981).

135. *Id.*

136. *Id.* This holding is contrary to *Cooper*, where the court acknowledged that although the government had no obligation to plea bargain with a defendant, once it chooses to do so, it must do so in good faith. *Cooper*, 594 F.2d at 19–20.

137. *State v. Edwards*, 279 N.W.2d 9, 12 (Iowa 1979).

138. 764 S.W.2d 62 (Ky. 1989).

139. *Id.* at 64.

agreement *before* the defendant pleads guilty.<sup>140</sup> Implicitly, then, the Constitution offers little or no protection in the great number of cases where the plea bargain does not even call for the entry of a plea. These cases include, for example, plea bargains that call for the complete dismissal of pending charges, as well as agreements not to file any charges at all. Therefore, because the Constitution can only enforce a very small percentage of government promises, a better and broader system of regulation is required.

### C. Contract Law

For many reasons, contract law—the law governing the enforcement of promises between parties—is the superior body of law to apply in the enforcement of plea bargains.<sup>141</sup> First, and most significantly, a plea bargain is not *like* a contract; it *is* a contract. Although “[n]o entirely satisfactory definition of the term ‘contract’ has ever been devised,”<sup>142</sup> a contract “contains a promise or promises that must be executed, that is, performed.”<sup>143</sup> The term “contract” has also been defined by one scholar as “the relations among parties to the process of projecting exchange into the future.”<sup>144</sup> Plea bargains clearly fall within this definition. Every plea bargain contains one or more promises and contemplates exchange between the government and the defendant either immediately, in the future, or both.

In light of this, numerous courts have explicitly held that plea bargains are, in fact, contracts. For example, in *United States v. Fields*,<sup>145</sup> when interpreting an ambiguous term in the plea agreement, the court held that “[a] plea bargain *is a contract*, the terms of which necessarily must be interpreted in light of the parties’ reasonable expectations.”<sup>146</sup> Similarly, in *United States v. Ballis*,<sup>147</sup> when reviewing the proper remedy for the defendant’s breach of the plea agreement, the court held that “[p]lea bargain agreements are contractual in nature, and are to be construed accordingly.”<sup>148</sup> Likewise, in *United States v. Hembree*,<sup>149</sup> the court held that the defendant’s agreement with the government, which included an exchange of testimony for immunity, “was simply a contract.”<sup>150</sup>

Second, contract law is the superior body of law for the enforcement of plea bargains in part because it is broader in scope and offers greater protection than the Constitution.<sup>151</sup> While the Constitution is only effective in cases where the

140. *But see* Westin & Westin, *supra* note 31, at 535 (arguing one year before *Cooper* was decided that the Constitution should protect expectation interests even in cases where the defendant has yet to enter a plea but “has given some substantial performance or has promised performance in exchange for the prosecutor’s promise”).

141. *See* Teeter, *supra* note 1, at 742 (arguing that contract law is “designed for and certainly capable of dealing with all aspects of plea negotiations”).

142. PERILLO, *supra* note 33, § 1.1, at 1.

143. *Id.* § 1.2, at 4.

144. *Id.* § 1.1, at 2 (quoting IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 4 (1980)).

145. 766 F.2d 1161 (7th Cir. 1985).

146. *Id.* at 1168 (quoting *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981)) (emphasis added).

147. 28 F.3d 1399 (5th Cir. 1994).

148. *Id.* at 1409.

149. 754 F.2d 314 (10th Cir. 1985).

150. *Id.* at 317.

151. *See* Ejzak, *supra* note 12, at 135 (“Because the concept of consideration is broader in scope than the

prosecutor reneges after the defendant enters a plea, contract law applies from the much earlier point where the parties actually reach an agreement.<sup>152</sup> This occurs not when a plea is entered, but when the parties first reach a “mutual manifestation of assent to the same terms. Ordinarily, this mutual assent is established by a process of offer and acceptance.”<sup>153</sup>

This broader scope of contract law is critical given the great number of government breaches that occur before, rather than after, the defendant enters a plea. Additionally, the greater breadth of contract law means that, when properly applied, contract law would nearly always satisfy constitutional mandates as well.<sup>154</sup> Similarly, the proper application of contract law, including the doctrine of good faith and fair dealing,<sup>155</sup> would also ensure the protection that is intended under most ethical rules, codes of professional conduct, and other standards, such as the ABA Standards for Criminal Justice.

Third and finally, the use of contract law to enforce plea agreements is very appealing from a historical perspective. It is commonly known that our body of criminal law originated from “the state’s desire to eliminate private vengeance and to minimize other forms of self-help.”<sup>156</sup> Although less commonly known, our body of contract law actually shares this same origin with criminal law. “Anthropology and history prove that a basis of contract law is the desire to keep the public peace.”<sup>157</sup> Indeed, it is undeniable that without a consistent and reliable way to enforce promises between parties, society as we know it could not properly function.

The government’s frequent and successful breach of plea bargain contracts is therefore somewhat ironic given that “contract law has the same genesis” as criminal law.<sup>158</sup> The government’s disregard of its promises is fundamentally at odds not only with contract law, but also with criminal law—the very body of law that gives the state its power over defendants and gives rise to the plea bargain contract itself. Instead, it would be both logically consistent and historically faithful if the government were held to its contractual promises in the criminal law context. This, in turn, would advance the shared purpose of both contract law and criminal law: to “keep the public peace.”<sup>159</sup>

## V. THE COURTS’ MISAPPLICATION OF CONTRACT LAW

Although contract law is the superior body of law to apply to plea bargains, the courts’ failure to properly and consistently apply basic contract law principles has

field of constitutional rights that a defendant might waive, a contracts approach offers broader protection for defendants than the [constitutional] approach.”).

152. *See id.*

153. PERILLO, *supra* note 33, § 2.1, at 26.

154. *See* Teeter, *supra* note 1, at 766 (arguing, in the context of waivers of the right to appeal, that “traditional contracts doctrines provide a more comprehensive analysis and are better adapted to protecting the rights of weak and uninformed defendants”); *cf.* Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979) (discussing a situation where constitutional protections are broader than contractual rights).

155. *See* PERILLO, *supra* note 33, § 11.38 (discussing “good faith”).

156. *See id.* § 1.4, at 6.

157. *See id.*

158. *See id.*

159. *See id.*



rendered it ineffective in enforcing government promises. “On the one hand, . . . plea agreements are construed as contracts; on the other hand, contractual principles are blatantly suspended if they are deemed antagonistic to the interests of the judiciary.”<sup>160</sup> Even worse is the courts’ “contorted and, at times disingenuous, contractual construction”<sup>161</sup> of basic legal doctrines. These doctrines include detrimental reliance, damages and the benefit of the bargain, the good faith requirement, and recognition of the contracting parties.

#### A. *Detrimental Reliance*

The most inexplicable misapplication of contract law is the courts’ use of the detrimental reliance doctrine to deny a defendant’s right to enforce a plea bargain. Simply stated, courts typically hold that even after a defendant accepts an offer and a contract has been formed, the defendant has no right to enforce the plea agreement unless he has relied to his detriment on the offer.<sup>162</sup> The problem with the courts’ use of detrimental reliance is two-fold: first, the doctrine should be applied only in cases of promissory estoppel, not in cases of fully formed contracts; and second, even if the doctrine were relevant to fully formed contracts such as plea bargains, the courts’ complete distortion of the doctrine denies defendants even minimal protection.

##### 1. Reliance Is Irrelevant in the Enforcement of Contracts

The doctrine of detrimental reliance is completely inapplicable where there is an accepted offer and a fully-formed contract. “[I]t is clear that under modern law a contract, once made, is binding and an action for breach may be instituted although the contract is repudiated *before it induces any action or inaction in reliance upon it*.”<sup>163</sup> Despite this, courts are not dissuaded from using the doctrine as a tool to allow prosecutors to escape their contractual obligations.

