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A Constitutional Law of Remedies for Broken Plea Bargains

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In Santobello v. New York *the Supreme Court held that a defendant has a constitutional right to relief when the state breaches a promise made to him in return for a guilty plea. Yet the Court refrained from deciding what remedies are constitutionally prescribed in such cases. The authors begin with the question of remedies, using it as a vehicle for exploring the meaning of* Santobello, *and conclude with the suggestion that in a legal system where most convictions are based on guilty pleas and most guilty pleas are based on bargained-for promises, the most important right of the criminally accused may be found not in the law of trial procedure, but in the law of contracts.*

"The State may not sell the cow and hope to continue to sup upon her milk."*

In 1970 the Supreme Court for the first time sustained the constitutionality of plea bargaining.[1] Since then the process of plea bargaining and its attendant difficulties have increasingly become the subject

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* Wynn v. State, 22 Md. 165, 173, 322 A.2d 564, 568 (1974).

1. Brady v. United States, 397 U.S. 742 (1970).

of judicial scrutiny. These difficulties include determining who has authority to enter into plea agreements, what kinds of evidence are admissible to prove the existence of an agreement, what kinds of terms are subject to bargaining, whether a plea agreement exists, and whether the agreement has been breached.

Two of the most difficult questions in this area are whether any constitutional remedy exists for broken plea agreements and, if so, whether any particular remedy is constitutionally required.[2] Aside from any remedies prescribed by domestic law, does a defendant have a *constitutional* right to relief from a broken plea bargain? If so, what is the proper constitutional remedy—to require the state to perform on its promise, or to rescind the guilty plea? Are both remedies constitutionally sufficient in every case, or does a defendant have a constitutional right to demand one remedy as opposed to the other? If a defendant does have a right to demand one remedy as opposed to the other, does it follow that he also has a right to elect whichever he prefers? Or are there limits on the election of remedies? For example, does a defendant ever have a right to rescind a guilty plea if the state is presently able and willing to perform on its promise? This Article attempts to answer these questions in the context of a general theory of remedies for broken plea agreements.

We begin with the seminal decision in *Santobello v. New York*,[3] in which the Supreme Court held that a defendant is constitutionally entitled to some form of relief for a broken plea agreement. We then ex-

2. There is a vast body of literature dealing with the plea bargain generally. *See* M. MARCUS & R. WHEETON, PLEA BARGAINING: A SELECTED BIBLIOGRAPHY (1976). Of particular usefulness are J. BOND, PLEA BARGAINING AND GUILTY PLEAS (1975); D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975); Alschuler, *The Trial Judge's Role In Plea Bargaining* (pt. 1) 76 COLUM. L. REV. 1059 (1976); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683 (1975); Thomas, *Plea Bargaining: The Clash Between Theory and Practice*, 20 LOY. L. REV. 303 (1973-1974); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971). Of these, the Alschuler article in the *University of Colorado Law Review* is the most useful in considering gencrally the qucstion of plea agreements. For interesting student work, *see* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977) [hereinafter cited as Note, *Transformation of the Process*]; Note, *The Uneonstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) [hcreinaftcr cited as Note, *Unconstitutionality*]; Comment, *Plea Bargaining Mishaps—the Possibility of Collaterally Attacking the Resultant Plea of Guilty*, 65 J. CRIM. L. & CRIMINOLOGY 170 (1974).

On the specific question of relief for broken plea agreements, *see* Fischer, *Beyond Santobello—Remedies for Reneged Plea Bargains*, 2 U. SAN FERN. V.L. REV. 121 (1973); Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771 (1973) [hereinafter cited as Note, *Legitimation of Plea Bargaining*]. *Cf.* Bishop, *Broken Bargains*, 50 J. URB. L. 231 (1972-1973).

3. 404 U.S. 257 (1971).

amine what the Court failed to consider—the possible sources of this constitutional right and the specific remedies they would require. There are three possible sources: the constitutional requirement that a guilty plea be "*voluntary*"; the constitutional requirement that a guilty plea be "*intelligent*"; and a constitutional requirement that the *contractual expectations* the state creates in criminal defendants be protected. After deciding that the "voluntariness" requirement is irrelevant to the inquiry, we show that the "intelligence" requirement can be fully satisfied by the remedy of directing specific performance of the state's promise or by the remedy of vacating the guilty plea. It follows, therefore, that insofar as some courts are now mandating specific performance as the exclusive remedy for broken plea agreements, they are giving implicit recognition to a new constitutional right—the right of a defendant to demand that the state fulfill the "expectations" created in him by its bargained-for promise. We conclude with a discussion of the far-reaching implications, both within and beyond the area of criminal procedure, of this trend toward constitutionalizing the state's contractual obligations.

I

SANTOBELLO V. NEW YORK

Santobello v. New York represents the Court's first attempt to deal with the constitutional problem of broken promises in the context of plea bargaining. Gary Santobello was a New York defendant indicted on two gambling-related charges in 1969. After initially pleading not guilty to both charges, he changed his plea to guilty on a lesser included offense in exchange for the prosecutor's promise to drop the more serious charges and to refrain from making any recommendation with respect to sentence. By the time of sentencing, however, a new prosecutor had replaced the one with whom Santobello had negotiated. Being unaware of his predecessor's promise, the new prosecutor recommended the maximum one year prison sentence, citing Santobello's criminal record. Santobello immediately objected claiming that the prosecution had breached part of its bargain. The sentencing judge overruled the objection on the ground that the prosecutor's recommendation would have no effect on the defendant's sentence, and then sentenced Santobello to one year in prison. After unsuccessfully seeking relief on appeal, Santobello filed a petition for certiorari which the Supreme Court granted.

Although numerous lower courts had addressed the question of relief for broken plea agreements, *Santobello* was a case of first impression for the Supreme Court. In the context of the Court's previous deci-

sion in *Brady v. United States*[4] that plea bargaining is constitutionally acceptable, *Santobello* presented the Court with three novel questions. First, does a defendant have a *constitutional* right to relief when the state breaches a promise given in return for a guilty plea? Second, if the defendant has such a right, what is its source in the Constitution? Third, given the source of the right, what if anything does it specifically require in the form of a remedy?[5]

The Court's answer to the first question was unequivocal. All seven members agreed that Santobello had a constitutional right to *some remedy* for the broken plea agreement.[6] This holding is made more emphatic by the facts of the case. The second prosecutor's failure to fulfill the original promise was conceded to be entirely inadvertent. Nonetheless, the Court held the second prosecutor responsible for his predecessor's promise, stating, "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done."[7] Further, the Supreme Court determined that "the interests of justice and appropriate recognition of the duties of the prosecutor in relation to promises made in the negotiation of pleas of guilty"[8] required that relief be given, despite the specific finding by the sentencing judge that the prosecutor's recommendation had no effect on the actual sentence imposed. The undisputed holding of *Santobello* was that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[9]

Unfortunately, the Court was less explicit in deciding the two remaining questions concerning the constitutional source of the defendant's right to relief, and the constitutional remedies it entails. Chief Justice Burger, writing for the Court, based the defendant's right to relief on the "interests of justice," but also adverted to the traditional requirements that a guilty plea be "knowing and voluntary."[10] Correspondingly, he left the choice of remedy to the "discretion" of the state

4. 397 U.S. 742 (1970).

5. In order to reach these questions, the Court must have implicitly decided certain preliminary issues: namely, that the first prosecutor had promised to make no sentence recommendation, that he offered the promise as an inducement or consideration for the defendant's plea of guilty, that the defendant pleaded guilty in return for the promise, and that the prosecutor breached his promise.

6. The Chief Justice wrote an opinion for the seven-member Court reversing the conviction, in which Justices Douglas, White, and Blackmun joined. Justice Douglas wrote a separate concurring opinion. Justice Marshall wrote an opinion in which Justices Brennan and Stewart joined, concurring in the decision to reverse, but dissenting from the decision to leave the choice of remedy to the "discretion" of the state courts on remand.

7. 404 U.S. at 262.

8. *Id.*

9. *Id.*

10. 404 U.S. at 261. The Chief Justice never explicitly said in his opinion for the Court that the decision was based on a construction of the Constitution. Needless to say, *Santobello* must

courts on remand, suggesting that either specific performance or vacatur might be "required" by the "circumstances of this case."[11] He gave no hint, however, as to which circumstances might require which remedies, or why.[12]

Justice Douglas, joining the opinion of the Court, advocated a "constitutional rule," evidently based on due process, for relief from broken plea agreements.[13] He emphasized that the choice of a remedy for a broken plea agreement is itself a constitutional issue, and that in any individual case, the Constitution requires not only some remedy, but a particular remedy. As to which remedy is required in an individual case, Justice Douglas stated that the defendant's preference should be given "considerable, if not controlling, weight."[14]

Justice Marshall, joined by Justices Brennan and Stewart, left the source of the defendant's right to relief unclear, but took the remedy one step further than either the Court or Justice Douglas. While agree-

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have been constitutionally based; otherwise, the Supreme Court would have lacked jurisdiction to reverse the judgment of the state court below. See note 16 *infra.*

11. The Chief Justice's opinion is ambiguous as to whether the choice of a particular remedy is, like the existence of some remedy, a constitutional issue. On the one hand, he says that the issue should be left "to the discretion of the state court," which suggests that the choice of remedy is not a constitutional question. On the other hand, he says that the state court must decide whether the circumstances of the case "require" specific performance, or whether they "require" vacatur, which suggests that the issue may be controlled by federal law. His entire discussion of the issue reads as follows:

> The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea . . . , or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty.

404 U.S. at 263.

12. On remand the New York Supreme Court, Appellate Division, gave Santobello specific performance of his plea agreement despite his apparent demand for vacatur. People v. Santobello, 39 App. Div. 2d 654, 331 N.Y.S.2d 776 (1972). The single dissenter from the court's decision did not object to the denial of Santobello's wishes, but rather to the leniency of the disposition. *Id.* at 655-56, 331 N.Y.S.2d at 778.

13. 404 U.S. at 267. Justice Douglas emphasized that *Santobello* was "a state case over which we have no 'supervisory jurisdiction' "; and, therefore, that the decision to reverse the conviction because of the prosecutor's breach of the plea agreement must be understood as a *constitutional* decision.

14. Justice Douglas did not explain why due process requires that the defendant's preference be given any weight; nor did he explain why the defendant's preference should be given "considerable" rather than "controlling" weight. His discussion of the issue reads in full as follows:

> Where the "plea bargain" is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however,a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the state.

Id. at 267.

ing that some remedy is constitutionally required for a broken plea bargain, Justice Marshall dissented from the decision to remand to the state court without any constraints on its choice of remedies. He argued that a defendant who asks that a guilty plea be vacated has an absolute right to that remedy; accordingly, since Santobello was seeking to set aside his guilty plea, Justice Marshall would have ordered the lower court to grant his request. Justice Marshall went on to say that a defendant who prefers specific performance might also be entitled to that form of relief, but he found it unnecessary to decide the question on the facts of the case. Instead, he was content to observe that a four-member majority of the Court (Justice Douglas plus the three dissenters) agreed that when a defendant requests the remedy of vacatur, the request "should generally be granted."[15]

Thus, *Santobello* stands for the proposition that state and federal courts alike have a constitutional obligation to give some relief to defendants aggrieved by broken plea agreements. But the decision leaves the lower courts without clear guidance to decide what kinds of remedies are appropriate, and whether any particular remedy is ever constitutionally required in any given case. Further, since the Court was "unclear"[16] about the actual source or nature of the constitutional right involved, the lower courts have no solid foundation for constructing a constitutional law of remedies for broken plea agreements.

15.

> When a prosecutor breaks the [plea] bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. This, it seems to me, provides the defendant ample justification for rescinding the plea. . . . Of course, where the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here.* Rather, it seems to me that a breach of the plea bargain provides ample reason to permit the plea to be vacated.
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> * Mr. Justice Douglas, although joining the Court's opinion . . . concludes that the state court "ought to accord a defendant's preference considerable, if not controlling, weight." Thus, a majority of the Court appears to believe that in cases like these, when the defendant seeks to vacate the plea, that relief should generally be granted.

Id. at 268.

16. *See* Note, *Criminal Law—Binding Effect of Prosecutor's Agreement to Dismiss Prosecution*, 23 WAYNE L. REV. 1129, 1141 n.111 (1977). Indeed, this confusion has led at least one court to the astounding conclusion that *Santobello* was not constitutionally based. State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) ("It is also worthy of note that *Santobello* was not adjudicated on any constitutional ground but rather by application of what may be termed a 'fair-play standard.' "). *See also* Comment, *Plea Bargaining Mishaps—the Possibility of Collaterally Attacking the Resultant Plea of Guilty*, 65 J. CRIM. L. & CRIMINOLOGY 170, 175 (1974). It is significant, however, that in *Santobello* the Court was reviewing a state court decision and that no federal statute applied. Thus, for the Supreme Court to have had jurisdiction under 28 U.S.C. § 1257 (1970) to reverse the state court below, it must have based its decision on federal constitutional grounds. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874); Note, *Criminal Law—Enforcement of Plea Bargains*, 51 N.C.L. REV. 602, 608 & n.46 (1973). The determination of which specific constitutional provision provides the basis for the defendant's right to relief may have implications for the types of remedies available. See note 161 *infra*.

II

VOLUNTARINESS OF THE PLEA

To determine what particular remedy, if any, is required by *Santobello*, we must first discern the nature of the constitutional interest that is violated by the state's breach of a plea agreement.[17] One possibility is that the breach of a plea agreement violates the defendant's constitutional interest in the validity of the guilty plea itself. Under this theory the constitutional interests being violated would be those protected by the general requirements for valid guilty pleas, namely, the requirements that guilty pleas be both "voluntary" and "intelligent."[18] By examining these two requirements and the constitutional interests they serve, we can ascertain whether their violation forms the basis for the Court's decision on *Santobello*. Moreover, insofar as one or more of these interests is affected by the state's breach, the nature of the respective interest should reveal whether any particular remedy is suitable for relief.

The Supreme Court has held that, to be valid, the waiver of constitutional rights must be "voluntary."[19] The Court has also held that a guilty plea constitutes a waiver of constitutional rights—principally the right to a jury trial, the right to confront one's accusers, and the right not to incriminate oneself—and, as such, is invalid unless "voluntary" under constitutional standards.[20] The question, then, is whether a prosecutor's breach of a plea agreement operates to render the defendant's

17. The nature of any particular constitutional remedy must, of course, depend on the nature of the underlying constitutional interest that the remedy is designed to serve: "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. . . . As with any equity case, the nature of the coustitutional violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Consequently, in order to determine the "scope of the remedy" for breach of a plea agreement, one must first identify the "nature of the [constitutional] violation" that occurs when the agreement is breached.

18. Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.") The Court sometimes suggests that there is yet a third requirement: that in addition to being "voluntary" and "intelligent," waivers must also be "knowing." *See* Brady v. United States, 397 U.S. 742, 748 (1970). We assume here that the requirement that a waiver be "knowing" is identical to the requirement that the waiver be "intelligent." Professor Dix appears to make the same assumption by grouping "intelligent" and "knowing" within the single category of "awareness." Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis*, 55 TEXAS L. REV. 193, 214-15 (1977).

19. *See* Brady v. United States, 397 U.S. 742, 748 (1970); Machibroda v. United States, 368 U.S. 487, 493 (1962); Waley v. Johnston, 316 U.S. 101, 104 (1942); Walker v. Johnston, 312 U.S. 275, 286 (1941); Kercheval v. United States, 274 U.S. 220, 223 (1927); Brain v. United States, 168 U.S. 532, 557-58 (1897).

20. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969). For a general discussion of the requirement that a guilty plea be voluntary, *see* J. BOND, *supra* note 2, at 95-136; Alschnler, *The Supreme Court, the Defense Attorney, and the Guilty Plea, supra* note 2, at 48-71; Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U.L. REV. 111 (1972).

plea "involuntary" by constitutional standards. This, in turn, requires a precise identification of the "voluntariness" requirement.

This inquiry does not lend itself to easy answers, because the Court has been strangely ambivalent about the constitutional meaning of "voluntariness." As Justice Frankfurter observed, "[t]he notion of 'voluntariness' is itself an amphibian"[21] that is simultaneously used for a variety of very different purposes. When the Court states that a waiver is involuntary, the Court sometimes means that the state engaged in conduct that "impaired" the defendant's "capacity for self-determination,"[22] either by "breaking" his "will,"[23] or by preventing him from making a "free and unconstrained choice."[24] At other times, however, the Court means that the state has engaged in conduct that is "offensive"[25] or that "[falls] below judge-created standards of decency,"[26] irrespective of the effect such conduct may have had on the defendant's exercise of will. Not surprisingly, one commentator has concluded that "we could survive quite nicely if we were to scrap the 'voluntariness' terminology altogether."[27]

This is not the place to try to establish a uniform convention on the proper use of the term "voluntariness." For purposes of clarity, however, the term will be used here in the narrower of the two senses described above. That is, "voluntariness" is used to describe the defendant's state of mind. To say that a waiver is "involuntary" means that the state engaged in conduct that improperly "impaired" the defendant's "capacity for self-determination."[28] Needless to say, this proposed terminology has no effect on the substantive constitutional standards that govern other kinds of "offensive" state conduct; it merely means that, as a matter of terminology, other terms will be used to describe the circumstances under which waivers are invalidated because of state practices that, although "offensive," have no bearing on the defendant's ability to make a "free and unconstrained choice."[29]

Unfortunately, even if voluntariness is used in this narrower sense

21. Culombe v. Connecticut, 367 U.S. 568, 604-05 (1961) (opinion of Frankfurter, J.) (discussing the voluntariness of a confession).

22. *Id.* at 602.

23. *Id.* at 584, 622, 634.

24. *Id.* at 602.

25. Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* CRIMINAL INTERROGATION AND CONFESSIONS, 17 RUTGERS L. REV. 728, 754-55 (1963).

26. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 417-21 (1954). *See, e.g.*, Malinski v. New York, 324 U.S. 401 (1945) (accused forced to stand naked for three hours); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (36 hours of questioning).

27. Kamisar, *supra* note 25, at 759.

28. Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.).

29. *Id.* For example, a waiver is constitutionally defective if it was induced by practices that violate the "intelligence" requirement, regardless of whether the practices affected the defendant's ability to make a "free and unconstrained choice." See text accompanying notes 110-140 *infra*.

to refer to conduct that affects the state of a defendant's mind,[30] the constitutional standard still remains "exceedingly ambiguous."[31] To be sure, some things are clearly prohibited. For one thing, the state may not extract a waiver from a defendant by putting him under such pressure as totally to preclude the exercise of his will.[32] In other words, the state cannot contend that a defendant waived his rights if it prevented him from ever making a willed choice to assert them. The basis for such a principle is easy to identify: absent the possibility of a willful choice by the defendant, the notion of "waiver" is meaningless, and affirming or denying constitutional rights on such grounds would be capricious.

The state is also prohibited from securing waivers by means of pressures (or threats of pressures) that are illegal in themselves. That is, the state cannot induce defendants to waive their constitutional rights by using devices and tactics that would exceed the scope of governmental power under *any* circumstance. For example, the state cannot obtain a valid waiver by threatening defendants or their loved ones with physical abuse,[33] or by threats of illegal trial tactics or an illegal sentence.[34] Obviously, the purpose of this prohibition is to prevent the state from using concededly illegal means to pressure defendants to waive their constitutional rights.

Typically, however, the question of involuntariness arises not from the state's applying pressures that are overwhelming or illegal in themselves, but from the state's using its otherwise lawful authority over the charging and sentencing process to discourage defendants from asserting their rights or (being the same thing) to encourage them to waive their rights. It is here—where the state structures the terms of defendants' choices by making it more or less costly for them to assert their rights—that the Court is ambivalent. With respect to the waiver of single constitutional rights, the Court has held that the state may not structure the terms of the defendant's choice so as to "penalize" a de-

30. Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination*, 6 AM. CRIM. L.Q. 187, 191 (1968).

31. Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: COURTS 108, 116 (1967).

32. Thus, a waiver is involuntary if it is the product of a hypnotic or unconscious act. *See* Chalker, *supra* note 30, at 191. A waiver is also involuntary if it is the product of an act that, though conscious, is nonetheless unwilled. *See* Parker v. North Carolina, 397 U.S. 790, 801 (1970) (Brennan, J., concurring in Brady v. United States and dissenting in Parker v. North Carolina) (a waiver is involuntary if "the physical or psychological tactics employed exerted so great an influence upon the accused that it could accurately be said that his will was literally overborne").

33. *See* Fontaine v. United States, 411 U.S. 213, 214-15 (1973); Broxson v. Wainwright, 477 F.2d 397, 398-99 (5th Cir. 1973).

34. *See* Waley v. Johnston, 316 U.S. 101, 102-04 (1942); Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir.), *cert. denied*, 400 U.S. 852 (1970). *See generally* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, *supra* note 2, at 48-50.

fendant for asserting those rights.[35] On the other hand, with respect to the wholesale waiver represented by a guilty plea, the Court has held that it is not unconstitutional for the state to structure the terms of a defendant's choice so as to "encourage a guilty plea by opportunity or promise of leniency."[36] Thus in order to decide whether a prosecutor's breach of a plea agreement renders the underlying guilty plea involuntary, we must identify the rationale that distinguishes a lawful "inducement" from an illegal "penalty."

The answer lies in the reconciliation of *United States v. Jackson*[37] with *Brady v. United States*.[38] The two cases share a common nucleus of fact: they both involve the effect of the Federal Kidnapping Act[39] on a defendant's exercise of the right to trial by jury. The statute provided different maximum penalties for kidnapping, depending on whether a defendant exercised the right to a jury trial. A defendant who demanded a jury trial and was convicted could be sentenced to death; a defendant who elected to be tried by a judge and was convicted, or who was convicted following a guilty plea could receive no penalty greater than life imprisonment. In short, the statute was structured in such a way that it imposed a risk of greater punishment on defendants who asserted their right to be tried by jury than on defendants who waived their right to a jury trial.

Despite their common subject matter, *Jackson* and *Brady* were decided differently. The defendant in *Jackson* asserted his right to be tried by a jury despite the statutory differential in sentences. On a subsequent appeal the Supreme Court invalidated the death penalty provision, holding that the sentence differential was unconstitutional because it imposed "an impermissible burden upon the exercise of a constitutional right."[40] Accordingly, in order to remove the portion of the sentencing scheme that "penalized" the defendant for asserting the right to jury trial, the Court held that following conviction by a jury, the defendant could receive no sentence in excess of life imprison-

35. United States v. Jackson, 390 U.S. 570, 581-83 (1968).

36. Brady v. United States, 397 U.S. 742, 750 (1970).

37. 390 U.S. 570 (1968).

38. 397 U.S. 742 (1970).

39. At the time *Jackson* and *Brady* were decided, the Federal Kidnapping Act provided as follows:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . shall be punished (1) *by death* if the kidnaped person has not been liberated unharmed, and *if the verdict of the jury shall so recommend*, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Ch. 645, 62 Stat. 760 (1948), *as amended by* Ch. 971, 70 Stat. 1043 (1956) (emphasis added). Following the decisions in *Jackson* and *Brady*, the Act was substantially modified and the death penalty provision replaced with a maximum sentence of life imprisonment. *See* 18 U.S.C.A. § 1201 (West Supp. 1977).

40. 390 U.S. at 572.

ment.[41]

Like the defendant in *Jackson*, the defendant in *Brady* was also given the choice between asserting his right to jury trial (and thus risking receipt of the death penalty) and waiving jury trial (and thus avoiding the risk of death). But instead of asserting his right to jury trial, Brady pleaded guilty—that being the only other choice open to him[42]—and then challenged his conviction on the ground that the statutory scheme operated to "deter" him from asserting his right to jury trial. This time, however, in a decision that has since been described as "enigmatic,"[43] the Supreme Court rejected the claim. Although the Court was willing to assume that the sentencing differential alone had caused Brady to plead guilty,[44] it nonetheless upheld the conviction, stating that it is not "unconstitutional for the State to extend a benefit to a defendant"[45] for waiving the right to a jury trial.

One way to reconcile the apparent inconsistency between *Jackson* and *Brady* is to distinguish the *rejection* of an inducement from its *acceptance*. The argument assumes that certain inducements may not be offered a defendant in exchange for the waiver of constitutional rights. If they are, and the defendant rejects them, as the defendant did in *Jackson*, the Court will order that he nonetheless be given the full value of the inducement in order to prevent him from being "penalized" for having asserted his rights.[46] If, however, the defendant accepts

41. The trial court in *Jackson* entered an order before trial dismissing the kidnapping charge on the ground that the statute was unconstitutional in its entirety. The Supreme Court reversed, holding that the defendant could be tried and convicted of kidnapping under the statute, provided that the death penalty provision were severed. 390 U.S. at 585-91. Thus, while the defendant himself had not yet been tried or convicted in *Jackson* the Court implicitly held that if he had been tried by a jury, convicted and sentenced to death, the appropriate remedy would have been to vacate the death sentence and replace it with a maximum sentence of life imprisonment. *Accord*, Pope v. United States, 392 U.S. 651 (1968).

42. Unlike the defendant in *Jackson*, defendant Brady did not enjoy the option of avoiding a possible death sentence by going to trial before a judge, because the judge informed Brady that he would not preside over a noujury trial. 397 U.S. at 743. Given the judge's refusal to try the case without a jury, Brady had only two alternatives—either to avoid the risk of the death penalty by pleading guilty, or to run the risk of the death penalty by standing trial. Consequently, in the context of Brady's case, the statute operated not to burden trial by jury as opposed to trial by judge, but rather to burden trial itself as opposed to a plea of guilty.

43. Davis, *supra* note 20, at 134.

44. 397 U.S. at 749-50. The lower court in *Brady* found that it was not the sentence differential but rather other considerations that led the defendant to plead guilty. Justice Brennan's agreement with this conclusion formed the basis for his concurrence with the Court's disposition in *Brady*. 397 U.S. at 815-16. Nonetheless, the majority in *Brady* sustained the guilty plea even though assuming arguendo that the sole cause of the defendant's plea was the sentence differential, and that his anticipation of his codefendant's cooperation with the prosecutor had no effect. 397 U.S. at 749-50. Any ambiguity in this regard was resolved in North Carolina v. Alford, 400 U.S. 25 (1970), in which the Court reached a similar result although it was undisputed that the sole motivation for pleading guilty was the defendant's desire to avoid the death penalty.

45. 397 U.S. at 753.

46. See note 41 *supra*.

the inducement by pleading guilty, as the defendant did in *Brady*, the plea is not necessarily invalid. Rather, the waiver will be upheld unless it was obtained by "actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[47] This approach appears to be the one adopted by the Court in *Brady* to distinguish the case from *Jackson*.[48]

The Court's attempted reconciliation of *Brady* and *Jackson* is wholly inadequate. As Justice Brennan demonstrated in his concurring opinion in *Brady*, the Court's analysis leads to the anomalous and inequitable result that whether defendants are entitled to relief for the burdening of their constitutional rights depends upon whether they succumb to the burden.[49] It is difficult to understand how this can be a principled way to distinguish between defendants who appear to be similarly situated. Further, one cannot believe that the Court really accepts the rule as stated because, among other things, the rule would require that a defendant who is offered a reduced sentence in exchange for pleading guilty but who rejects the offer would be entitled to demand that any sentence following trial be reduced to the lowest level offered during the plea negotiations.[50] One must conclude, therefore, that the Court's effort to distinguish *Brady* from *Jackson* is untenable.[51]

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47. 397 U.S. at 750.

48. *Id.* at 745-48.

49. *See* Parker v. North Carolina, 397 U.S. 790, 807 (1970) (Brennan, J., concurring in *Brady* and dissenting in *Parker*).

50. The argument that defendants who reject the state's offer by refusing to plead guilty are entitled to whatever benefits they would have received had they accepted the inducement has been made and rejected. *See* United States v. Resnick, 483 F.2d 354, 358 (5th Cir.), *cert. denied*, 414 U.S. 1008 (1973):

> Reaching to the bottom of the barrel for his last contention on appeal, appellant suggests that he should be given the fruits of an abandoned bargain—in spite of the fact that he pleaded "not guilty." To allow the imposition of the greater sentence, he argues, punishes him for exercising his Fifth and Sixth Amendment rights . . . . But it stretches our credulity to think that one who declines to plead guilty with a recommended sentence acceptable to the Court should nevertheless be given the benefits of a bargain available to, but rejected by, him.