For example, in *State v. Beckes*, the state made a plea offer to the defendant agreeing to dismiss one of his two criminal counts, and recommending probation with county jail time as a condition of that probation.<sup>164</sup> “The final term of the agreement was that [the] defendant was required to accept [the offer] before the preliminary examination.”<sup>165</sup> The defendant accepted the terms of the plea agreement in a timely manner, and that same day waived his right to a preliminary examination.<sup>166</sup>

At the subsequent arraignment, however, the state refused to dismiss one of the two counts or otherwise perform its end of the bargain and the defendant moved to

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160. Cook, *supra* note 2, at 889 (internal citations omitted).

161. *Id.* at 913 (arguing specifically in the context of the “plea withdrawal process” and the “bilateral reality underlying plea agreement dispositions”); *see also* Teeter, *supra* note 1, at 752 (“While the court professes loyalty to the idea that ordinary principles of contract law ought to apply to plea agreements, it refuses to adhere, again without explanation, to the most fundamental contract principle. . .”).

162. *See, e.g.*, Commonwealth v. Reyes, 764 S.W.2d 62, 64 (Ky. 1989).

163. PERILLO, *supra* note 33, § 1.4(e), at 9 (emphasis added).

164. State v. Beckes, 300 N.W.2d 871, 872 (Wis. Ct. App. 1980).

165. *Id.*

166. *Id.*

enforce the plea agreement.<sup>167</sup> Although the court outright rejected the state's proffered reason for withdrawal, it nonetheless allowed the state to withdraw because the defendant supposedly had not detrimentally relied on the plea agreement.<sup>168</sup>

It is true that detrimental reliance may be properly applied to enforce a promise where an offer was made and then withdrawn *before* acceptance but *after* the offeree relied on the promise in some way.<sup>169</sup> Such was not the case in *Beckes*, however, where the defendant accepted the offer by the precise means and within the time frame prescribed by the state and a contract was formed. Under these circumstances, the doctrine of detrimental reliance should not play any role in determining whether the government must honor its promises.

## 2. Judicial Distortion of the Detrimental Reliance Doctrine

Even assuming, for sake of argument alone, that the doctrine of detrimental reliance is applicable to accepted plea offers and fully formed contracts, courts have consistently distorted the doctrine to the point where defendants have little or no ability to enforce the government's promises.<sup>170</sup> In *State v. Beckes*, for example, the state required that its offer be accepted prior to the preliminary hearing, which would necessarily require the waiver of that hearing.<sup>171</sup> The defendant accepted the offer, and that same day waived his right to a preliminary examination.<sup>172</sup> This, of course, relieved the state of its obligation to present evidence at the hearing, and eliminated the risk that the defendant would win the hearing and have his case dismissed.

When the state refused to honor its obligations, the court framed the issue as whether the defendant detrimentally relied on the state's offer.<sup>173</sup> "Detrimental reliance," however, is defined as nothing more than an act by the defendant in response to the state's offer.<sup>174</sup> "Detriment" is defined more specifically in this context as follows:

In that connection, "detriment" means that the promisee has, in return for the promise, *forborne some legal right* which he otherwise would have been entitled to exercise, or that he has *given up something* which he had a right to keep, or *done something* which he had a right not to do.<sup>175</sup>

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167. *Id.*

168. *Id.* at 872-73.

169. See PERILLO, *supra* note 33, § 6.3, at 265; see also *Cooper v. United States*, 594 F.2d 12, 16-17 (4th Cir. 1979) (refusing to analyze the defendant's motion to enforce the plea agreement under contract law principles because the offer was withdrawn prior to acceptance and instead applying the constitutional law principles).

170. David Aram Kaiser, Note, *United States v. Coon: The End of Detrimental Reliance for Plea Agreements?*, 52 HASTINGS L.J. 579, 580 (2001) (arguing that "the *Coon* court defines detrimental reliance so narrowly that the only act that qualifies is involuntary pleading").

171. See *Beckes*, 300 N.W.2d at 872.

172. *Id.*

173. *Id.* at 872-73.

174. *Id.*

175. BLACK'S LAW DICTIONARY 311 (6th ed. 1991) (emphasis added).

Under the Wisconsin law applicable in *Beckes*, all defendants charged with a felony, except corporate defendants, are entitled to a preliminary hearing.<sup>176</sup> By waiving that hearing, as the prosecutor demanded under the terms of the plea offer, the defendant in *Beckes* was clearly giving up a legal right that he otherwise would have been entitled to exercise.<sup>177</sup> Equally clear is that the defendant's forfeiture of this right was beneficial to the state, which is why the state specifically made it part of the offer. Nonetheless, the court in *Beckes* inexplicably held that "[i]n this case, defendant took no action in reliance on the plea bargain"<sup>178</sup> and, therefore, the state was free to withdraw.<sup>179</sup>

Interestingly, the court based its decision on the fact that the defendant's right to have a preliminary examination was restored.<sup>180</sup> This is significant for two reasons. First, by giving the defendant back the preliminary hearing that he previously waived as part of the plea agreement, the court admitted that the defendant had given up a legal right that had value in exchange for the prosecutor's promise. If the preliminary hearing had no value, or if it had been given up for reasons unrelated to the state's offer, there would be no reason to return it to the defendant. The return of the preliminary hearing therefore undermines the court's conclusion that the defendant did not detrimentally rely, or take "action in reliance on the plea bargain."<sup>181</sup>

Second, "although the defendant's right to a preliminary hearing could have been restored, such a remedy would have done little to restore the defendant to the position in which he found himself prior to the waiver."<sup>182</sup> Part of the value of a preliminary hearing, unlike a jury trial, is the strict timeframe in which it must be held. Under the applicable Wisconsin law in *Beckes*, the hearing must be held within either ten or twenty days of the defendant's initial appearance, depending on whether he is in custody.<sup>183</sup> The purpose of this short timeframe is to ensure that defendants are not incarcerated because of "malicious, improvident, and oppressive prosecutions,"<sup>184</sup> and to determine "whether or not there are substantial grounds upon which a prosecution may be based."<sup>185</sup>

In *Beckes*, however, the defendant's initial appearance was on March seventh and, after the state reneged and the defendant moved to enforce the agreement, the court did not even restore the *right* to a preliminary hearing until May ninth.<sup>186</sup> This so-called restoration of the *right* to a hearing, and not the hearing itself, occurred nearly two months after the deadline for the *actual* hearing had passed. A preliminary hearing delayed by well over two months does nothing to fulfill the

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176. WIS. STAT. § 971.02 (2005–2006).

177. See *supra* note 175 and accompanying text.

178. *Beckes*, 300 N.W.2d at 873.

179. *Id.*

180. *Id.* at 874.

181. *Id.* at 873; cf. *People v. Macrander*, 756 P.2d 356, 361 (Colo. 1988) (holding that the waiver of a preliminary hearing is detrimental reliance).

182. *Macrander*, 756 P.2d at 362.

183. WIS. STAT. § 970.03(2) (2005–2006).

184. *State v. Richer*, 496 N.W.2d 66, 69 (Wis. 1993) (quoting *Thies v. State*, 189 N.W. 539, 544 (1922)).