51. To be sure, it can separately be argued that by choosing to plead guilty, a defendant *waives* or *forfeits* whatever constitutional objections he may otherwise have to the way in which the state has structured his right to stand trial. This argument for the forfeiture of constitutional rights is based on the recognition that it is very difficult for the state successfully to prosecute a defendant who has caused it to terminate its investigation by pleading guilty, and that the state thus has a very strong interest in the finality of guilty pleas. Accordingly, a defendant who wishes to argue that the state has "burdened" his right to go to trial may be required to do so by motion before trial or by appeal following trial; if he proceeds by pleading guilty, he may be deemed to have forfeited his claim. For further analysis of the principle of forfeiture in the context of guilty pleas, *see* Westen, *Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977). Interestingly, the Court appeared to rely on the principle of forfeiture as an alternative ground for its decision in *Brady*, holding in Part III of its opinion that regardless whether the kidnapping statute induced the defendant to waive his right to stand trial, the defendant forfeited his objection by pleading guilty. 397 U.S. at 756-58.

A second approach is to focus on the Court's characterization of the inducement in *Brady* as a "benefit"[52] and in *Jackson* as a "burden."[53] Thus, sentence differentials that impose a burden on a defendant for asserting his rights must be distinguished from differentials that confer a benefit on him for waiving his rights. Although the Court spoke in terms of "benefits" and "burdens" in *Jackson* and *Brady*, it is not clear whether the Court meant by these terms to do anything other than merely to restate the distinction between accepting an inducement and rejecting it. In any event, whatever the distinction between "benefits" and "burdens" may mean in other contexts,[54] it cannot be used to distinguish *Brady* from *Jackson*, because precisely *the same differential* was involved in each case. It can hardly be said that the statutory difference between the death penalty and life imprisonment was a "burden" in the one case and a "benefit" in the other. It was either a burden in both, or a benefit in both.[55]

A third approach would eschew any asserted constitutional difference between benefits and burdens or between the acceptance and rejection of inducements and, instead, would explain the different results in *Jackson* and *Brady* by reference to the state's especially strong interest in encouraging defendants to forgo trial by pleading guilty. It is generally assumed that the state has an interest in settling criminal cases by means more economical than litigation, and that the vast numbers of guilty pleas accepted each year relieve courts of an otherwise unmanageable burden.[56] Further, even in *Jackson* the Court implied

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Nonetheless, there are two things that must be said about the relationship of forfeiture to the decision in *Brady*. First of all, the argument for forfeiture does nothing to explain the distinction between *accepting* an inducement and *rejecting* it, except where acceptance happens to take the form of a plea of guilty. In other words, forfeiture provides no support for the general proposition that by yielding to illegal coercion on the assertion of his constitutional rights, a defendant loses the right to object to the coercion; rather, insofar as forfeiture applies at all, it is limited to those cases in which the defendant responds to the coercion by adopting the particular and dispreferred response of pleading guilty.

Second, although the Court could have based its decision in *Brady* solely on grounds of forfeiture, it chose not to do so. Instead, it based the principal part of its opinion not on the argument that the defendant had forfeited the opportunity to challenge an illegal inducement but rather on the proposition that the differential sentence did not in any way constitute an illegal inducement. Thus, *Brady* cannot be fully explained by the procedural notion of forfeiture: it also stands for the substantive proposition that the defendant there had nothing at all to forfeit, because he had no valid constitutional claim in the first place. This has now been confirmed, because the Supreme Court has held that a defendant cannot complain about the state's use of differential sentencing to induce guilty pleas, even where the defendant responds by *rejecting* the inducement and standing trial. *See* Bordenkircher v. Hayes, 98 S. Ct. 663 (1978).

52. 397 U.S. at 753.

53. 390 U.S. at 583.

54. As we shall discuss later, we believe it is meaningful to distinguish between "benefits" and "burdens" for purposes of plea bargaining. See text accompanying note 70 *infra*.

55. We conclude that the differential should be considered a benefit. See text accompanying note 97 *infra*.

56. *See* D. NEWMAN, *supra* note 2, at 3-4. *Accord*, Blackledge v. Allison, 431 U.S. 63, 71

that "inducements" (or "burdens") that are otherwise invalid may nonetheless be justified if supported by a sufficiently strong state interest.[57] Thus, one might conclude that the difference between *Jackson* and *Brady* was not the effect of the inducement on the defendant's rights, since the effect was identical in each case, but was rather the sufficiency of the state's interest in offering the inducement.[58]

This alternative explanation must be rejected as well, however, because if carried to its logical conclusion, it produces results that are unacceptable. If the state's interest in avoiding trials were sufficient to justify a policy of imposing burdens on the right to go to trial, the state could make the policy explicit. That is, the state could adopt a statute containing two separate sentencing schedules—one for defendants convicted following trial, the other for defendants convicted on guilty pleas. If, for example, the state determined it to be desirable for at least ninety percent of all defendants to plead guilty, it could calculate the average percentage increase in sentence necessary to guarantee that result and, having done so, provide by statute that defendants who assert their right to stand trial and are convicted will receive an explicit penalty corresponding to the calculated increase in sentence.[59] Indeed, if

(1977). Of course, this interest was not involved in *Jackson*, since the defendant was encouraged to waive only his right to trial by jury—not to forgo trial entirely by pleading guilty.

57. "Whatever might be said of Congress' objectives, they cannot be pursued by means that *needlessly* chill the exercise of basic constitutional rights. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is *unnecessary* and therefore excessive." 390 U.S. at 582 (footnotes omitted, emphasis added). Thus, the Court appears to have left open the possibility that in a case involving a stronger showing of need, even the sentencing scheme in *Jackson* might be constitutioual.

In the subsequeut case of Chaffin v. Stynchcombe, 412 U.S. 17, 29-35 (1973), the Court distinguished *Jackson* and upheld a state scheme that allowed a jury to give a greater sentence following appeal, reversal, and retrial than was originally given. In so doing, the Court emphasized the tenuous nature of the burden on the right to appeal and relied heavily upon its prior ruling in Crampton v. Ohio, 402 U.S. 183 (1971), which stated that not all encouragement to waive constitutional rights in the criminal context is unconstitutional. Others have questioned this distinguishing of *Jackson* and have suggested that *Chaffin* actually represents a significant retrenchment regarding how "necessary" the system that burdens constitutional rights must be. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 239-43 (1973).

58. This appears to be the conclnsion reached by Professor Dix. *See* Dix, *supra* note 18, at 258-59 ("The only possible justification for legitimizing discretionary rewarding of waivers is that relied on in *Brady v. United States*: sueh official behavior is inevitable and essential to the continued existence of the criminal justice system because without waivers eucouraged in this fashion cases conld simply not be processed."). *Accord*, Note, *The Preliminary Hearing In California: Adaptive Procedures In a Plea Bargaining System of Justice*, 28 STAN. L. REV. 1207, 1215 (1976).

59. One author has proposed a scheme similar to this hypothetical, except for one crucial difference. The author proposes that the sentencing authorities determine the appropriate sentence for every defendant and then reduce the sentence by a fixed perceutage, the "specific discount rate," as an inducement to those defeudants who plead guilty. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 301 (1972). *See also* Alschuler, *The Trial Judge's Role In Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1124-29 (1976). The difference between the Yale Note's proposal and the hypothetical case is that the former offers a "benefit" to defendants who plead guilty, while the latter imposes an explicit "burden" or "penalty" on defendants who stand

this "state interest" argument were truly sound, it would permit the state to impose an explicit penalty on *all* defendants who assert their right to go to trial—including defendants who are subsequently acquitted.[60] Yet the Supreme Court has repeatedly held, and continues to hold, that a sentencing differential is unconstitutional if it has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them."[61] As long as the Court adheres to this principle, the difference between *Jackson* and *Brady* cannot be explained by the strength of the state's interest in avoiding trials.

A fourth approach is to assume that there is no valid distinction between the two cases. Hence, if *Jackson* remains good law, as the Court still assumes it to be,[62] then *Brady* must be overruled. Although this is the solution Professor Alschuler prefers,[63] such a ruling seems unlikely, considering the Court's continued adherence to *Brady* and its outspoken solicitude toward plea bargaining as an integral part of the administration of criminal justice.[64]

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trial. See note 70 *infra* and accompanying text. Thus, although the hypothetical case is unconstitutional, see note 61 *infra* and accompanying text, the *Yale Law Journal* proposal may survive constitutional challenge.

60. In Fuller v. Oregon, 417 U.S. 40 (1974), the Court was asked to pass on the constitutionality of a state statute that required defendants who were *convicted* to reimburse the state for the costs of appointed counsel, but exempted defendants who were *acquitted*. The defendant challenged the statute on the ground that the distinction between convicted and acquitted defendants was invidious. Although the Court upheld the statute, it took pains to emphasize that its scope of review was "limited," and that its decision was not to be taken as evidence that the statutory distinction was "wise" or "desirable." Considering the Court's noticeable lack of enthusiasm over the distinction between convicted and acquitted defendants, it is fair to assume that the Court would sustain the validity of a statute that imposed an identical responsibility for reimbursement on both convicted and acquitted defendants. Accordingly, if it is constitutional to penalize convicted defendants for insisting on standing trial, then it would also be constitutional to penalize acquitted defendants to the same extent, because each imposes the ideutical costs on the state by refusing to plead guilty.

61. United States v. Jackson, 390 U.S. 570, 581 (1968). *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutioual' ") (citing *Jackson* and quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32-33 n.20 (1974)); United States v. Derrick, 519 F.2d 1, 3 (6th Cir. 1975) (vacating defendant's sentence and remanding for resentencing because it "is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty and go to trial, no matter how overwhelming the evidence of his guilt").

62. *See* Gregg v. Georgia, 428 U.S. 153, 192 (1976) (opinion of Stewart, J.); National League of Cities v. Usery, 426 U.S. 833, 841 (1976).

63. *See* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, *supra* note 2, at 70-71. *Accord*, Note, *Unconstitutionality*, *supra* note 2.

64. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) (citing *Brady*):

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it

A fifth and final approach to the problem—and the one proposed here—focuses upon the interests underlying the principle that the state shall not impose "burdens" on constitutional rights by discouraging their assertion. In order to decide what, if anything, the state may do to discourage defendants from asserting their rights, we must understand *why* we are reluctant to discourage the assertion of constitutional rights.

One possible reason is the defendant's personal interest in receiving the full value of his procedural rights. Assume, for example, that a legislature defines criminal offenses broadly, intending the executive branch (through the person of the prosecutor) to determine public policy regarding the proper level at which to charge particular defendants. Based on the available evidence, a prosecutor has probable cause to charge a defendant with either of two offenses of differing gravity. In accord with his delegated authority and based on an assessment of the defendant's conduct, the prosecutor makes an official determination that the defendant should be charged with the lesser of the two offenses. Yet at the same time, the prosecutor is anxious to avoid going to trial. Therefore, in order to deter the defendant from asserting his right to stand trial, the prosecutor advises the defendant that unless he pleads guilty to the lesser offense, he will be charged instead with the higher offense. In short, the prosecutor is willing to admit that in his official judgment, prosecution for the higher offense is not in the public interest but is solely designed to discourage the defendant from exercising his constitutional rights.

The result in such a case should be obvious. The prosecutor, possessing final authority within the jurisdiction to establish prosecutorial policy, concedes that he has engaged in "overcharging" [65]—*viz.*, that he

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enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Accord, Blackledge v. Allison, 431 U.S. 63, 71 (1977).

Similarly, *Jackson* cannot be dismissed as merely an aberration attributable to the Supreme Court's misgivings concerning the death penalty. The Court has indicated that it will apply its holding in *Jackson* to cases in which death in not one of the possible punishments confronting the accused. *See* Middendorf v. Henry, 425 U.S. 25, 48 n.25 (1976). Moreover, lower courts have stated that they regard *Jackson* as dispositive even in cases where the defendant waives his right to jury trial and thereby avoids the possibility of a sentence of death. *See, e.g.*, Robinson v. United States, 394 F.2d 823, 824 (6th Cir. 1968).

65. The term "overcharging," like "voluntariness," is used in very different ways. Sometimes it is used to describe cases in which the principal defect is the lack of probable cause—cases in which the prosecutor charges a defendant with an offense for which there is insufficient evidence. *See, e.g.*, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(3)(a), at 244 (1975). "Overcharging" is also used to describe cases in which the principal defect is unequal treatment—cases in which the prosecutor charges a defendant with an offense more serious than that ordinarily brought against defendants who committed the same acts. *See, e.g., id.* "Overcharging" is used here in still a third sense, to describe cases in which the prosecutor charges a defendant with an offense that—though supported by evidence and regularly charged against other defendants similarly situated—is more serious than the prosecutor believes is justified by the nature of the defendant's conduct. For a description of this use of the term "overcharging," *see*

has threatened the defendant with prosecution on the higher charge solely to "penalize" the defendant for asserting his constitutional rights. Accordingly, the defendant should be entitled to relief, because the prosecutor has acted to deprive the defendant of the value of the latter's constitutional rights.[66] If the defendant responds to the threat by pleading guilty, he can demand that the plea be set aside;[67] conversely, if he nonetheless insists on standing trial and is convicted, he can demand that the charge or sentence be reduced to the maximum level he would have received for the lesser charge.[68] In either event the prosecutor has

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Dix, *Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 353-54 n.247. The defect in "overcharging" of this third kind is that the state, speaking through a representative possessing final authority to so announce, admits that it has *no interest* in charging the defendant with a particular offense except to penalize him for asserting his constitutional rights.

66. This hypothetical case must be distinguished from Bordenkircher v. Hayes, 434 U.S. 357 (1978) (defendant, after being convicted of a higher offense, is not automatically entitled to relief simply by showing that the prosecutor charged him with the higher offense only after he refused to plead guilty to a lesser offense). The prosecutor in *Bordenkircher* did *not* admit that prosecution on the higher charge was contrary to the "public interest" or was designed solely to "penalize" the defendant for standing trial. To be sure, the lower court did conclude that the prosecutor "admitted" that he acted from a "vindictive motive" in charging the defendant on the higher offense. *Id.* at 361 n.7. But the Supreme Court rejected that finding. Indeed, the Court agreed that "to penalize a person's reliance on his legal rights is 'patently unconstitutional.' " *Id.* at 363. The Supreme Court rejected the finding of "vindictiveness" because it rejected the lower court's reasoning. The lower court based its finding of vindictiveness on two assumptions. First, the lower court drew an inference of vindictiveness from the timing of the prosecutor's charge. That is, the lower court concluded that by not bringing the higher charge originally, the prosecutor created a "strong inference" that he did not think the charge was appropriate. 547 F.2d at 44-45. The Supreme Court refused to draw an inference based on that "chronological distinction." 434 U.S. at 361. *Compare id.* at 367 (Blackmun, J., dissenting); *id.* at 372 (Powell, J., dissenting). Second, the lower court apparently concluded that by admitting that the threat of prosecution on the higher charge was designed in part to "save the [trial] court the inconvenience and necessity of a trial" (*id.* at 358 n.1), the prosecutor conceded that the higher charge was not otherwise appropriate. But the Supreme Court rejected that assumption as well. Rather, the Court analogized the case to one in which a prosecutor originally brings a higher charge and then offers to reduce it if the defendant pleads gnilty. In both cases, the higher charge may be appropriate, and yet the prosecutor may be willing to give the defendant an incentive to plead guilty in order "to persuade the defendant to forgo his right to plead not guilty." *Id.* at 364. In other words, the fact that a prosecutor's desire to enhance his bargaining position plays a "part" (*id.* at 365) in the decision to file a charge does not mean that that is the sole motivation or that the charge itself is otherwise inappropriate. Thus *Bordenkircher* should not be taken to stand for the proposition that a prosecutor may threaten a defendant with prosecution on a charge that is contrary to the public interest or that serves no purpose but to penalize the defendant for standing trial. Rather, the case is decisive authority for the proposition that "vindictiveness," if proved, is "patently unconstitutional," bnt also holds that the particular evidence of vindictiveness in that case—the timing of the higher charge and the prosecutor's statement of reasons for the higher charge—was insufficient to justify a finding of vindictiveness.

67. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21, 24-29 (1974) (defendant who pleaded guilty to a greater charge in the face of a vindictive threat of a higher sentence may challenge his plea).

68. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969) (defendant whose sentence was based in part on a vindictive desire to punish him for asserting his right of appeal may have the portion of the senteuce that reflects vindictiveness set aside).

imposed an "impermissible burden" on the defendant's assertion of his rights.

But to say that the state has imposed a "burden" on the defendant's rights is to assume that his constitutional "interests" have been abridged. That, in turn, raises the question of what those interests are. In this context, the answer is fairly obvious. The Constitution provides defendants with certain procedural protections to safeguard them from being convicted of offenses they did not commit. A prosecutor who uses the charging authority to make defendants pay a price for asserting their rights impairs the value of those rights to the defendants. The result, of course, will be that defendants either will not take advantage of their procedural safeguards as readily as they otherwise would, or will do so at an additional cost. In either event, the prosecutor has taken something of the defendant's—the value of his constitutional rights—without giving anything in exchange.

The previous example assumed that the prosecutor used the charging authority solely for the purpose of impairing the value of the defendant's procedural rights. That is, the prosecutor admitted that prosecution on the higher charge was solely designed to deter the defendant from asserting those rights. In most cases, however, the state's purposes are less explicit. For example, suppose that in exercising his delegated authority to define prosecutorial policy the prosecutor makes an official determination that it is appropriate to charge a defendant with a certain offense. The prosecutor still wishes to avoid taking the case to trial; but rather than threatening the defendant with a charge that is not otherwise justified by the defendant's conduct, the prosecutor agrees instead to charge the defendant with a lesser included offense in return for a plea of guilty. The question now is whether the defendant's "interests" are the same here as in the previous hypothetical.

It is tempting to say that the two hypotheticals are identical, because in each case the defendant must risk a higher level of punishment in order to assert the right to stand trial.[69] But there is a significant difference between the two cases, and the difference lies in the maxi-

69. Some authorities assume that there is no conceptual validity to the distinction between "benefits" and "burdens" in the area of plea bargaining. That is, they assume that once a defendant's choices are structured so that he receives a lesser sentence for pleading guilty than for standing trial, it makes no difference whether one says that he has been threatened with a "penalty" for standing trial or that he has been offered a "benefit" for pleading guilty. *See* Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969) (Bazelon, C.J.); People v. Earegood, 12 Mich. App. 256, 268, 162 N.W. 2d 802, 812 (1968), *modified*, 383 Mich. 82, 173 N.W.2d 205 (1970); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS REPORT, § 3.1, at 48 (1973); Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar With the Department Store*, 5 AM. J. CRIM. L. 215, 222 (1977); Note, *Unconstitutionality, supra* note 2, at 1397-1401; Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 220 (1956).

mum punishment the defendant risks. In the first hypothetical, if the prosecutor is prohibited from offering the defendant an inducement to plead, the prosecutor will reduce the maximum possible punishment by reducing the charge, because he admits that the defendant's conduct does not justify the higher charge. In the second case, if the prosecutor is prohibited from offering the defendant a concession to plead guilty, he will resort to charging the defendant on the original, higher charge, because that is the charge he believes justified by the defendant's conduct. Thus, a criminal defendant, if given a choice, would undoubtedly oppose the first kind of bargain, but strongly favor the second.

To that extent, there is a meaningful distinction between "burdens" and "benefits" in the area of plea bargaining. The distinction turns on whether the risks a defendant faces in standing trial are greater than the risks he would face if plea bargaining were abolished (a "burden"), or whether the risks of standing trial are either the same as or no greater than the risks he would face if plea bargaining were prohibited (a "benefit").[70] The defendant in the first hypothetical was threatened with a "burden," because if plea bargaining were abolished he would be charged with the lesser offense. In contrast, the defendant in the second hypothetical was offered a "benefit" for pleading guilty, because if bargaining were abolished, he would be charged with the greater offense.

This difference between benefits and burdens is significant because it bears on the conclusion that the constitutional interest to be protected is the defendant's self-interest in receiving the full benefit of his procedural entitlements. It makes perfect sense to invoke a defendant's self-interest to invalidate a "burden" on his right to stand trial, because the defendant will then be able to stand trial on the lesser charge. But those cases are rare, because the courts pay such deference to the exercise of prosecutorial "discretion"[71] that it is difficult to prove that a prosecutor has engaged in overcharging.[72] In most cases, there-

70. Several courts have adopted this distinction between burdens and benefits. *See, e.g.*, Fielding v. LeFevre, 548 F.2d 1102, 1106 (2d Cir. 1977); United States v. Wiley, 267 F.2d 453 (7th Cir. 1959); United States v. Rodriguez, 429 F. Supp. 520, 524 n.5 (S.D.N.Y. 1977). (*Cf.* United States v. Ramos, 572 F.2d 360, 362-63 (2d Cir. 1978) (Lumbard, J. concurring)). Certain commentators also have adopted the distinction. *See* ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.8 at 37, 51-52 (1967); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(3) at 244-45, 609-17 (1975).

71. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

72. The Court in *Bordenkircher* rejected the invitation to treat the *timing* of the prosecutor's threat of a higher charge as circumstantial evidence of intent to overcharge. See note 66 *supra*. Without circumstantial evidence or an explicit admission by a prosecutor, however, defendants will find it difficult, if not impossible, to prove overcharging. What this means, of course, is that although the Court emphasized that a defendant may not be "penalized" for asserting the right to stand trial, the Court has implicitly taken the state's "interest" into account in structuring the rules of proof in such a way that defendants will rarely, if ever, be able to prove that they have been

fore, it must be assumed that the prosecutor has structured the charges so as to offer the defendant a "benefit" for pleading guilty. Yet it hardly makes sense to invoke the defendant's self-interest to prevent a defendant from accepting such a "benefit," if the ultimate result is to make the defendant stand trial on a higher charge.

To illustrate this point more dramatically, assume that a defendant is legitimately charged with an offense carrying a maximum sentence of ten years imprisonment. Although the evidence against the defendant is substantial, the prosecutor prefers to dispose of the case without a jury trial, and therefore agrees to dismiss the charge and replace it with a charge carrying a sentence of no more than probation if the defendant agrees to waive the right to jury trial. To say that the prosecutor's offer is contrary to the defendant's self-interest is simply unbelievable. At the very least, if we were truly and solely concerned with the defendant's self-interest, we would let *him* decide how much a trial by jury was worth *to him*.[73] That is, we would leave it to the defendant himself to decide whether his interests were better served by asserting his right to jury trial or by waiving it. The same is also true of a plea bargain in which the defendant is offered a concession in exchange for a guilty plea. As long as the prosecutor does not overcharge the defendant to begin with, the defendant should be allowed to decide that *to him* the value of the concession is greater than the value of standing trial.[74]

In short, if the defendant's self-interest is the only controlling consideration, then in the absence of overcharging there should be *no* con-

"penalized." In that sense, in weighing the defendant's right to stand trial against the state's interest in discouraging trial, the Court is giving real—though hidden—weight to the state's interest.

73. Thus we agree with Professor Goldstein that as long as the state is truly and exclusively concerned with the dignity of the individual, it should leave to the individual the autonomy to decide for himself what is in his own best interests. Goldstein, *supra* note 2, at 696-98, 700-01. Of course, we go on to argue that in the context of plea bargaining, the state is concerned not only with the dignity of the individual, but also with the accuracy of the criminal justice system, and that this additional interest in accuracy permits the state to limit the range of choices available in plea bargaining. See notes 77-78 *infra* and accompanying text. (Interestingly, in the context of medical experiments on prisoners, Professor Goldstein concedes that the state would be justified in setting similar limits on the range of choices available to prisoners if necessary to protect its interest in avoiding "Nuremberg-like abuses." *Id.* at 697.) Moreover, we would also argue that it is society's interest in the accuracy of plea bargaining that justifies giving a defendant standing (on society's behalf) to challenge the validity of an "involuntary" guilty plea.

74. To be sure, it can rationally be argued that a defendant is not the best judge of his own constitutional "interests," and that it is a feature of his constitutional rights that he not have the final word on their value to him. But even if an argument for paternalism is rational, it flies in the face of our constitutional tradition. In Gilmore v. Utah, 429 U.S. 1012 (1976), for example, the defeudant's mother argued that the defendant was not the best judge of whether it was in his interests to raise a constitntional claim as to the validity of his pending death sentence, and that she, as his "next friend," should be allowed to assert his interests on his behalf. The Supreme Court rejected the argument, holding that the defendant had made "a knowing and intelligent waiver of any and all federal rights." *Id.* at 1014.

stitutional restraints at all on the kinds of inducements a defendant could be offered to plead guilty. Presumably, the state could offer a defendant unlimited "benefits" to induce him to plead guilty, including inducements so alluring that he could never reasonably afford to assert his rights. Yet the Court has held that "there are *undoubtedly* constitutional limits"[75] on the terms on which plea agreements are structured. In *Brady* itself the Court noted that it would have "serious doubts" about the validity of "offers of leniency" if they "substantially increased the likelihood that defendants . . . would falsely condemn themselves."[76]

Since the Court apparently objects to the offering of certain inducements even where accepting them would be in the defendant's own best interest, it follows that the Court is implicitly protecting some interest other than the defendant's self-interest. This other interest is not hard to find. It is the same consideration that preoccupies so many authorities on plea bargaining—society's interest in preventing defendants from "falsely condemn[ing] themselves."[77] Most procedural rights, and certainly the right to plead "not guilty," are designed to enhance the accuracy of the factfinding process and to ensure that only the guilty are convicted. To allow the state to bribe defendants to waive their rights by offering inducements that are clearly disproportionate to the potential value of the procedural rights would undermine the accuracy of the criminal justice system. No matter how innocent an individual believes himself or how important he considers his procedural rights, at some point his options can always be structured so as to induce him to waive his procedural rights. Therefore, in the interest of accuracy, some limitations must be placed on the kinds of incentives that may be offered a defendant to induce him either to waive his rights selectively (as in *Jackson*) or to waive them wholesale by pleading guilty (as in *Brady*).[78]

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75. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (emphasis added).

76. 397 U.S. at 758.

77. *Id.* With reference to "innocent" defendants, it is important to distinguish between defendants who did not actually commit the acts alleged ("factual" innocence) and defendants who are factually guilty but would be acquitted if they had gone to trial ("legal" innocence). In expressing reservations that plea bargaining might induce defendants to condemn themselves "falsely," the Supreme Court in *Brady* was clearly concerned about defendants who are "factually" innocent. This is also the primary concern of the commentators who have written about the danger that "innocent" defendants will plead guilty. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS REPORT, § 3.1, AT 48 (1973); D. NEWMAN, *supra* note 2, at 225-26; Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 60-64 (1968); Uviller, *Pleading Guilty: A Critique of Four Models*, 1977 LAW & CONTEMP. PROB. 102, 118-26.

There is no good evidence on how many, if any, factually innocent defendants plead guilty. On the other hand, there is evidence that substantial numbers of "legally" innocent defendants—defendants who would have been acquitted if they had gone to trial—now plead guilty. *See* Finkelstein, *supra* note 2.

78. See text accompanying note 92 *infra*. It is interesting to note that, insofar as constraints

To illustrate this point, assume that a defendant is charged with murder, a crime punishable in the jurisdiction by death. Further, suppose that a reasonable assessment of the case shows that the defendant has a fifty-fifty chance of being acquitted if he goes to trial. The defendant, firmly believing his own innocence, would normally demand a jury trial with its attendant procedural protections. If, however, the prosecutor offers the defendant the opportunity to plead guilty to a lesser offense carrying a maximum penalty of, say, thirty days in jail or probation, the defendant would almost certainly accept the offer. He would do so even though he truly believes himself to be innocent, because the potential risks of standing trial so greatly outweigh any possible gain. On the other side, the prosecutor, by making the defendant "an offer he cannot refuse," avoids the weaknesses in his case that might otherwise lead to acquittal. Thus, if a sentence concession is "too good" in light of the risks of trial, it undermines the accuracy of the criminal justice system.

Now that we have identified the interests underlying the general rule that constitutional rights should not be burdened—the defendant's self-interest in the full benefit of his procedural protections, and society's interest in the accuracy of criminal convictions—we can try to identify the specific rule that governs the area of plea bargaining. With respect to the imposition of "burdens," the answer is easy. The state may not overcharge or otherwise penalize a defendant for asserting the right to stand trial, because to do so abridges the defendant's self-interest in enjoying the full benefit of his procedural entitlements. With respect to the offering of "benefits," on the other hand, the answer is more difficult. Obviously, the goal is to prevent the state from offering inducements that are so irresistible that defendants will be "driven to false self-condemnation."[79] The difficulty is in fashioning a judicial standard to achieve that goal.