185. *Id.*

186. *Beckes*, 300 N.W.2d at 872.

hearing's fundamental goals and purpose. A hearing delayed by that length of time simply has no value to a defendant.<sup>187</sup>

The result in *Beckes*, however, is not anomalous. Other courts have also refused to find detrimental reliance despite clear reliance by, and detriment to, the defendant. For example, in *United States v. Thalman*,<sup>188</sup> the government offered to dismiss five counts, make no specific sentence recommendation, and submit a revised offer of proof to the court regarding the sole count to which the defendant, himself a law enforcement officer, would plead.<sup>189</sup> After pleading guilty, the defendant moved to strike certain information contained within the offer of proof submitted by the government, in part because it contained allegations regarding counts that had been dismissed.<sup>190</sup> The defendant asked the court to order that the offer of proof be amended to comply with the plea agreement, but the court refused.<sup>191</sup> Instead, the court vacated the defendant's guilty plea after finding that the plea entered by the defendant was not knowingly made, and reinstated all counts.<sup>192</sup>

After the court's action, the prosecutor refused to honor the original agreement with the defendant.<sup>193</sup> The defendant moved to enforce the original plea agreement as he had already entered a guilty plea in open court, suffered adverse publicity, lost his right to a speedy trial, and incurred "additional attorney's fees and prolonged mental anguish."<sup>194</sup> The defendant argued that his actions, including the entry of the plea, constituted "a change of position to his substantial and irrevocable detriment."<sup>195</sup>

Although the court did not address the defendant's argument that his plea of guilt in open court constituted detrimental reliance, the court did address the defendant's other arguments on the issue. The court held that there was no material detriment to the defendant, as "the economic and emotional adversities [were] an unfortunate but unavoidable consequence of our adversary system of justice."<sup>196</sup> Interestingly, these harms are actually completely avoidable if the courts would simply hold the government to the promises it makes when inducing defendants to enter pleas of guilt.

Similarly, in *United States v. Ocanas*,<sup>197</sup> the defendants were charged with multiple criminal counts in an indictment.<sup>198</sup> In exchange for a plea to a single count, the government offered to dismiss all remaining counts.<sup>199</sup> The defendants then "relied on the government's promise by tendering guilty pleas and submitting

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187. See *Macrander*, 756 P.2d at 362 (holding that the preliminary hearing must be held in a timely manner in order to have any value to a defendant).

188. 457 F. Supp. 307 (E.D. Wis. 1978).

189. *Id.* at 308.

190. *Id.*

191. *Id.* at 308-09.

192. *Id.* at 309.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 310.

197. 628 F.2d 353 (5th Cir. 1980).

198. *Id.* at 356.

199. *Id.*

to extensive presentence investigations.”<sup>200</sup> After the government obtained the pleas and the information in the presentence reports, however, it reneged on its bargain and filed a new indictment.<sup>201</sup> At trial, the defendants were convicted of multiple counts and appealed.<sup>202</sup>

In response to the defendants’ post-trial motion to enforce the original plea agreement, the court found “no basis for granting relief.”<sup>203</sup> The court completely distorted not only the Constitution—as guilty pleas had actually been entered *before* the government breached the agreement—but also the doctrine of detrimental reliance. Although the defendants met the definition of detrimental reliance by giving up “legal right[s] which [they] otherwise would have been entitled to exercise,” and doing “something which [they] had a right not to do,”<sup>204</sup> the court still held that the government could withdraw from the agreement.<sup>205</sup>

The basis for the court’s ruling was that the defendants “offered no evidence that information provided by them in the course of the plea bargaining and presentence investigation was used by the government...at trial.”<sup>206</sup> Of course, the defendants would have had no reason to attempt to present such evidence because it would have been irrelevant under the current legal standards in force. Nonetheless, the court created a new standard that ultimately denied the defendants even the minimal protection afforded by the doctrine of detrimental reliance.

The application of the detrimental reliance doctrine by other courts has been equally bizarre. For example, the defendant in *People v. Navaroli*,<sup>207</sup> as part of a plea bargain, fully cooperated with authorities and gave up “his time, his labor, and his safety, as well as a significant bargaining chip”<sup>208</sup> by providing the government with valuable information in its law enforcement initiatives.<sup>209</sup> When it came time for the government to amend his charge and recommend probation, however, the government reneged and the court allowed it, holding that the defendant did not detrimentally rely on the state’s promise.<sup>210</sup>

Despite the slightly different factual backgrounds in each of these cases, the common theme is the courts’ distortion of the detrimental reliance doctrine—a doctrine that has no place in fully-formed contract cases to begin with—in order to allow the government to renege on its promises after it has already obtained the benefit for which it bargained.

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200. *Id.* at 358.

201. *Id.* at 356.

202. *Id.*

203. *Id.* at 358.

204. BLACK’S LAW DICTIONARY, *supra* note 175, at 311.

205. *Ocanas*, 628 F.2d at 358.

206. *Id.*

207. 521 N.E.2d 891 (Ill. 1988).

208. *Id.* at 899 (Clark, J., dissenting).

209. *See id.*

210. *Id.* at 896 (admitting that the defendant could not “call back his year of cooperation with Federal agents,” yet still holding there was no detrimental reliance and refusing to enforce the plea agreement).

### B. Damages and the Benefit of the Bargain

Courts also misapply contract law by refusing to recognize the benefit for which the defendant bargained and the corresponding damages suffered when a prosecutor reneges on an agreement. “[T]he law of damages seeks to place the aggrieved party in the same...position the aggrieved party would have attained *if the contract had been performed*. This involves an award of both the losses caused and gains prevented by the...breach....”<sup>211</sup>

For example, when a defendant is charged with two criminal counts and agrees to plead to one in exchange for dismissal of the other, the benefit for which the defendant has bargained is the dismissal of one count or, alternatively stated, the right to plead to only one count. If the government reneges on its promise and refuses to dismiss one count, and the defendant is subsequently convicted of both counts at trial, the defendant has suffered damages. Damages measure the loss of the benefit of the bargain. In this simple example, the lost benefit of the bargain was the dismissal of one count or, alternatively stated, the damage is the conviction on the second count.

Similarly, in the cases from the previous section—*Beckes*, *Thalman*, *Ocanas*, and *Navarroli*—the defendants not only detrimentally relied on their offers, but they also accepted the offers, thereby creating binding contracts.<sup>212</sup> Ultimately, after the government reneged, the defendants were tried and convicted of more counts than they would have been had they been allowed to enter pleas under their respective plea agreements. The damage is the difference between the defendants’ total, actual convictions and the smaller number of convictions they would have incurred absent the government’s breaches.

Unfortunately, courts have generally refused to acknowledge the benefit for which a defendant bargains when measuring damages. For example, in *State v. Beckes*, the plea offer accepted by the defendant would have resulted in a plea to one count and dismissal of the other.<sup>213</sup> When the state breached the agreement by refusing to dismiss the second count, the defendant was tried and convicted of two counts.<sup>214</sup> Despite this, the court concluded that, although the state breached the contract, “the defendant ha[d] not proven that he was damaged as a result of the breach.”<sup>215</sup>

This reasoning was echoed in *State v. Bourland*, where the court held that the right to jury trial was the proper remedy for the government’s breach.<sup>216</sup> The court stated that “[t]here is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has.”<sup>217</sup> Likewise, in *Navarroli*, the court held that, after the government’s breach, a jury trial was a sufficient “remedy.”<sup>218</sup>

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211. PERILLO, *supra* note 33, § 14.4, at 564 (internal quotation omitted) (emphasis added).

212. *See supra* Part IV.C (discussing how plea agreements create binding contracts).

213. *See State v. Beckes*, 300 N.W.2d 871, 872 (Wis. Ct. App. 1980).

214. *See id.*

215. *Id.* at 873.

216. *State v. Bourland*, 116 N.M. 349, 350, 862 P.2d 457, 458 (Ct. App. 1993).

217. *Id.* (quoting *Virgin Is. v. Scotland*, 614 F.2d 360, 365 (3rd. Cir. 1980)).

218. *People v. Navarroli*, 521 N.E.2d 891, 896 (Ill. 1988).

This reasoning is fundamentally flawed in at least two ways. First, the “rational basis” for holding that a jury trial is not an appropriate remedy for the breach is that a trial is not a *remedy*; it is a fundamental *right*.<sup>219</sup> Every defendant has this right, and each defendant may exercise it or bargain it away as he chooses.