One possibility is the solution proposed by Judge David Bazelon

upon permissible inducements for waiver are attributable to concerns about accuracy, a very different test may apply to waiver of purely personal rights, such as the right against unreasonable searches and seizures under the fourth amendment. Such rights are not related to the accuracy of adjudication, but rather serve the interests of the citizen alone. The possibility is left open, therefore, that there are no constitutional constraints upon the positive inducement that can be offered for the waiver of these rights. This question is, however, outside the scope of this Article.

Some might argue that in addition to concern for the accuracy of the guilty plea, society's interest in the overall appearance of legitimacy in the criminal justice system requires that some constraint be placed on the inducements offered the plea-bargaining defendant. *See* Dix, *supra* note 18, at 217. Insofar as society questioned the legitimacy of large inducements, however, the concern would be largely attributable to a concern for accuracy; that is, people would be concerned that overly large inducements would encourage the innocent to plead guilty. The interest in institutional legitimacy would be fully protected, therefore, by adequate protection of the accuracy of the plea.

79. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

in *Scott v. United States*[80] to protect defendants from being "deterred from exercising their right to a trial."[81] Judge Bazelon would allow the state to offer defendants certain inducements to waive their rights, recognizing that the very existence of an inducement may make waiver a more attractive option for defendants than it otherwise would be.[82] On the other hand, in order to prevent the state from imposing a "chilling effect"[83] on the right to stand trial, Judge Bazelon would prohibit the state from making an inducement so advantageous to a defendant that the option of waiving his rights becomes more attractive to him than the alternative of asserting his rights. In the context of guilty pleas, this means that while a defendant may be offered certain concessions for pleading guilty, the value of the concessions may not exceed the expected value to him of standing trial:

> The danger presented by plea bargaining is that defendants deciding upon a plea will be deterred from exercising their right to a trial. The relevant vantage point is thus before trial, and the relevant comparison is between the expectations of those who decide to insist upon a trial and those who decide to eliminate the risk of trial by pleading guilty. If the sentence expectations of those two classes at that time are the same, then there will be no chilling effect upon exercise of the right to trial . . . .[84]

To ensure that the value of the concession does not exceed the value to the defendant of standing trial, the prosecutor must tailor the concessions to the defendant's " 'expected sentence before trial'—[the] length of sentence discounted by the probability of conviction."[85] In other words, the prosecutor may not offer to settle a criminal case with a defendant on terms that are more advantageous to the defendant than the discounted present value to him of standing trial. Thus, as the likelihood of conviction increases, the magnitude of the allowable concession decreases proportionately. Where the likelihood of conviction is fifty percent, the sentence concession may equal, but not exceed, one-half of the expected sentence following trial.

The strength of Judge Bazelon's analysis is that it focuses attention where it belongs—on the relationship between the magnitude of concessions on the one hand, and the perceived value to the defendant of standing trial on the other. As others have demonstrated,[86] however, Judge Bazelon's proposed solution presents problems of its own. For one thing, by requiring the state to calculate a defendant's "expected

80. 419 F.2d 264 (D.C. Cir. 1969).
81. *Id.* at 276-77.
82. *Id.* at 276.
83. *Id.* at 277.
84. *Id.* at 276-77.
85. *Id.* at 276.
86. *See* Note, *Unconstitutionality, supra* note 2, at 1401-02.

sentence before trial,"[87] the proposal assumes that prosecutors and courts can make precise predictions concerning the probability that a defendant will be convicted if he stands trial and the likelihood that he will receive particular sentences if he stands trial or pleads guilty. Yet the state lacks the information it would need to make those predictions accurately. Furthermore, by focusing on the effect of concessions on a defendant's state of mind, the proposal assumes that prosecutors and courts can account for the fact that different defendants have different "risk and time preferences";[88] yet the state has no easy way to determine whether defendants are risk averse or penalty averse.

Nonetheless, although Judge Bazelon's proposal may be unworkable in its original form and may fall short of its original purpose,[89] it can be modified to serve the task at hand. After all, the purpose of the present inquiry is not to prevent more defendants than not from being induced to plead guilty, but to prevent *innocent* defendants from being induced to plead guilty. Thus, instead of asking whether the state has made it more attractive to a defendant to waive his rights than to assert them, we should inquire whether the state has made it so attractive to the defendant to waive his rights that even an innocent defendant would perceive it to be in his self-interest to plead guilty. To reformulate the rule in that light, *a guilty plea is invalid if based on an inducement that is so advantageous compared to the alternative value of standing trial that even a defendant who believes himself to be factually innocent would plead guilty.*[90]

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87. 419 F.2d at 276.

88. *See* Note, *Unconstitutionality, supra* note 2, at 1402.

89. It is difficult to assess Judge Bazelon's test of proportionality on its own merits, because he fails to identify the *purpose* of the test. The test does not appear to be designed to protect factually innocent defendants from pleading guilty; on the contrary, Judge Bazelon appears to view the test as a protection for all defendants, whether guilty or innocent. On the other hand, by failing to distinguish between "benefits" and "burdens," Judge Bazelon fails to explain why defendants who are not factually innocent need to be protected from offers of excessive leniency. To be sure, in some of those cases, the defendants may have been overcharged in the first place; but in that event, *any* offer of differential sentencing should be invalid, even if it is tailored to the strength of the state's case. In the remaining cases, where the defendant is presumably receiving a "benefit" for pleading guilty, the defendant should be allowed to choose for himself whether accepting the offer is in his best interests.

90. The same test was proposed more than a decade ago by a student commentator: "Preferably, however, a flexible rule should be maintained under which the courts may void pleas in the rare cases in which the prosecutor's bargain has been so extreme as to give rise to the probability that an innocent defendant should have been induced to plead guilty." Comment, *Official Inducements to Plead Guilty: Suggested Morals For a Marketplace*, 32 U. CHI. L. REV. 167, 177 (1964) [hereinafter cited as Comment, *Official Inducements*].

What distinguishes this test from Judge Bazelon's is that the proposal makes an assumption about the risk preferences of the defendants it is designed to protect. Judge Bazelon's standard, being designed to protect all defendants, is difficult to apply in individual cases because of the difficulty of identifying the "risk and time preferences" of individual defendants. See text accompanying note 88 *supra*. The proposed test, on the other hand, being limited to the protection of factually innocent defendants, rests on the not unreasonable assumption that defendants who

This proposed standard has two important advantages. First, it gives the reviewing court a feasible standard for reviewing the constitutionality of plea agreements. The court must put itself in the position of a defendant who, knowing himself to be factually innocent, is confronted with the deal offered by the prosecutor. If, in light of the probability of conviction and the possible sentence upon conviction, the court concludes that even a defendant who is convinced of his own innocence would plead guilty, it must overturn the guilty plea. To be sure, the standard may not eliminate all inaccurate guilty pleas, but it provides a basis for overturning some plea agreements, and particularly those with which we should be the most concerned.

A second advantage of this proposed standard is that it comports with the concern expressed by the Court in *Brady*. Observing that there was no reason to doubt the truthfulness of Brady's admission of guilt,[91] the Court stated: "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves."[92] This suggests that in the interests of accuracy courts should "satisfy themselves"[93] that the state's offer of leniency is not excessive in light of the merits of its case.

From *Brady* and *Jackson* taken together, then, we can define the constitutional limits on the inducements that may be offered a defendant for waiving his procedural rights. The state may not overcharge or oversentence a defendant to discourage him from standing trial. Beyond that, however, it may offer him concessions to plead guilty, provided that the inducements do not make the alternative of waiving his rights so much more desirable to him than the alternative of asserting them that even an innocent defendant would be likely to condemn himself falsely.[94] In most cases plea agreements will not violate these latter limits because it is generally not in the prosecutor's interest to

know themselves to be factually innocent have a greater aversion to the stigma of conviction than factually guilty defeudants and, therefore, require an inducement that is stronger than usual in order to condemn themselves falsely.

91. 397 U.S. at 758.

92. *Id.*

93. *Id.*

94. In a series of cases involving public employment and state licensing of private employment, the Supreme Court has suggested a third possible restriction on inducements offered to encourage waiver of constitutional rights: that the receipt of public benefits can never be conditioned upon the recipient's waiver of their constitutional rights. In Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), for example, the Court held unconstitutional a provision of the New York City Charter which conditioned employment by the city on the employee's relinquishment of his fifth ameudment privilege against self-incrimination. *See also* Beilan v. Board of Educ., 357 U.S. 399, 412-14 (1958) (Douglas, J., dissenting). Similarly, the Court has closely scrutinized provisions which condition admission to the state bar upon the applicant's willingness to forego certain constitutional rights. *See, e.g.*, Konigsberg v. State Bar, 353 U.S. 252, 270 (1957). Thus, insofar as the concession offered a defendant in exchange for his plea of guilty can be considered a

make sentence and other concessions that are wholly unrelated to the strength of the case against the defendant. Insofar as the prosecutor does find such disproportionate concessions worthwhile, however, *Jackson* and *Brady* require that the plea agreement be struck down as unconstitutional.

This formulation may also explain one difference between *Jackson* and *Brady*. We concluded earlier that the different results in *Jackson* and *Brady* could not be explained by the difference between a benefit and a burden because they both involved the same differential—the effect of the death sentencing provision of the Federal Kidnapping Act on a defendant's right to jury trial. Thus, the differential was either a burden in both cases, or a benefit in both. On that issue it seems clear that the differential was not a burden. The death penalty provision was not the product of overcharging; it did not reflect a penalty that the legislature perceived to be excessive for the crime of kidnapping or that it intended as a penalty for demanding a jury trial.[95] If

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"benefit," the Court's decisions on the conditioning of public benefits must be considered as a possible restriction on what may be offered.

These cases on unconstitutional conditions can be distinguished on at least two grounds. First of all, the Court has never said that public benefits can never be conditioned on the waiver of constitutional rights. On the contrary, the Court has held that such conditions may be imposed if they are necessary to achieve the state's purposes in offering the benefit. *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971). That is certainly true here, because the state's very purpose in offering a defendant "benefits" regarding charges or sentencing is to induce him to forgo standing trial: the state would never make the offer except in exchange for the defendant's waiver of the right to stand trial.

Second, insofar as the Court has prohibited the state from conditioning the receipt of public benefits on the waiver of constitutional rights, it has done so with regard to rights in which the public has an interest, such as the first amendment rights of free speech and association, *see, e.g.*, Baird v. State Bar, 401 U.S. 1 (1971), rather than rights that are wholly personal to an individual. *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971) (fourth amendment right of privacy). Thus, the Court appears to be unwilling to leave it to individuals to decide how much their constitutional rights are worth to them, if doing so would encourage them to waive rights in which the public at large has an interest. Significantly, this distinction between rights in which the public has an interest and rights that are wholly personal helps explain the limits on the state's authority to offer a defendant "benefits" in return for his waiver of the right to stand trial. The state may offer a defendant charge and sentencing concessions up to the point at which the concessions become so attractive that even a factually innocent defendant would be induced to plead guilty, because at that point, the public at large has an interest in avoiding false self-incrimination, even if the defendant himself has no objection.

95. The Court in *Jackson* assumed that Congress' purpose in reserving the death penalty for jury-tried cases was not to impose an otherwise excessive or unjustified sentence on kidnappers convicted by a jury, but to provide a more lenient sentence for kidnappers convicted by a court or on a plea of guilty. Thus, the Court assumed that if the sentencing differential were abolished, Congress "might" respond by imposing the death penalty on every kidnapper:

> But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act may be viewed as ameliorating the severity of *the more extreme punishment that Congress might have wished to provide.*

390 U.S. at 581-82 (emphasis added).

it had been, the defendant Brady would surely have had a right to challenge its effect on his right to stand trial.[96]

It follows, therefore, that the statutory differential in *Brady* and *Jackson* was a "benefit" as the term is used here.[97] But that does not mean that the same result was required in each case. On the contrary, with respect to the danger of convicting innocent defendants, there is a significant difference between a defendant's induced waiver of *all* his constitutional rights (as occurred in *Brady*) and an induced waiver of a *single* constitutional right (as occurred in *Jackson*). The difference is that it is much easier to assess the value of a defendant's combined rights to stand trial, and hence to assess the validity of any given inducement to waive them, than to assess the value of a single procedural safeguard.

Most procedural rights, after all, are designed to protect innocent defendants from being falsely convicted. Accordingly, whenever the state allows a defendant to waive all his procedural rights by pleading guilty, it runs the risk that an innocent defendant will be falsely convicted.[98] With respect to spontaneous or noninduced pleas, the risk can be minimized by requiring the prosecution to present a "factual basis"[99] for the plea and by relying on the defendant to look to his own self-interest to avoid false self-condemnation. With induced or negotiated pleas, on the other hand, the factual basis requirement and the defendant's self-interest both become less reliable, because if an inducement to plead guilty is attractive enough even an innocent defendant may perceive it to be in his self-interest to make a false confession of guilt.[100] Therefore, with negotiated pleas there are two alternatives: either to prohibit the state from offering defendants any inducements

96. See text accompanying notes 61-70 *supra.*

97. The differenee between a "benefit" and a "burden" turns on the level of punishment the defendant could reasonably expect to risk if the sentencing differential were abolished. See text accompanying note 70 *supra.* Thus, in *Jackson* and *Brady*, the opportunity to avoid the death penalty by waiving trial by jury was a "benefit," because if the opportunity were abolished, Congress "might" respond by imposing the death penalty on every defendant. See note 95 *supra.*

98. It should not be assumed, however, that the guilty plea process creates a risk that would not otherwise exist, because even the plenary trial process creates some risk that innocent defendants will be falsely convicted. Thus, in deciding whether to allow defendants to plead guilty, the question is not whether the guilty plea process creates a risk of inaccuracy that did not exist before, but whether it increases the risk and, if so, whether the benefits of disposing of cases by means of guilty pleas justify the increase.

99. North Carolina v. Alford, 400 U.S. 25, 37-38 (1970); FED. R. CRIM. P. 11(f). For a thorough discussion of the requirement of a "factual basis" for the acceptance of guilty pleas, see Uviller, *supra* note 77, at 118-26.

100. Courts have attempted to minimize this risk [that innocent defendants will be tempted to plead guilty] by inquiring into the factual basis for the guilty plea before accepting it. This remedy is insufficient, though, because defense counsel might advise their clients to admit involvement in the crime in order not to jeopardize the bargain that has already been struck.

Note, *Transformation of the Process, supra* note 2, at 574-75.

to plead guilty, or to try to identify the particular inducements that present the greatest risks of false conviction. The courts have opted for the latter solution by prohibiting the state from offering defendants inducements that are "too good" to refuse. One can make that assessment with a guilty plea, because one can rationally assume that the value to a defendant of all his trial rights is the value of standing trial itself; that is, the likelihood that he will be acquitted.

With the waiver of a single constitutional right, on the other hand, there is no comparable way to assess its value to a defendant and, therefore, no comparable way to identify the kinds of inducement that are likely to lead to the conviction of innocent defendants. Suppose, for example, that a prosecutor offers a defendant a reduced sentence in return for waiving the right to counsel or the right to present witnesses. How does a defendant go about assessing the value of the particular safeguard to his case? Unlike the rights waived by a guilty plea, he cannot assume that any single safeguard is equal to the combined value of standing trial. Nor can he assume that it equals his overall chances of acquittal. Yet neither he nor the prosecutor has any other measuring rod. Consequently, the danger is that either he will underestimate or the prosecutor will overestimate its value to the case. In either event the existence of the inducement creates an unreviewable risk that an innocent defendant will be induced to waive procedural safeguards against false conviction.

To that extent, at least, the state creates a greater risk of false conviction when it induces a waiver of a single procedural safeguard than when it induces the waiver of the combined rights to stand trial. To quote from the Supreme Court in a related context, an offer of "lenient treatment" for the waiver of a single constitutional right may pose "a greater danger of inducing a false [conviction] by skewing the assessment of the risks a defendant must consider."[101] This additional risk

101. Bordenkircher v. Hayes, 434 U.S. 357, 364 n.8 (1978) (distinguishing the "constitutional implications" of inducing guilty pleas by offering the defendant benefits in the form of leniency to "some person *other* than the accused" (emphasis in original)).

Theoretically, of course, there is no difference between an offer of leniency to the defendant himself and an offer of leniency to a third person. In each case (absent overcharging), the defendant may well find it to be in his own self-interest to accept the "benefit"; in each case, the defendant should be allowed to make that decision for himself, unless he is an innocent person who is thereby induced to engage in false self-condemnation; in each case, therefore, the issue is whether the offer is so attractive to the defendant that even an innocent person would be induced to accept it. Hence, if there is a per se rule against all offers in the form of leniency for third persons, as the Court implied in *Bordenkircher*, it must be because of the difficulty of assessing—and, therefore, of reviewing—the value to the defendant of the offer. In other words, by "skewing the assessment of risks a defendant must consider," such offers create an unreasonable risk that innocent defendants will "be driven to false self-condemnation" (*id.* at 363).

In summary, the test proposed in this Article requires that guilty pleas be overturned in two different situations. First, a guilty plea is invalid if it is the product of an inducement that is so disproportionate to the weakness of the state's case that even an innocent defendant would be

may explain the apparent inconsistency between *Brady* and *Jackson*.[102] It may also explain why it is assumed to be "invalid"[103] to offer a defendant any significant inducement for the waiver of a single procedural safeguard.

This now brings us back to the question we began with: does a prosecutor's breach of a plea agreement render the defendant's plea "involuntary" by constitutional standards? If the foregoing analysis of the voluntariness requirement is correct, a prosecutor's breach of a promise has *no* effect at all on the voluntariness of the defendant's guilty plea. After all, with respect to the coerciveness of the prosecutor's offer, the crucial point in time is the point at which the offer is either accepted or rejected by the defendant: "Since 'voluntary' refers to the state of the defendant's will at the time of his plea, it should be possible to determine whether the plea was voluntary immediately after it is made by looking at the circumstances in which it was made."[104]

If the state elicits a plea of guilty from a defendant by applying pressures that override any exercise of his will, or by threatening him with actions that are illegal in themselves, or by overcharging him, the violation occurs when the plea is entered and the coerciveness of the threat is measured by its effect then. Similarly, if the state elicits a plea by offering the defendant an inducement to waive his right to stand trial, the validity of the plea will depend upon the magnitude of the inducement in light of the probability of conviction and sentence at that point in time. If the bargain passes this test, then as far as voluntariness is concerned, it makes no difference whether the prosecutor ever

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likely to plead guilty. Second, a guilty plea is invalid if it is the product of an inducement the strength of which cannot be meaningfully compared to the worth of standing trial. One such example may be an inducement in the form of offers of leniency to third persons. Another may be financial inducements, such as an offer of a million dollars in exchange for a plea of guilty. Given the difficulty of assessing the dollar value of standing trial, courts may be justified in adopting a per se rule against any inducement measured in those terms.

102. Ironically, this explanation is difficult to square with the particular constitutional right at issue in *Jackson*. After all, the danger of allowing the state to induce the waiver of single constitutional rights is that innocent defendants may be induced to waive safeguards against conviction. Yet the particular constitutional right at issue in *Jackson*—the right to be tried by a jury rather than by a judge—does not affect the reliability of the factfinding process, because judges are presumably just as capable of making accurate decisions as juries. Consequently, even if it is advisable to adopt a per se rule against the induced waiver of single constitutional rights, it does not follow that the rule should apply to rights (like the right to trial by jury) that do not affect the accurate determination of factual guilt. If this criticism is correct, it means that *Jackson* was wrongly decided and should be overruled. In that connection, it should be pointed out that at least one commentator believes that the Court has since backed away from *Jackson* and already overruled it in all but name. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV.55, 239-43 (1973) (commenting on Chaffin v. Stynchcombe, 412 U.S. 17 (1973)).

103. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea, supra* note 2, at 69.

104. Comment, *Official Inducements, supra* note 88, at 169 n.9.

performs on his promise.[105] In other words, the subsequent failure of the inducement cannot have any effect on the desirability of the inducement at the time the defendant accepts it and, therefore, cannot operate to burden the exercise of his constitutional rights.[106] As Justice (then Judge) John Paul Stevens put it: "On the issue of voluntariness, it is, of course, inappropriate to take into account subsequent events, such as the actual sentence imposed; necessarily, the [guilty] plea is either voluntary or involuntary at the time the defendant makes his choice."[107]

This means, of course, that the "voluntariness" requirement provides no constitutional justification for the rule that plea agreements are to be enforced. It also means—contrary to what many courts assert[108]—that *Santobello* cannot be explained by the requirement that guilty pleas be voluntary.[109] If *Santobello* is to be explained, the expla-

105. "The voluntariness of [the defendant's] plea does not depend on whether he was the victim of a false promise. The question remains: Did the promise, *even if fulfilled*, induce the plea and deprive it of the character of a voluntary act." Bailey v. MacDougall, 392 F.2d 155, 159 (4th Cir.) *cert. denied*, 393 U.S. 847 (1968) (emphasis added). *Accord*, Chalker, *supra* note 30, at 191 ("if the subjective state of the defendant's mind at the time of the inducement is the controlling factor in any determination of voluntariness, what occurs subsequently to the inducement should be of no concern"); Comment, *Official Inducements, supra* note 88, at 169 n.9 ("If the inaccuracy of the information is the operative factor in these cases [involving breach of a plea bargain], then the voluntary plea requirement is inapplicable on its face.").

106. One might say that breach of the prosecutor's bargain, while not affecting proportionality, does affect one of the interests protected by voluntariness: the appearance of legitimacy in the criminal justice system. As pointed out above, however, this concern with apparent legitimacy is principally attributable to concern with the accuracy of the guilty plea. See note 78 *supra*. Since the broken bargain in no way affects the proportionality of the inducement, and proportionality fully protects the interest in accuracy, one can conclude that breach of the prosecutor's promise does not affect the voluntariness of the plea. Insofar as there is concern for legitimacy in the sense of the government doing something reprehensible, there is no reason to believe this legitimacy has a special relation to voluntariness.

107. Bachner v. United States, 517 F.2d 589, 598 (7th Cir. 1975).

108. *See, e.g.*, Griffith v. Wyrick, 527 F.2d 109 (8th Cir. 1975); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173, 1174 (4th Cir. 1975); Lambur v. Slayton, 356 F. Supp. 747, 750 (E.D. Va. 1973); People v. Price, 36 Ill. App. 3d 566, 571, 344 N.E.2d 559, 563 (1976); State v. Crosby, 339 So. 2d 584, 586 (La. 1976). The lower courts are not alone in this error. The Supreme Court itself has implied that a prosecutor's breach of a plea agreement renders the underlying guilty plea not "voluntary." *See* Blackledge v. Allison, 431 U.S. 63, 75 n.8 (1977); Brady v. United States, 397 U.S. 742, 755 (1970) ("The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: '[A] plea of guilty . . . must stand unless induced by . . . unfulfilled or unfillable promises . . . .'"); Machibroda v. United States, 368 U.S. 487, 493 (1962). *Accord*, Santobello v. New York, 404 U.S. 257, 266 (1971) (Douglas, J., concurring) ("The lower courts . . . have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness' . . . .").

109. Of course, to say that the breach of a plea agreement does not render the underlying plea "involuntary" does not mean that the breach is constitutional. On the contrary, the breach of a plea agreement violates the constitutional requirement that the plea be "intelligent." See text accompanying notes 110-140 *infra*. Indeed, this difference of opinion concerning the effect of a breach on the "voluntariness" of a plea may be nothing more than a difference in terminology.

nation must be sought elsewhere.

III

INTELLIGENCE OF THE PLEA

In addition to requiring that waivers of constitutional rights be voluntary, the Constitution also requires that waivers be made "intelligently."[110] As with voluntariness, the "intelligence" requirement applies to guilty pleas because of the important constitutional rights a defendant waives by pleading guilty.[111] In searching for a constitutional basis for the holding in *Santobello*, therefore, one must examine the interests protected by the intelligence requirement. If these interests are violated by a prosecutor's breach of a plea agreement, then the Court may be correct in suggesting that pleas resulting from such broken agreements are not intelligent.[112] The nature of these interests, in turn, may indicate the form of relief most appropriate to remedy the injury.

A guilty plea will be deemed not intelligently made if the defendant is not fully informed of the nature of the charges to which he is pleading guilty.[113] Some authorities have observed that the function of

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"Voluntariness" is used in this Article, in the narrower of two possible senses, to refer to actions by the state that have a bearing on the defendant's state of mind. See text accompanying notes 19-30 *supra*. Accordingly, it follows that the state's breach of a plea agreement can have no bearing on the voluntariness of the plea at the time it was entered. See note 105 *supra*. On the other hand, it appears that the term "voluntariness" is sometimes used more broadly to refer to all sorts of offensive state conduct, regardless of whether the conduct has any bearing on the defendant's "capacity for self-determination." See text accompanying notes 25-26 *supra*. In that latter sense, it may be meaningful to say that because the state's breach of a plea agreement is "offensive," it renders the defendant's plea involuntary. But it is meaningful only because "voluntariness" is being used as an umbrella word to encompass two otherwise separate kinds of problems—problems that are discussed in this Article in terms of "voluntariness" and "intelligence" respectively.

110. *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) (guilty pleas must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"); McMann v. Richardson, 397 U.S. 759, 770 (1970) (defendant's plea of guilty must be based on reasonably competent advice to be "intelligent"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (an effective waiver of constitutional rights is "an intentional relinquishment or abandonment of a known right or privilege"). For a general discussion of the intelligence requirement, *see Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, supra* note 2, at 37-41.

111. *See* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (guilty plea is a waiver of several important constitutional rights and therefore is to be judged by the ordinary waiver standard).

112. The Court has implied that a prosecutor's breach of a plea agreement renders the underlying guilty plea unintelligent. Blackledge v. Allison, 431 U.S. 63, 75 n.8 (1977) ("[Allison's petition] raised the serious constitutional question whether his guilty plea was *knowingly* and voluntarily made") (emphasis added).

113. *See* Henderson v. Morgan, 426 U.S. 637, 638 (1976) (a guilty plea to second-degree murder is invalid unless the defendant is advised that "intent to cause the death of his victim" is "an element of the offense").

There is some dispute as to whether a defendant is also entitled to be given notice of substantive *defenses* to the charges against him before pleading guilty. On the one hand, the Court recognizes a constitutional distinction between the "elements" of an offense and "affirmative de-

the intelligence requirement is to guarantee that only defendants who are actually guilty will so plead.[114] Indeed, it is reasonable to suppose that a defendant must have some notion of the offense with which he is charged in order to assess accurately whether his alleged conduct was in fact criminal. For example, a murder defendant who is unaware of the defense of justifiable homicide may incorrectly believe himself to be guilty of murder and may compromise the accuracy of the system by pleading guilty. Therefore, one of the interests served by the intelligence requirement—or at least by that part of the requirement that mandates that defendants be apprised of the charges against them—is an interest in the accuracy of the criminal justice system.

In addition to notice of charges, the courts have consistently held that a defendant must be advised that he has certain constitutional rights incident to standing trial, and that by pleading guilty, he waives those rights.[115] Thus a defendant must be made generally aware of the constitutional alternatives to pleading guilty: the right not to be a witness against oneself, to confront the witnesses against one, and to be tried by a jury.

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fenses" at least for purposes of allocating burdens of proof. Patterson v. New York, 432 U.S. 197, 202-05 (1977). On the other hand, the Court has implied that a guilty plea is invalid unless a defendant is apprised of "defenses" to the charges against him. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (one reason a defendant has a constitutional right to the assistance of counsel before pleading guilty is that " '[o]nly the presence of counsel [enables the] accused to know all the *defenses* available to him . . . .' ") (emphasis added); Von Moltke v. Gillies, 332 U.S. 708, 724 (1947) (where defendant waives right to counsel and pleads guilty, "the waiver [of counsel] must be with an apprehension of . . . possible *defenses* to the charges . . . .") (emphasis added).

Perhaps the answer lies in between. Thus, it can be argued that, in contrast to the purpose of allocating burdens of proof, no constitutional distinction should be drawn between elements of an offense and affirmative defenses for purposes of giving a defendant the notice necessary for an informed plea of guilty. That does not mean, however, that a defendant must be apprised of "every conceivable defense that may be available to him." Flores v. United States, 337 F. Supp. 45, 48 (D.P.R. 1971). On the contrary, just as the state has no obligation to advise a defendant of all the "technical elements" of an offense, Henderson v. Morgan, 426 U.S. at 644, so, too, it has no obligation to advise him of "every conceivable defense." Rather, the state's obligation with respect to notice of the elements of an offense and its affirmative defenses is the same: in each case, the defendant must be given real notice of the true nature of the charge against him. *See* Smith v. O'Grady, 312 U.S. 329, 334 (1941). As the Court observed in *Henderson*, "the court should examine the totality of the circumstances [to] determine whether *the substance of the charge*, as opposed to its technical elements, was conveyed to the accused." 426 U.S. at 644 (emphasis added).