Second, when a defendant bargains away the right to a trial, he does so in order to obtain some level of certainty and something of presumably greater value, such as a plea to a lesser charge or to fewer charges. When the state refuses to perform, the only proper remedy is to recognize the benefit for which the defendant bargained and place him in the position he would have been in had the state not breached the agreement. It is not sufficient merely to return the right to a jury trial, which the defendant already had *before* he bargained with the state. As the court stated in *Ex parte Yarber*:<sup>220</sup>

The Third Circuit Court of Appeals...held that where the state breaches a plea agreement before the defendant acts in reliance on it, specific performance is denied because the defendant has the adequate remedy of a jury trial. *We cannot accept that proposition.* We agree with the Third Circuit that the right to a jury trial is an important and fundamental *right*. Nevertheless, it may be an *inadequate remedy* for a defendant seeking to enforce the terms of an agreed upon plea. In so holding, we do not belittle the value of that fundamental right. We merely recognize that the uncertainty of its outcome is likely to make a jury trial less than a meaningful remedy.<sup>221</sup>

By analogy to a contract for the sale of goods, imagine that a manufacturer pays fifty-thousand dollars to a supplier in exchange for the delivery of parts to be used in the manufacturing process. Assume the supplier reneges and the manufacturer loses sales and profits due to the supplier’s breach. Is it sufficient to simply return the manufacturer the fifty-thousand dollars paid to the supplier? Would any court in the country hold, as the *Bourland* and *Navaroli* courts essentially did in the criminal context, that because the supplier was never obligated to enter into the contract in the first place, the manufacturer has no right to seek damages? Would any court in the country hold, as the *Beckes* court did in the criminal context, that after receiving the delayed return of the fifty-thousand dollars, the manufacturer “has not proven that he was damaged as a result of the breach”?<sup>222</sup>

No court would so hold because to do so would completely deny the non-breaching party the benefit of its bargain and would ignore the damages suffered as a result of the breach. Despite this, a completely different standard exists in criminal law, and the result is that defendants are afforded far fewer rights than civil litigants.<sup>223</sup>

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219. U.S. CONST. amend. VI.

220. 437 So. 2d 1330 (Ala. 1983).

221. *Id.* at 1335–36 (emphasis added).

222. *State v. Beckes*, 300 N.W.2d 871, 873 (Wis. Ct. App. 1980).

223. *Ejzak*, *supra* note 12, at 118 (arguing that the law “provides criminal defendants with less protection in bargaining with the state than parties to a commercial agreement receive under contract law”).

### C. Good Faith

Another contract law principle that courts misapply in the plea bargaining process is the duty to act in good faith. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>224</sup> This concept of good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."<sup>225</sup> Conversely, bad faith has been held to include not only the failure or refusal to perform one's duties, but also a "lack of diligence," the intentional "rendering of imperfect performance," and even the "evasion of the spirit of the bargain."<sup>226</sup>

Courts have specifically held that the duty of good faith extends to parties in the plea bargaining context as well. For example, in *State v. Scott*, the court acknowledged that "[e]very contract entails an implied obligation of good faith and fair dealing."<sup>227</sup> Likewise, in *State v. Wills*,<sup>228</sup> the court discussed the prosecutor's duty to act in good faith and use his "best efforts" in the fulfillment of the government's obligations under the plea bargain.<sup>229</sup>

The problem, however, is that the courts make no attempt to actually apply these principles to which they pay lip service. For example, in *Beckes*, the prosecutor indicated that he was withdrawing from the agreement because, after the defendant accepted the plea offer and waived his preliminary hearing as required by the offer, the defendant allegedly breached the agreement by requesting a substitution of the assigned judge.<sup>230</sup> Because the plea agreement did not prohibit the substitution of judges, and because the defendant's substitution request was not "a material change in circumstances,"<sup>231</sup> the court rejected this proffered reason.

After the *Beckes* court rejected the prosecutor's proffered reason for withdrawal, the doctrine of "good faith" would have required that the prosecutor perform the state's obligations under the agreement. However, the court ignored the good faith requirement and instead placed the burden on the defendant. The court held that because the defendant did not show that the prosecutor was "mak[ing] and withdraw[ing] plea proposals as a means of testing the wills and confidence of defendants and their counsel or [for the purpose] of deliberate harassment,"<sup>232</sup> the prosecutor was allowed to withdraw from the plea agreement, even after his proffered reason for withdrawal had already been rejected.

This ruling essentially replaces the prosecutor's duty to act in good faith, including the duty to use diligence and best efforts in rendering performance, with a burden on the defendant to prove the impossible. How could the defendant possibly prove that the prosecutor was testing his will and confidence or that the prosecutor was deliberately harassing him? These are impossible burdens and could

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224. PERILLO, *supra* note 33, § 11.38, at 476 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979)).

225. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979)).

226. *Id.*

227. *State v. Scott*, 602 N.W.2d 296, 301 (Wis. Ct. App. 1999).

228. 523 N.W.2d 569 (Wis. Ct. App. 1994).

229. *Id.* at 572.

230. *State v. Beckes*, 300 N.W.2d 871, 872 (Wis. Ct. App. 1980).

231. *Id.*

232. *Id.* at 874 (quoting *Cooper v. United States*, 594 F.2d 12, 20 (4th Cir. 1979)).



be refuted by virtually any reason offered by the prosecutor. Paradoxically, in *Beckes*, the prosecutor's proffered reason for withdrawal, i.e., that the defendant breached the agreement by filing a substitution of judge request, was flatly rejected by the court, yet was somehow deemed sufficient under the court's new "deliberate harassment" test.<sup>233</sup>

Similarly, other courts have gone out of their way to replace the prosecutor's duty to act in good faith with a burden on the defendant to prove some type of sinister prosecutorial plan. For example, in *State v. Singleton*,<sup>234</sup> the court held that the defendant must show "evidence of devious practices by the state such as bad-faith negotiations aimed at gaining an improper advantage."<sup>235</sup> Likewise, in *State v. Wheeler*, the court allowed the government to breach an agreement for any or no reason unless the defendant shows "that the prosecutor has abused its [sic] discretion by *routinely rescinding* its offers."<sup>236</sup> Finally, in *People v. Heiler*, the court would allow the state to withdraw for any reason, unless the prosecutor "abused his discretion,"<sup>237</sup> although that standard was not explained further in the opinion.

The result of this is that the prosecutor's duty to act in good faith has been removed from the plea bargaining process, despite the courts' empty recitation of the doctrinal language. In its place, the courts have imposed nearly impossible burdens on defendants to show sinister prosecutorial motives or plans. This completely frustrates the plea bargaining process, and again gives the prosecutor powers unimaginable to parties contracting in the civil arena.

#### D. Parties to the Plea Agreement

Another way courts distort contract law principles and allow the government to renege on its agreements is to make the court itself a party to the plea agreement. In *Ocanas*, for example, the defendant moved to enforce his plea agreement with the state not only because he had a binding contract, but also because he had fully performed his end of the bargain by pleading guilty and submitting to the presentence investigation.<sup>238</sup> The court, however, refused to enforce the agreement on either constitutional or contractual grounds. The court offered the following analysis:

The danger in a pure contractual approach to plea bargaining is that it may seduce one into thinking that the plea bargain involves *only two parties*, the prosecutor and the defendant, when in fact the trial court plays a critical role in

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233. *See id.*

234. 801 So. 2d 1150 (La. Ct. App. 2001).

235. *Id.* at 1159. It is difficult to imagine a court holding an evidentiary hearing on whether the government has been "devious."

236. *State v. Wheeler*, 631 P.2d 376, 380 (Wash. 1981) (emphasis added). Of course, based on the plain language of the court's holding, such a proof would require tremendous resources and the ability to gather data on all, or at least a significant sample, of the prosecutor's cases that were resolved by plea bargain. *Id.* Such a commitment of money and time is usually out of reach for most defendants and defense lawyers.

237. *People v. Heiler*, 262 N.W.2d 890, 893 (Mich. Ct. App. 1977).