114. *See* Henderson v. Morgan, 426 U.S. 637, 649 (1976) (White, J., concurring) (fact that defendant did not know intent to kill was an element of the offeuse undermines the reliability of his guilty plea); Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 375-76 (1955) [hereinafter cited as Note, *Withdrawal of Guilty Pleas*].

115. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (waiver of constitutional rights by defendant in pleading guilty must appear in the record); *In re* Tahl, 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rptr. 577, 584 (1969) ("the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of the plea").

The interest protected by this aspect of the intelligence requirement is the same as that protected by notice of the charges: the accuracy of the criminal justice system.[116] In deciding whether to enter a guilty plea, a defendant makes at least two assessments. First, he assesses the criminality of his own past conduct in light of the offenses with which he is charged; and second, he assesses the likelihood that he will be found guilty of those offenses if he elects to stand trial.[117] As previously noted, a defendant cannot accurately assess the criminality of his previous conduct unless he knows what kinds of conduct are proscribed by law. But notice of the offenses charged is not enough, because a plea of guilty also depends in part on the defendant's assessment of what will occur if he stands trial. He must also know what procedural alternatives exist for contesting his guilt. Otherwise, a defendant who believes himself to be factually innocent might plead guilty under the mistaken assumption that he will not receive the procedural protection at trial that is required to demonstrate his innocence. Therefore, requiring defendants to be informed of essential procedures for determining guilt or innocence at trial—requiring that they be apprised of the *alternatives* to pleading guilty— further ensures that their guilty pleas will be accurate.[118]

However attractive this analysis may be, it cannot account for the full scope of the intelligence requirement and, hence, does not account for all of the interests protected by the requirement. For in addition to

116. *See* Dix, *supra* note 18, at 224-25.

117. One of the principal factors that determines whether a defendant will plead guilty is his assessment of the likelihood that he will be convicted if he stands trial. *See generally* Nagel & Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models* (pts. 1 & 2), 51 IND. L.J.987 (1976), 52 IND. L.J. 1 (1977). *See also* Note, *Transformation of the Process, supra* note 2, at 573-74. In North Carolina v. Alford, 400 U.S. 25, 36-37 (1970), the Court recognized that defendants who believe they are factually innocent may nonetheless plead guilty because of the strength of the state's case against them. In *Brady* the Court assumed that at least some guilty pleas are based on the defendant's perception of the strength of the state's case. 397 U.S. at 756-58.

118. To be sure, by apprising defendants of their full panoply of constitutional rights, the system also enables those who know they are factually guilty to insist on standing trial in the belief that they can use their procedural entitlements to avoid conviction. This possibility does not, however, defeat the constitutional value of apprising defendants of their procedural rights before allowing them to plead guilty. Rather, it merely reflects an existing balance that the Constitution strikes between the risk of convicting the innocent and the danger of allowing the guilty to go free. Thus, it is society's aversion to convicting the innocent that supports the requirement that the state prove its case beyond a reasonable doubt, even though the anticipated result is that a substantial number of defendants who are actually guilty will thereby go free. As Justice Harlan put it, "the requirement of proof beyond a reasonable doubt . . . [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). This same balance requires that criminal defendants not only receive certain procedural protections when they go to trial, but also that they know of the scope and nature of these protections when they are called upon to decide whether to plead guilty. Otherwise, by inducing defendants to enter improvident pleas of guilty, the state could avoid the force of the constitutional presumption in favor of acquitting the innocent.

notice of charges and procedural rights, a defendant is also entitled to be informed accurately of certain consequences of pleading guilty, such as the range of possible sentences. If the defendant is not so informed, any guilty plea will be considered invalid.[119] Yet this required notice of consequences cannot be explained by any possible interest in the accuracy of guilty pleas. Informing a defendant of the consequences of conviction does not help him in assessing his own guilt or innocence. Knowing that the crime with which he is charged carries a maximum penalty of, say, ten years imprisonment, as opposed to five, does not help a defendant to determine whether he actually engaged in the conduct alleged against him; nor does such knowledge help him determine whether the alleged conduct could actually be proved against him at trial.[120]

In order to explain why guilty pleas violate the intelligence requirement if a defendant is uninformed or misinformed with respect to important consequences of his plea, one must go beyond society's interest in being free from inaccuracies. The most plausible basis for this undisputed doctrine is that the defendant has a constitutional interest in making an informed choice between alternatives presented to him by the state when his decision will have a profound effect on his life. To treat a defendant with the dignity required by the Constitution, the state must make a reasonable effort to advise him of the consequences of the various alternatives. As Professor Joseph Goldstein has acutely observed:

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119. In Machibroda v. United States, 368 U.S. 487 (1962), the Court stated that "[o]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." 368 U.S. at 493 (quoting Kercheval v. United States, 274 U.S. 220, 223 (1927)). While *Machibroda* and *Kercheval* were both federal cases, the Court subsequently has assumed that the standard it set forth for guilty pleas is constitutional and therefore applicable to the states. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 748 (1970). Thus, in *Brady* the Court stated that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances *and likely consequences*." 397 U.S. at 748 (emphasis added). *Accord*, Henderson v. Morgan, 426 U.S. 637, 650 (1976) (White, J., concurring). Even Justice Rehnquist, who favors more liberal standards for the acceptance of guilty pleas, appears willing to concede that the requirement of *Machibroda*, that defendants be apprised of the consequences of their guilty plea, is constitutional. *See* Henderson v. Morgan, 426 U.S. 637, 653 (1976) (Rehnquist, J., dissenting). *But see* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 1173-76 (1974); Note, *Withdrawal of Guilty Pleas, supra* note 114, at 375-76.

120. *See* United States *ex rel.* Tillman v. Alldredge, 350 F. Supp. 189, 194 (E.D. Pa. 1974) ("What the sentence for a crime may be is totally irrelevant to the issue of guilt or innocence."). A possible exception is when the defendant does not realize the seriousness of the offense with which he is charged. Thus, if a defendant believes his possible punishment to be trivial, he may plead guilty even though he is in fact innocent in order to avoid the nuisance of trial. Apart from such an extreme misapprehension of the consequences of pleading guilty, however, ignorance of such consequences should not affect a plea's accuracy. *See* Note, *Withdrawal of Guilty Pleas, supra* note 114, at 375-76.

> These rules [that guilty pleas be "intelligent"] are rooted in a basic commitment of the legal system to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him. They have been designed to assure that citizens . . . remain free to make their respective critical choices without coercion or deception by the authorities. . . . [Their purpose is to reinforce] respect for the individual's competence and right to determine for himself what he needs to know . . . in order to choose what he thinks is best for himself.[121]

It is the defendant's interest in being given the information he needs in order to choose what is "best for himself" that explains the requirement that he be advised of the consequences of pleading guilty.

Nevertheless, the rule of disclosure is not absolute. It is universally assumed, for example, that a defendant need only be advised of the "direct" consequences of pleading guilty; the state need not disclose all "indirect" consequences of conviction.[122] Hence, in order to determine whether the broken plea agreement runs afoul of the intelligence requirement, it is necessary to explore the scope of this limitation, that is, the rationale for the distinction between "direct" and "indirect" consequences.

The lower courts have made it clear that the state is not obliged to advise a defendant of all possible consequences of pleading guilty. No court has ever suggested, for example, that to plead guilty intelligently a defendant must be told of all the personal consequences to him of conviction.[123] On the contrary, courts have consistently held that some consequences resulting directly from state-imposed sanctions need not be disclosed to the defendant prior to the decision.[124] It is tempting to assume that the scope of required disclosure turns upon the importance of the consequence to the defendant: the more important the consequence to the defendant, the more likely that it will be treated as a "direct" consequence to be disclosed.[125] Yet guilty pleas are routinely upheld in cases where the defendant was not advised of consequences of extreme importance to him—often more important than the criminal

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121. Goldstein, *supra* note 2, at 685-86. *Accord,* Dix, *supra* note 18, at 219 ("Perhaps the least discussed policy pertaining to many waiver situations is the interest that criminal defendants have in the determination of their own destiny. It has been argued elsewhere that an important aspect—perhaps the essence—of the dignity of the individual is his ability to control his own destiny.") (citations omitted).

122. *See, e.g.,* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 119, at 1175-76.

123. *See* United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (defendant need not be advised of collateral consequences of disenfranchisement in another state); J. BOND, *supra* note 2, at 148.

124. *See, e.g.,* Nunez Cordero v. United States, 533 F.2d 723 (1st Cir. 1976) (possibility of deportation is a collateral or "indirect" consequence of conviction and therefore need not be revealed to the defendant prior to pleading); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. PA. L. REV. 865, 875-76 (1964).

125. *See* J. BOND, *supra* note 2, at 148.

sentence itself—such as deportation.[126]

A more plausible explanation for the distinction between direct and indirect consequences is that it reflects a balance between the defendant's need for disclosure and the state's ability to provide it. It is unreasonable to expect a trial judge or prosecutor to undertake the burden of identifying and disclosing all the consequences of conviction, no matter how remote or unforeseeable.[127] On the other hand, if the consequence in question is closely and foreseeably related to the case, it is reasonable to require that it be disclosed.[128] Thus, while a court is not required to inform a defendant of relatively unforeseeable possibilities of deportation, it may be required to inform him of foreseeable possibilities of parole.[129]

Having identified the rationale for the distinction between "direct" and "indirect" consequences, we are in a position to define the scope of the state's duty. The state has a constitutional obligation to treat defendants with dignity with respect to the crucial decisions concerning life and liberty that it lays before them; that is, to make a reasonable effort to give defendants the information they need to decide what is in their "best interests." This, in turn, helps explain the scope of the state's obligation to ensure that its information concerning the consequences of conviction be *accurate*. Obviously, as long as the state is obliged to assist defendants in making crucial choices about life and liberty, it cannot be allowed to mislead defendants into making disadvantageous choices by giving them information that is false. Thus, even with respect to indirect consequences, once the state gives a defendant information on which to rely, it has an obligation to see that the information is correct.[130]

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126. *See, e.g.*, Nunez Cordero v. United States, 533 F.2d 723 (1st Cir. 1976).

127. This analysis presents one way to understand the Court's decision in McMann v. Richardson, 397 U.S. 759 (1970). It would be unreasonable to require the court to tell the defendant of all possible future changes in the law that might render the defendant's alternative of going to trial more desirable. Thus, the Court refused to vacate defendant Richardson's guilty plea even though his decision to plead assumed a system for determining the admissibility of his confession at trial that was subsequently found unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964).

128. *See* Berry v. United States, 412 F.2d 189 (3d Cir. 1969).

129. *See, e.g., id.* (defendant's conviction for narcotics violation must be vacated where he was not advised prior to pleading guilty that his record made him ineligible for parole).

130. *See* Shelton v. United States, 242 F.2d 101, 114 (5th Cir.) (Tuttle, J., dissenting), *rev'd on rehearing en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on Solicitor General's confession of error*, 356 U.S. 26 (1958) (a guilty plea is invalid if the defendant was "misled on purpose" by promises that are "not performable at all" or "not within the power of the promisor" or "simply disregarded once their purpose was accomplished"). The requirement that the state's representations be accurate is a function of the requirement that the state treat the defendant with dignity with respect to his significant choices: it would be irrational to require that the defendant be advised of the consequences of conviction, and yet permit the advice to be inaccurate. Since the requirement of accuracy is a function of the requirement that the defendant be treated with dignity (rather than a function of "foreseeability"), it applies with equal force to whatever representa-

Indeed, the standard that governs the accuracy of the information the state gives the defendant is stricter than the standard that defines the amount of information the state must initially disclose. In advising a defendant of the consequences of conviction, the state must make a "reasonable" effort to gather and disclose the information it believes he will find useful in deciding whether to plead guilty. On the other hand, once the state gives the defendant information on which to rely—whether it volunteers the information or is required to give it—it must comply with "the most meticulous standards" of accuracy.[131] This difference in standards is no accident; rather, it is a reflection of the fact that as far as the defendant is concerned, false information is far worse than no information at all. When a defendant receives no information from the state concerning the consequences of conviction, he is alerted that he must gather the information himself. But when he receives false information, he is lulled into ceasing his own inquiries and perhaps into overlooking material information that he might otherwise have acquired on his own. In short, the difference in standards reflects the difference between being uninformed and being misinformed. Since the prejudice of being misinformed is greater than that of being uninformed, the standard of disclosure is stricter.[132]

In summary, the requirement that a defendant's plea be intelligent involves three types of disclosure. First, the defendant must be made aware of the elements of the offense in order to ensure that he will not admit guilt through mistake. Second, he must be apprised of the constitutional alternatives to pleading guilty, again to protect the accuracy of the guilt-determining process. Third, the court must inform the defendant of all reasonably foreseeable consequences of conviction in order to respect the defendant's right to choose.[133] Further, once the state pro-

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tions the state makes to the defendant, regardless of whether they relate to "direct" consequences or "indirect" consequences.

131. Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

132. This difference in standards is also reflected in the tort law of deceit. *Compare* RESTATEMENT OF TORTS § 525 (1938) (liability for fraudulent misrepresentation) *with id.* § 551 (liability for nondisclosure). *See also* 3 L. LOSS, SECURITIES REGULATION 1434-35, 1439 (2d ed. 1961).

133. Until now we have assumed that the only interest supporting the requirement that a defendant be advised of the elements of an offense and of his constitutional alternatives to pleading guilty is society's interest in the accuracy of criminal judgments. Now that we have recognized that part of the intelligence requirement presupposes still another interest, *i.e.*, the defendant's interest in being treated with dignity with respect to his significant choices, we can reasonably assume that this latter interest also supports the requirement that a defendant be advised of the elements of the offense and of his alternatives to pleading guilty. To be sure, in most cases the state's interest in accuracy is sufficient to explain these latter components of the intelligence requirement, because the accuracy of a defendant's plea is almost always in question. But there are some cases in which accuracy is not genuinely in question and which cannot be explained on that basis. Thus, in Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that the defendant had a right to be advised of the key elements of the offense even though there was overwhelming evidence that he was guilty. Similarly, Professor Dix argues that a defendant has a right to be advised

vides a defendant with material information about the consequences of conviction—whether information the state is obliged to give him (concerning "direct" consequences), or information that it chooses to volunteer (concerning "indirect" consequences)— the state must make a meticulous effort to see that the information is accurate.