238. *United States v. Ocanas*, 628 F.2d 353, 356 (5th Cir. 1980).

the process....Under Rule 11 [of the Federal Rules of Criminal Procedure] the trial court clearly retains discretion in accepting or rejecting plea bargains.<sup>239</sup>

Using this analysis, the court stated that a plea agreement is not binding and therefore may not be relied upon until that agreement is accepted by the court.<sup>240</sup> Because the trial judge in that particular case had yet to enter judgment on the defendant's plea, the court reasoned, the defendant was not "justified in relying substantially on the bargain" and the government therefore had no duty to perform.<sup>241</sup> Accordingly, the court released the prosecutor from his obligations under the plea agreement.<sup>242</sup>

This reasoning is flawed on at least two levels. First, and most significantly, the court is *not* a party to the plea agreement.<sup>243</sup> The parties are the government, represented by the prosecutor as its agent, and the defendant. While the plea agreement may be subject to the court's approval, this in no way makes the court a party.<sup>244</sup> Further, the fact that the court must approve the agreement is no reason to relieve the prosecutor of his duty to perform the government's obligation under the agreement, especially after the defendant has fully performed his obligations. As the court in *Yarber* correctly stated:

[W]e cannot conclude that a plea agreement is *unenforceable* merely because it is tentative in the sense that it is subject to the trial court's approval. The mere fact that a contract is subject, in effect, to the approval of a third-party, does not, by itself, render it unenforceable. For example, a contract for the purchase of realty is not rendered unenforceable because it is subject to the release and approval of the seller's contemplated mortgage.<sup>245</sup>

Similarly, the court in *Kenneth H.* held that although the ultimate decision to approve or reject a plea agreement lies with the court, the prosecutor is not relieved of his obligations under the agreement.<sup>246</sup> Additionally, by way of analogy, even commercial contracts can later be declared unenforceable by the court for various, unanticipated reasons. The mere possibility of this happening at some point in the

239. *Id.* at 358 (emphasis added); see also Cook, *supra* note 2, at 881 (arguing that a plea agreement is best viewed as a tripartite arrangement).

240. *Ocanas*, 628 F.2d at 358 ("Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea.").

241. *Id.*

242. See *id.*

243. See, e.g., CHRISTINE M. WISEMAN ET AL., WISCONSIN PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 23.12, at 742 (1996) ("The trial judge, on the other hand, may be neither a party to a plea agreement nor a part of the plea agreement process.") (citation omitted).

244. Professor Julian A. Cook, III, who persuasively advocates for reforms to the system to better protect defendants' interests, argues that the judge is a party and actually "accepts" the plea offer made jointly by the defendant and the prosecutor. Cook, *supra* note 2, at 885. He bases this argument in part on Rule 11 of the Federal Rules of Criminal Procedure, which authorizes a court to "accept" a plea agreement. *Id.* at 882. However, this term is not used in its contractual sense of accepting an offer, but rather in the colloquial sense and refers to the courts' approving of the agreement. This does not make the court, the judge, or even the prosecutor, for that matter, a party. The parties to a plea agreement are the same as the parties to the criminal action: the government, represented by the prosecutor, and the defendant. However, this in no way compromises the persuasiveness of Professor Cook's broader arguments for reform.

245. *Ex parte Yarber*, 437 So. 2d 1330, 1334 (Ala. 1983) (emphasis added).

246. *In re Kenneth H.*, 95 Cal. Rptr. 2d 5, 8 (Cal. Ct. App. 2000).

future, however, in no way relieves either party of its duty to act in good faith and perform its obligations under traditional contract law principles.<sup>247</sup>

The second major flaw in the *Ocanas* court's reasoning is practical rather than legal. The *Ocanas* court concluded that the defendant should never have relied on the prosecutor's promise because "[s]urely, neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea."<sup>248</sup> This conclusion, however, ignores the reality of the criminal courts and criminal practice: nearly every plea of guilt tendered to the courts *does* result in the entry of a judgment of guilt. Therefore, the very opposite of the court's assertion is true: surely, nearly every defendant, and prosecutor for that matter, *does* expect a benefit from a plea agreement as soon as the agreement is made.<sup>249</sup>

Under the facts of *Ocanas*, it is highly unlikely that the defendant, after entering a plea and submitting to a presentence report, would draw the subtle distinction between his entry of a guilty plea and the court's entry of judgment of guilt on that plea. Rather, reasonable inferences from the facts of *Ocanas* indicate that the defendant *did* contemplate the benefit for which he bargained.

## VI. PROPOSED CONTRACT-BASED FRAMEWORK

The contract-based framework proposed in this Article begins by correcting the misapplication of the contract law doctrines discussed previously in Part V. This includes (a) eliminating the detrimental reliance analysis in cases of fully formed contracts, (b) recognizing the benefit for which a defendant bargains as the appropriate measure of damages when the prosecutor breaches, (c) enforcing the good faith and fair dealing standard on the prosecutor, and (d) recognizing that there are only two parties to a plea bargain—the government, represented by the prosecutor, and the defendant.

Next, the framework proceeds with the fundamental principle that citizens accused of crimes, who bargain with their liberty, are entitled to the same contractual rights as citizens entering into commercial contracts, who bargain with their labor or money. The framework then specifically incorporates several contract law principles that are relevant to plea bargains but have not explicitly been recognized by the courts. These include the recognition that (a) most plea agreements are bilateral contracts, (b) some plea offers are irrevocable offers, and (c) defendants have limited contractual capacity.

The result of this proposed framework is to hold prosecutors more strictly accountable to the promises they make on the government's behalf. Furthermore, the implementation of this framework would in no way "inhibit the prosecutor's use of plea bargaining."<sup>250</sup> It cannot be seriously asserted that if a prosecutor were to be bound to the agreements he makes, he would stop plea bargaining and instead

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247. See *supra* Part V.C.

248. *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980).

249. *Cook*, *supra* note 2, at 888 ("Prior to a guilty plea hearing, a defendant believes that satisfaction of the Rule 11 process—including the presentation of the joint offer and the change of plea—signifies that the proposed agreement to settle the case short of trial has been accepted by all relevant parties.").

250. *Cf. State v. Wheeler*, 631 P.2d 376, 379 (Wash. 1981).

would try every case, or even more cases.<sup>251</sup> Instead, the implementation of this framework would only inhibit the prosecutor's ability to make plea offers and then renege on those promises with impunity.

Under the proposed framework, prosecutors would be held to the same standards as ordinary, and often less sophisticated, citizens in the commercial marketplace. Consequently, the result would be to restore integrity to the plea bargaining process and promote a more efficient process with far less litigation. "[J]ust as we enforce commercial contracts so as to better serve the public interest in the free flow of commercial exchange, so enforcement of . . . plea bargains serves the public interest in the efficient administration of justice."<sup>252</sup>

#### A. *Equal Contract Rights for Citizens Accused of Crimes*

Part IV.C has already established that a plea bargain is not *like* a contract, but rather, it *is* a contract. Therefore, contract law principles should not merely be selectively applied or used as analogies, but should be applied consistently as the governing body of law that controls plea agreements. Under the contract approach, there is no reason why an individual who bargains with his liberty should receive fewer contractual protections than an individual or business in the commercial marketplace that buys products or services.<sup>253</sup>

Stated conversely, there is no reason why the government, when dealing with an accused individual, should have more power than when it, or any other entity or individual, deals in the commercial marketplace. Consider, for example, the *Reyes* court's statement in dicta that "[t]he prosecutor's right to withdraw is equal to his right to withhold an offer."<sup>254</sup> One need not be very creative in order to imagine the business consequences if this principle were applied to commercial contracts. Dire consequences aside, however, there is no legitimate reason that prosecutors should be given this type of extraordinary privilege.

In fact, criminal defendants should actually be afforded *greater* protection than persons contracting in the civil arena.<sup>255</sup> Unlike the civil arena, criminal defendants are not merely bargaining with their money, property, or labor, but with their very liberty. Therefore, "[t]he constitutional concerns undergirding a defendant's 'contract rights' in a plea agreement demand broader and more vigorous protection than that accorded private contractual commitments."<sup>256</sup>

Additionally, there is more at stake than the rights of defendants. "At stake is the honor of the government, public confidence in the fair administration of justice, and

251. *See id.*; *see also* Ejzak, *supra* note 12, at 126 ("Recognition of firm plea proposals is no more likely to inhibit prosecutors' willingness to bargain than irrevocable offers are likely to inhibit commercial negotiations.").

252. *People v. Navaroli*, 521 N.E.2d 891, 899 (Ill. 1988) (Clark, J., dissenting).

253. *Kaiser*, *supra* note 170, at 579 ("Out of all of those who come before the court, we expect the defendant in a criminal prosecution to receive the greatest protections. However, when it comes to contracts, the civil litigant is sometimes in a superior position to a criminal defendant.").

254. *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989).

255. Daniel F. Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751, 752 (1985) ("[I]nterpreting the scope of disputed plea bargains only begins, but does not end, with the application of contract-law principles.").

256. *State v. Scott*, 602 N.W.2d 296, 302 (Wis. Ct. App. 1999).

the efficient administration of justice in a federal scheme of government.”<sup>257</sup> “We generally assume that people ought to keep their promises.... Because of the extraordinary power of the state and the critical nature of promises concerning criminal consequences, this obligation applies with special force to [prosecutors].”<sup>258</sup> Furthermore, and perhaps most significantly, “[w]e do law enforcement authorities no favor when we decide they cannot be held to their agreements. In the long run that decision can only undermine their ability to persuade defendants to cooperate.”<sup>259</sup>

Finally, providing defendants with the full range of contractual protections places no undue burden on the government, which is in full control of the timing and terms of the plea offers that it makes.<sup>260</sup> It is true that the correct and consistent use of contract law principles would require the government, as a practical matter, to institute some basic policies and procedures for plea bargaining.<sup>261</sup> These may include, for example, a procedure requiring the review of a defendant’s criminal history *before* conveying an offer, or a policy designating which prosecutors do not have actual authority to convey offers.

However, the government is a sophisticated party with vast financial and human resources. Given this, the implementation of “such simple and obvious precautions [could not possibly be considered] unreasonable or even significantly burdensome from an administrative standpoint.”<sup>262</sup> In fact, such precautions would surely save time, resources and litigation expense in the long run, particularly when compared to the current inefficient and chaotic state of plea bargaining jurisprudence.

### B. Plea Agreements Are Bilateral Contracts

Courts must also recognize that, in the context of plea bargaining, most plea bargains are bilateral contracts and are formed upon the exchange of promises. The distinction between unilateral and bilateral contracts is critical. Basic contract law holds that when an offeror makes a promise in exchange for the *completion of an act* by the offeree, the resulting contract is said to be *unilateral* because it contains only one promise.<sup>263</sup> Therefore, the contract is not even formed unless and until the offer is accepted, which occurs when the bargained-for act is completed by the offeree.<sup>264</sup>

When an offeror makes a promise in exchange for a *return promise* by the offeree, however, the resulting contract is said to be *bilateral* because it contains

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257. State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974).

258. Westen & Westin, *supra* note 31, at 524.

259. People v. Navaroli, 521 N.E.2d 891, 899 (Ill. 1988) (Clark, J., dissenting).

260. See Ejzak, *supra* note 12, at 135 (“The burden on the prosecutor is not substantial. After all, the prosecutor need not enter into a plea bargain or nonprosecution agreement, and certainly may control the content of his promise....”).

261. In fact, nearly every prosecutor’s office already maintains basic policies and procedures for numerous legal and administrative functions, including the disclosure of discovery materials to defense counsel.

262. See Cooper v. United States, 594 F.2d 12, 20 (4th Cir. 1979) (discussing governmental precautions to protect the interests of the defendant after plea discussions are underway).

263. PERILLO, *supra* note 33, § 2.10, at 65.

264. *Id.*

two promises.<sup>265</sup> The contract is still not formed unless and until the offer is accepted, which occurs and becomes binding only when the offeree makes a return promise.<sup>266</sup>

Consider, for example, that an offeror states to an offeree: “I want to fly to California this weekend. I will pay you \$100.00 if you will care for my dog while I am gone.” Now assume that the offeree replies, “Yes, I will care for your dog this weekend while you are gone.” The contract in the preceding example is bilateral, rather than unilateral, because it involves two promises. The reason it is classified as bilateral, and is therefore binding upon the exchange of promises, is that the offeror was bargaining for “the security of a promise to bind the offeree.”<sup>267</sup> Clearly, the offeror was not asking the offeree to accept by actual performance. The offeror would not risk coming back from his trip to find that the offeree decided *not* to accept his offer and therefore did not walk or feed his dog for two days. Rather, by receiving acceptance of the offer in the form of a return promise, the offeror was able to make travel plans, adjust his schedule, and make all other arrangements necessary for his weekend trip.

Similarly, when a prosecutor makes an offer to plead to count one, and in exchange promises to dismiss the remaining counts, for example, he is not bargaining for the act of pleading guilty. Instead, he is bargaining for the *promise to plead guilty*. To expand on this example, assume that on a Thursday a prosecutor begins to prepare for a Monday jury trial. The trial is expected to last several days and will have numerous witnesses, including experts. After a minimal review, however, the prosecutor makes a new plea offer to defense counsel with a Friday deadline for acceptance. He is then notified by defense counsel that the new offer is accepted, and defense counsel gives the prosecutor a copy of the plea agreement, signed by the defendant.

Under this set of facts, there is no doubt that the prosecutor, much like the dog owner in the previous example, was bargaining for a return promise and not for an actual act.<sup>268</sup> To prove this, one need only look at the offer itself. In this case, and in nearly every case that involves a plea offer, the prosecutor has imposed a specific, pre-trial deadline by which the defendant must accept the offer. This, by itself, proves that the prosecutor is bargaining for a return promise.

Regardless of whether a specific deadline was imposed, however, one need only look at what a prosecutor would do after receiving the defendant’s return promise to plead guilty. Would the prosecutor continue to prepare for the trial by subpoenaing his witnesses, studying the physical evidence, preparing his experts or rehearsing his opening statement? Of course he would not. Based on the defendant’s promise to plead guilty, the prosecutor will call off his trial witnesses and turn his

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265. *Id.*

266. *Id.*

267. *Id.* at 67. Commercial contract law has evolved to allow even more protection for offerees. Today, instead of assuming that an offer is bilateral (because the offeror is presumed to want the security of a return promise), modern contract law now assumes that, except in the rarest of circumstances, the offeror is indifferent as to whether acceptance is in the form of a return promise or actual performance. *Id.* The end result for our purposes, however, is the same: the offeror is bound upon receiving a return promise by the offeree.

268. Cook, *supra* note 2, at 886 (arguing that the promissory exchange in a plea agreement “is characteristic of a classic bilateral arrangement—a promise has been exchanged for another promise.”).

attention to other cases. Clearly, the prosecutor was asking the defendant to accept his offer by a return promise to plead guilty, which was of great value to him. Once he received “the security of a promise to bind the offeree,”<sup>269</sup> he was free to allocate his resources elsewhere.

Although simple logic and a basic understanding of the criminal process clearly indicate that plea agreements are usually bilateral contracts, one need not rely on this approach in order to draw the same conclusion. Even those courts that blatantly disregard all contractual protections for defendants still acknowledge that plea agreements are not only contracts, but also are *bilateral* contracts.

For example, in *Navarroli*, the court held that “[a] plea agreement results when the prosecutor and the defendant *exchange promises* to perform or refrain from performing specified actions.”<sup>270</sup> Likewise, in *State v. Bembenek*,<sup>271</sup> the court acknowledged that “[i]n plea bargaining terms, there must be a *promissory exchange* and the promise of certain benefits, including the exact penal promises, in return for a *defendant’s promise* to enter a guilty or no contest plea.”<sup>272</sup> Despite the bilateral nature of most plea agreements, courts still cling to the unilateral structure and, in the process, effectively—and perhaps intentionally—deprive defendants of even minimal contractual rights.<sup>273</sup>

Regardless of the reasoning employed, however, the conclusion that most plea agreements are bilateral in nature is inescapable. The significance of viewing plea agreements as bilateral contracts is that the contract is formed and is *enforceable* when the defendant accepts the state’s offer by giving a return promise for future performance. With a binding contract in place, the prosecutor should not be allowed to renege for any or no reason. Consequently, if he attempts to do so, the defendant should be entitled to the benefit of his bargain with the government.

### C. Partial Performance and the Irrevocable Offer

Although most plea bargains are bilateral contracts, there are some instances where the government requires that the defendant accept its offer by the performance of an act, rather than by return promise. In these instances, the ensuing contract is unilateral in nature. The government will require acceptance by action in cases where it desires some act, waiver, or other service from the defendant well before, or in lieu of, the entry of a guilty plea. In many of these agreements, the contract will not even require a plea by the defendant, but rather will result in the full dismissal of charges or an agreement not to prosecute.

Consider the example where, on the morning of a defendant’s scheduled preliminary hearing, the prosecutor realizes he may have difficulty in proving an element of the crime charged. The prosecutor may then make a plea offer to amend the sole

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269. PERILLO, *supra* note 33, § 2.10, at 67.

270. *People v. Navarroli*, 521 N.E.2d 891, 893 (Ill. 1988) (emphasis added).

271. 724 N.W.2d 685 (Wis. Ct. App. 2006).

272. *Id.* at 689 (quoting *State v. Bowers*, 696 N.W.2d 255, 264 (Wis. Ct. App. 2005) (Brown, J., dissenting)) (emphasis added).

273. Cook, *supra* note 2, at 886 (despite the bilateral nature of most plea agreements, “the system promotes an alleged and flawed unilateral structure”). As an example of Professor Cook’s assertion, see *State v. Collins*, 265 S.E.2d 172, 176 (N.C. 1980) (concluding, without any supporting reasoning and contrary to common logic, that “it is clear that plea agreements normally arise in the form of unilateral contracts”).

charge to a lesser charge, in exchange for the defendant's waiver of his preliminary hearing and, of course, a plea to the lesser charge at some future hearing date.

In this example, the prosecutor is seeking acceptance in the form of a waiver of the preliminary hearing as well as the subsequent entry of a plea at some future date. Assuming the defendant wishes to accept the offer, or simply wants to preserve the offer for future consideration, he would do so by immediately waiving his preliminary hearing, creating a unilateral contract. Alternatively, if he wishes to reject the offer, he would refuse to waive his hearing and the prosecutor would have to go forward and attempt to meet the state's burden of proof for bind-over at the preliminary hearing.

Consider another example where the state has charged a defendant with misdemeanor possession of a controlled substance but wishes to entice the defendant to cooperate against the person who actually delivered the controlled substance. In this instance, the prosecutor may offer to dismiss the defendant's misdemeanor charge outright in exchange for information about the supplier of the controlled substance. Again, the prosecutor is inviting acceptance by performance—this time in the form of providing information.<sup>274</sup>

In these types of agreements, a problem arises when the government tries to renege on its promise after the defendant partially or fully performs by waiving his preliminary hearing or providing the requested information to the government. Under these facts, while some courts have held the government to its promises,<sup>275</sup> many courts have allowed the government to renege freely.<sup>276</sup> In these cases, the courts' holdings inevitably blend contract law with constitutional law, and in doing so actually distort the tenets of both.<sup>277</sup> This blending has created an illogical, hybrid-type law that affords defendants even less protection than under contract law alone.

The correct contract law analysis, however, is that when the government's offer calls for acceptance by action, such as the waiver of a preliminary hearing and subsequent entry of a guilty plea, and the defendant begins to perform by actually waiving the preliminary hearing, the parties have created a unilateral contract. Under these facts, the defendant has at least partly performed his obligations, and, therefore,

once the offeree begins to perform, *the offer becomes irrevocable*. The term "irrevocable offer" is often used interchangeably with the expression used in the Restatement (Second)—"option contract." Under this view, the offeree does not

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274. See, e.g., *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986) (holding that when the government seeks information from the defendant in exchange for a promise not to prosecute the defendant, the resulting contract is unilateral in nature).

275. See, e.g., *id.*; *People v. Macrander*, 756 P.2d 356, 362 (Colo. 1988).

276. See, e.g., *United States v. Coon*, 805 F.2d 822 (8th Cir. 1986) (refusing to recognize the defendant's cooperation with FBI agents—where the defendant "spilled his guts"—as detrimental reliance); *United States v. Ocanas*, 628 F.2d 353 (5th Cir. 1980) (allowing the government to renege after the defendant fully performed by pleading guilty); *People v. Navaroli*, 521 N.E.2d 891 (Ill. 1988) (allowing the state to renege after the defendant performed his end of the bargain by acting as an informant in the state's drug investigations); *State v. Beckes*, 300 N.W.2d 871 (Wis. Ct. App. 1980) (allowing the state to renege after the defendant waived his preliminary hearing as part of the plea agreement).

277. See Teeter, *supra* note 1, at 742, 745–46 (discussing the courts' unwieldy blending of contract law and constitutional law in analyzing waivers of the right to appeal).



become bound to complete performance, but the offeree will not be entitled to a contractual recovery unless performance is completed within the time allowable, or is excused.<sup>278</sup>

Under the preceding examples, then, the prosecutor's offer becomes irrevocable and the defendant may accept by completing the performance, at his sole discretion. For example, in the preliminary hearing waiver situation, the defendant, having already waived his preliminary hearing, has preserved the state's offer and may later choose to complete performance by pleading to the lesser charge. If he chooses to do so, the state is obligated to perform its end of the bargain and amend the original charge to the lesser charge. Alternatively, if the defendant chooses not to complete performance, he may go forward with trial on the original charge, but without the benefit of his preliminary hearing which has already been waived.

Therefore, when the substance of a plea agreement calls for performance, rather than a return promise, it is unilateral in nature. The significance of viewing this plea arrangement as a unilateral contract is that the contract is formed and is enforceable, at the defendant's option, when the defendant begins performance under the contract. With a binding contract in place, the prosecutor should not be allowed to renege for any or no reason. Consequently, if he attempts to do so, the defendant should, once again, be entitled to the benefit of his bargain with the government.

#### *D. The Defendant's Capacity to Contract*

It is well settled that until a defendant enters a guilty plea in open court, and until the trial judge makes an independent determination that the defendant is entering the plea knowingly, intelligently, and voluntarily, a defendant is free to withdraw from a plea agreement at any time.<sup>279</sup> Some courts have seized on this principle, however, to afford the same luxury to the prosecutor. These courts do so under the theory that both the government and the defendant should be on a level playing field in their ability to withdraw from a plea agreement. For example, in *People v. Heiler*, the court held that plea agreements should not be binding on the government "anymore than they are binding upon defendants who are always free to withdraw from plea agreements prior to entry of their guilty plea."<sup>280</sup>

This reasoning, however, is flawed for several reasons. First, "[b]ecause the state is the source of positive law, when it makes a promise it thereby both undertakes a moral obligation and declares a legal obligation."<sup>281</sup> Therefore, the government should be held to a higher standard than a defendant. Also, when a prosecutor gives his word as an agent of the government, "[a]t stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."<sup>282</sup>

Second, given the disparity in power and resources between the government and nearly every defendant, there is little risk that a defendant would intentionally enter

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278. PERILLO, *supra* note 33, § 2.22, at 108 (emphasis added).

279. *See, e.g.*, *United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988) (citing FED. R. CRIM. P. 11(c)(3)).

280. *People v. Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977).

281. Ejzak, *supra* note 12, at 122.

282. *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974).

into and then renege on plea agreements to harass a prosecutor or to test the prosecutor's will or confidence in the state's case. It would be completely contrary to his self-interest to agitate the very person who holds so much power over him. Consequently, it would be the rarest of cases where a defendant would abuse his right to withdraw from a plea bargain. On the other hand, prosecutors do have the power, ability, and motivation to act in bad faith and harass defendants in the plea bargaining context.<sup>283</sup>

Third, the most compelling reason for allowing defendants, and not prosecutors, the right to withdraw from plea agreements before the formal entry of a plea is the concept of limited contractual capacity. Defendants, by law, simply do not have the contractual capacity to bargain away fundamental constitutional rights, unless and until certain procedural safeguards are met in open court.<sup>284</sup> Consequently, a plea agreement is avoidable, at the defendant's option, unless and until the judge makes an independent determination that the defendant has entered into the contract and waived his constitutional rights intelligently, knowingly, and voluntarily.<sup>285</sup>

The concepts of limited contractual capacity and the accompanying safeguards are well known in contract law, especially with regard to minors. For example, when a minor enters into a contract, that contract is generally avoidable by the minor until he reaches the age of majority.<sup>286</sup> "Not only an executory contract, but also an executed transaction, such as a sale, conveyance or release may be avoided by a minor."<sup>287</sup>

If the minor fails to make a timely avoidance, or if the minor affirmatively adopts the contract upon reaching the age of majority, the contract becomes legally ratified.<sup>288</sup> Additionally, specific court approval, such as in the settlement of a tort claim involving a minor, will also ratify a contract.<sup>289</sup> However, a minor's limited contractual capacity does not mean that the agreement is not a contract; rather, it simply means that the contract is avoidable by the minor.

Similarly, a defendant may enter into a plea agreement, yet avoid or disaffirm it at any time prior to the court's fulfillment of the constitutional mandates designed to protect the defendant. This in no way places the defendant on a different, or higher playing field than the government. It merely recognizes that, much like minors contracting with more sophisticated parties, additional safeguards are mandated for defendants to ensure that their waiver of fundamental, constitutional rights is intelligent, knowing, and voluntary.

#### *E. Other Contract Doctrines*

The purpose of this Article is not to discuss every possible contract principle that could be applicable to the body of contracts known as plea bargains. Because plea

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283. See *supra* Part III.

284. See Ejzak, *supra* note 12, at 127; Kaiser, *supra* note 170, at 586.

285. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); see also *State v. Bangert*, 389 N.W.2d 12 (Wis. 1986) (citing *Boykin*, 395 U.S. 238); WIS. STAT. § 971.08(1) (2005–06) (requiring the trial judge to make specific inquiries of the defendant in order to ensure the plea is intelligent, knowing and voluntary).

286. Ejzak, *supra* note 12, at 127; PERILLO, *supra* note 33, § 8.4, at 290 (discussing voidability by infants).

287. PERILLO, *supra* note 33, § 8.4, at 290.

288. *Id.* at 291.

289. *Id.* at 289.

bargains are limited only by the needs of the prosecutor and the imagination of the parties, such a comprehensive discussion certainly would be beyond the scope of an article. In fact, some contract law doctrines only briefly addressed in this Article may very well be applicable.

For example, in cases where government agents other than prosecutors, such as police officers, enter into agreements with defendants, the basic principles of agency and authority are implicated.<sup>290</sup> In addition, although the principle of detrimental reliance is often incorrectly applied in situations involving fully formed contracts, the doctrine may, in some circumstances, be relevant. If a plea offer is made but withdrawn before acceptance, a defendant's prior reliance thereon, if reasonable, could be the basis for enforcement in a promissory estoppel context. As a final example, a prosecutor may agree to hold an offer open for a specified period of time, but then withdraw prior to the deadline and before the defendant is able to accept it. In that circumstance, if certain conditions were met, the offer may be irrevocable as a firm offer, even without detrimental reliance by, or consideration from, the defendant.<sup>291</sup>

Conversely, there are numerous contract law doctrines regarding defenses to performance that provide *legitimate* reasons for a prosecutor's refusal to perform under a plea agreement.<sup>292</sup> For example, a defendant may affirmatively misrepresent facts to induce a prosecutor to enter into an agreement. In other situations, defendants have themselves breached plea agreements. Under these circumstances, the defendant would have no grounds to compel performance by the government. That these and other topics are outside the scope of this Article, however, in no way implies that they are not appropriate doctrines to be employed in the enforcement of plea bargains.

Finally, there are certainly arguments that can be made to extend defendants' contractual rights beyond those afforded to parties in the commercial setting.<sup>293</sup> However, in light of the current misapplications of contract law doctrine—all to the detriment of defendants—a more obtainable objective would be simply to elevate defendants to equal footing with those in the commercial arena. Under no circumstances, however, does this Article advocate for the diminishment of constitutional rights in the rare event that the Constitution would provide more protection than contract law. For “[e]ven settled contractual norms must bend when they conflict with constitutional principles.”<sup>294</sup>

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290. See, e.g., *State v. Collins*, 265 S.E.2d 172, 176 (N.C. 1980) (“[W]here the content of a plea bargain and the authority for its offer are at issue...traditional precepts of contract and agency should apply.”) (quoting *United States v. McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979)).

291. See *Ejzak*, *supra* note 12, at 124–25.

292. See, e.g., *Ketchum*, *supra* note 15, at 482–83 (discussing the frustration of purpose doctrine as a reason for withdrawal from a plea agreement).

293. See *Scott & Stuntz*, *supra* note 4, at 1934 (“Contract norms might justify some constraints, both to reduce the risks of process defects and to enhance the dignitary values associated with an exchange involving the entitlement to personal liberty.”); *Kaplan*, *supra* note 255, at 752 (“due process concerns...require that ordinary contract analysis not be the exclusive touchstone for interpreting [plea] agreements”).

294. *Cook*, *supra* note 2, at 916.

## VII. CONCLUSION

The government, both at the state and federal levels, resolves nearly all criminal cases by means of plea bargain rather than jury trial. The plea bargaining system provides tremendous benefits to the government because it allows it to obtain more convictions with fewer resources. Without plea bargaining, the government would either obtain fewer convictions or expend greater resources in obtaining its current level of convictions. Additionally, the government also obtains other benefits from plea bargaining, including valuable information from defendants that leads to the conviction of more culpable individuals for more serious criminal conduct.

Given the tremendous benefits that flow to the government and society from the plea bargaining process, it is critical to ensure the integrity and reliability of the process. When a state or federal prosecutor, acting on behalf of the government, makes a promise to a defendant and then freely reneges on that promise for no valid reason, the integrity and reliability of the plea bargaining process is severely compromised. As a result, the tremendous benefits that flow from the process are threatened. Additionally, even more resources are expended unnecessarily in the vast amount of litigation over broken government promises.

When defendants move to enforce government promises, courts have employed numerous bodies of law in their legal analysis, including the ABA Standards of Criminal Justice and similar rules of professional responsibility, the Constitution, and contract law. Of these, contract law is the superior body of law, in part because a plea agreement is nothing more than a contract between the government and the defendant. Unfortunately, however, the courts have misapplied and distorted contract law principles, with the result that prosecutors have been allowed to renege on their promises for any or no reason.

The solution to the problem is to apply contract law consistently and accurately in the enforcement of plea agreements. The underlying principle behind this approach is that citizens accused of crimes, who bargain in good faith with their very liberty, should be afforded at least the same level of contractual rights as citizens who contract for goods and services in the commercial marketplace.

The framework proposed in this Article is two-fold. First, the courts are already selectively applying some contract law doctrines in analyzing broken plea bargain promises. With regard to these familiar doctrines, however, courts must *stop applying* principles where they are not applicable—e.g., the doctrine of detrimental reliance in cases of fully formed plea agreements—and must *properly apply* principles such as the duty to act in good faith and the concept of the benefit of the bargain.

Second, courts must also recognize and apply contract law principles that have heretofore been ignored in the context of plea bargains. This includes the recognition that most plea agreements are bilateral in nature and are binding when the defendant accepts a plea offer by a return promise to plead guilty. Additionally, in the case of unilateral contracts, the courts must recognize that the agreements are binding, at the defendant's option, when he begins performance under the agreement.

Only a consistent and accurate application of contract law doctrine to the enforcement of plea agreements will restore integrity to the plea bargaining process and ensure its continued use and tremendous governmental and societal benefits.