It is readily apparent that the first two forms of disclosure—notice of charges and notice of procedural alternatives—are not involved in a broken plea bargain. Whether the prosecutor follows through on a promise to the defendant does not in any way affect the defendant's ability to determine whether his behavior violated statutory norms or whether his guilt would be more accurately determined by the constitutional alternative of plenary trial. It should also be apparent by now, however, that the third type of disclosure required for a plea to be intelligent *is* implicated by the prosecutor's breach. Since the state is obliged to make a meticulous effort to see that the information it gives a defendant concerning the consequences of his plea is accurate, the state breaches its duty by causing him to plead guilty by means of false promises. A promise, after all, is a representation of future conduct. In the context of plea bargaining, it is a factual representation by the state that it will behave in a certain fashion in the future—that certain consequences will follow from a defendant's decision to plead guilty. Therefore, if the state cannot make false representations to a defendant about the consequences of pleading guilty, it cannot make false promises to a defendant as consideration for a plea of guilty. Moreover, since the government must meticulously protect the accuracy of any representation made to the defendant regarding the consequences of his guilty plea, it makes no difference whether the government's false promise pertains to "direct" or "indirect" consequences. In either event, the resulting plea is unintelligent.

Two objections might be raised at this point. First, it might be argued that while the intelligence requirement prohibits a prosecutor from making promises he knows to be false, it does not prevent him from making a promise in good faith based upon circumstances as he understands them to be, and then later reneging when he discovers that circumstances are different from what he envisaged. For example, a prosecutor may make a promise based upon the good faith assumption that he will be in charge of a case throughout its prosecution, and then later renege when he is unexpectedly replaced by another government attorney.

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of his constitutional alternatives to pleading guilty even where these rights have no bearing on the accuracy of the criminal justice system. Dix, *supra* note 18, at 219-20, 224-29. The only way to explain a requirement of notice in these cases is to assume that the same interest in dignity that requires that a defendant be advised of the consequences of pleading guilty requires that he also be advised of the elements of the offense and of his alternatives to pleading guilty.

The answer to this argument is that it rests on a faulty premise. The validity of the state's conduct is measured not by whether it is taken in "good" faith or "bad" faith, but by whether it is properly designed to assist the defendant in wisely making a crucial choice the state has laid before him. When a prosecutor makes a promise to a defendant, he makes a statement of fact about the future—a statement of what he and other state officials will do for the defendant if the defendant pleads guilty. Since the prosecutor knows that the defendant will rely on these representations in deciding to plead guilty, he has a strict duty to see that the representations are accurate. Accordingly, if a prosecutor makes a promise based on a mistaken perception of the circumstances, and the defendant pleads guilty, the prosecutor cannot avoid his obligation simply by showing that the promise was made in "good faith." Rather, as part of the obligation to assist the defendant in making a meaningful decision, the prosecutor has a constitutional obligation to avoid mistakes[134] and to anticipate future contingencies[135] before making such solemn representations.

Second, it might be argued that while the state is prohibited from making false promises to defendants, it can nonetheless avoid the pitfalls of the intelligence requirement by explicitly reserving the authority to renege on its promises. In this view, prosecutors could satisfy the intelligence requirement by routinely disclaiming any intent to be bound by their promises or by informing defendants that their promises are subject to future contingencies—including, say, the disapproval of other officers or even a simple change of mind.

Again, however, this argument misconceives the rationale underlying the intelligence requirement. It assumes that the requirement's only purpose is to protect defendants from being misled about the consequences of conviction. That cannot be its sole purpose; if it were, the state could avoid the problem altogether by refusing to give the defendant any notice at all about the consequences of conviction. Rather, the purpose of the requirement is considerably broader; it is to assist defendants in deciding what is in their "best interests" with respect to choices the state lays before them. Therefore, it is not enough to refrain from misleading the defendant about the consequences of conviction;

134. "Prosecutorial misrepresentations, though made in good faith, . . . are not acceptable. Ignorance of the law is no excuse for the government . . . ." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

135. In *Santobello* the first prosecutor promised in good faith that he would refrain from recommending a sentence, not realizing that a second prosecutor would be in charge of the case at the time of the sentencing hearing; the second prosecutor, in turn, recommended a sentence at the hearing, not realizing that the first prosecutor had made a contrary promise. In holding the promise to be enforceable, the Court implicitly held that in making his promise, the first prosecutor had an obligation to anticipate the future contingency that he would no longer be in charge of the case at the time of sentencing. 404 U.S. at 262.

instead, the state has an affirmative obligation to ascertain and disclose to the defendant with a reasonable degree of certainty the actual nature of his alternatives, including the consequences of a guilty plea.

Of course, there may be instances where the prosecutor does not know, and cannot find out with a reasonable amount of effort, whether the state will be able to perform as promised. In such cases, the state does all that can reasonably be expected if it fully explains the situation to the defendant and gives him some idea of when the agreement can be expected to become more definite.[136] But if a prosecutor does know or should know that the state will be able to fulfill the promise, it would violate the duty to treat the defendant with dignity to withhold that information from the defendant.

We are now able to answer one of the basic questions posed at the outset. It is the requirement that guilty pleas be "intelligent" that provides a constitutional basis for the enforcement of plea agreements. Nonetheless, the crucial question of remedy remains. Given the constitutional interest involved, what is the appropriate remedy for a broken plea agreement? Is the defendant entitled to specific performance of the state's promise, or is he entitled to rescind his plea and replead? Is the choice of remedies the defendant's, or is it up to the state to elect the remedy?

Ordinarily, upon a showing that a guilty plea is not "voluntary" or "intelligent," the courts order that the conviction be reversed and the plea vacated.[137] This remedy of vacatur, which is equivalent to rescission, presumably returns the defendant to the status quo ante.[138] The defendant then can reassess the alternatives that remain open and

136. In United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975), for example, the prosecutor promised the defendant that if he pleaded guilty, the prosecutor would advise the court that the defendant had been "cooperative"; at the same time, however, the prosecutor also went on to say that he could not promise that the judge would accept the representation, nor could he promise that the judge would be lenient. Under the circumstances, there was nothing unreasonable about the prosecutor's limited promise, because he was not capable of controlling the judge's exercise of sentencing authority. Later, however, before the defendant had pleaded guilty, the prosecutor led the defendant to believe that the judge had actually agreed to sentence the defendant to probation. Under these circumstances, the court held that the prosecutor was bound by this representation concerning probation because it superseded his earlier, more qualified representation. It should be noted, however, that the prosecutor's error was not in failing to promise probation in the first place but in later causing the defendant to rely on the representation of probation.

137. *See, e.g.*, Martinez v. Mancusi, 409 U.S. 959, 966 (1972) (Marshall, J., dissenting) (where broken promise renders the guilty plea invalid, plea should be vacated); People v. Barajas, 26 Cal. App. 3d 932, 103 Cal. Rptr. 405 (4th Dist. 1972) (appropriate remedy for breach of plea bargain is withdrawal of the plea); Commonwealth v. Wilkins, 442 Pa. 524, 277 A.2d 341 (1971) (where plea bargain is not kept, the trial court cannot refuse the defendant's motion to change his plea to not guilty).

138. *See* United States *ex rel.* Anolik v. Commissioner of Corrections, 393 F. Supp. 48, 51 (S.D.N.Y.), *rev'd on other grounds*, 524 F.2d 650 (2d Cir. 1975) ("[p]etitioner's argument that he is entitled to specific performance because the alternative of reinstating his not guilty pleas would be inadequate to place him in the status quo ante is . . . without merit").

make an informed choice about which is in his "best interests."[139] Moreover, except in cases where the defendant has relied to his detriment, this remedy adequately protects the defendant's interest in making an intelligent plea.[140] By affording the defendant an opportunity to choose again on the basis of accurate information, the court fully protects the defendant's opportunity to make a meaningful choice between the alternatives that are open. Thus, if a court orders a guilty plea vacated because of a broken plea bargain, the defendant has no right to demand some other remedy. As long as rescission adequately protects the interest in being able to make an informed choice, a defendant has no constitutional right to insist on specific performance of the bargain.

By the same token, while a defendant has no right to *demand* specific performance, he has no right to *complain* about it either. After all, the remedy of specific performance gives the defendant the full benefit of his original choice and therefore should always be sufficient to vindicate his constitutional interest in deciding what is in his best interest. Thus, if a court either orders specific performance or permits the state to elect to perform on its promise, the defendant has no right to demand vacatur instead. For as far as the intelligence requirement is concerned, the defendant's interests can be fully protected either by vacating the plea and allowing him to replead, or by performing on the original promise concerning the consequences of conviction.

In conclusion, the requirement that a guilty plea be made intelligently forbids the prosecution from breaching promises made to the defendant with respect to the consequences of his plea. This is because by breaching its promises, the state fails to do what is reasonably within its power to assure the accuracy of its representations to the defendant with respect to the alternatives open to him, and by this failure abridges his constitutionally protected interest in choosing what is in his "best

139. There is some disagreement on what the proper status quo ante is for the defendant who successfully appeals from his guilty plea. For example, where the prosecutor promises, pursuant to a plea agreement, to reduce the charges against the defendant, some have argued that courts "should hold that the rule permitting reprosecution of successful plea-bargain appellants on the original, higher charges is unconstitutional." Comment, *The Constitutionality of Reindicting Successful Plea-Bargain Appellants on the Original Higher Charges*, 62 CALIF. L. REV. 258, 292 (1974). The purpose of such a rule would be to avoid discouraging plea-bargaining defendants from appealing their convictions by making them risk the possibility of harsher punishment on remand. Professor Borman argues, however, that this purpose may be fully served by requiring the prosecutor again to offer, and the court again to accept, the original concessions after a successful appeal. *See* Borman, *The Chilled Right to Appeal From a Plea Bargain Conviction: A Due Process Cure*, 69 NW. U. L. REV. 663 (1974).

140. The efficacy of vacatur as a relief for the broken plea bargain may be sharply limited in some circumstances. Specifically, in some cases the defendant may have altered his position because of his plea so that it is impossible to return him to his initial situation. For example, the defendant may have served a substantial portion of his sentence. *See, e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973). In such cases, the remedy of vacatur may be tantamount to no relief whatsoever. *See* note 190 *infra*.

interests." In providing relief for such breach, a court can adequately protect the defendant's interests either by vacating the plea, or by ordering specific performance of the state's promise, or by leaving the election of remedies to the state. If *Santobello* rests solely upon the constitutional requirement that a guilty plea be "intelligent," a defendant has no right to demand any particular remedy for a broken plea agreement.

IV
EXPECTATION INTERESTS

As we have seen, the requirement that guilty pleas be intelligent explains why defendants have a constitutional right to *some* remedy for a broken plea agreement. If that is the only constitutional interest at stake, however, it leaves a defendant with no right to any particular remedy for a broken plea agreement. Moreover, in the absence of detrimental reliance either rescission or specific performance would always be constitutionally sufficient from the defendant's point of view. Therefore, if the defendant has a constitutional right to demand the remedy of specific performance, as a majority in *Santobello* seemed to suggest, the remedy must be based on something other than the interests protected by the requirement that pleas be voluntary and intelligent.

It is sometimes said that the interest supporting the remedy of specific performance is the state's interest in the continued vitality of the process of plea negotiation.[141] The state, so the argument goes, has an essential interest in being able to resolve criminal cases by means of negotiated settlement in order to avoid the delay, expense, and inefficiency of plenary litigation. Moreover, in order to encourage defendants to enter into negotiation, the state must be able to assure defendants that their expectations will be protected and that they will receive the actual benefits of what they are promised. Otherwise, if defendants come to believe that the only remedy for a broken plea agreement is rescission, or restoration of the status quo ante, they may be reluctant to enter into plea negotiations.[142] Therefore, for defendants to have the assurances that are necessary to induce them to engage in plea

141. "There is more at stake than just the liberty of this defendant. At stake is the honor of the government . . . and the efficient administration of justice in a federal scheme of government." United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972). *Accord*, State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 383 (1976); Johnson v. Commonwealth, 214 Va. 515, 518, 201 S.E.2d 594, 596 (1974); State v. Tourtellotte, 88 Wash. 2d 579, 564 P.2d 799, 802 (1977). *See also* Fischer, *supra* note 2, at 142; Note, *Plea Bargains: Is Court Enforcement Appropriate*, 17 STAN. L. REV. 316, 319 (1965).

142. If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain . . . .

State v. Tourtellotte, 88 Wash. 2d 579, 564 P.2d 799, 802 (1977).

negotiations, they must be made to believe that the state's bargained-for promises will be specifically enforced.

The trouble with this argument is that it fails to provide a *constitutional* explanation for the remedy of specific performance. To be sure, the prosecutor, the courts, and even the state itself may have a legitimate interest in the continued vitality of plea bargaining. To that end they may also have a legitimate interest in giving defendants the assurances necessary to induce them to engage in plea negotiations, including assurances that the state's promises will be enforced. But those are institutional interests on the part of the state, not personal interests of the defendant. While they may explain why a state would order specific performance as a matter of domestic law, they do not explain why the Bill of Rights—which protects the interests of individuals by creating rights that are personal to them[143]— gives defendants, as individuals, the right to demand specific performance on their own behalf. Nor do they explain why defendants have a right to insist on the remedy of specific performance in cases where prosecutors and courts believe that the state's institutional interests would be better served by the remedy of rescission.

Nevertheless, although the previous argument may fail as a constitutional rationale, it can be reformulated to explain why the defendant should have a personal constitutional right to demand the remedy of specific performance in lieu of rescission. Specifically, *Santobello* can be understood as extending constitutional protection to the personal expectations created in defendants by plea agreements with the state. When the state makes and then breaches a plea bargain with a defendant, the only remedy that protects the defendant's expectations is one that gives him the "benefit of the bargain," that is, the remedy of specific performance. Rescission is obviously inadequate for that purpose, as are the traditional remedies at law.[144] Hence, if the Court truly in-

143. *See* Faretta v. California, 422 U.S. 806, 818-21 (1975).

144. Rescission is insufficient as a remedy since it merely returns the defendant to his original situation before the plea agreement, giving no compensation for lost expectations. Money damages, on the other hand, are inadequate for a quite different reason. Under the law of contract remedies, there is a presumption against specific performance as relief for a broken agreement. Thus, specific performance is generally ordered only if there is no adequate remedy in damages at law. *See* 5A A. CORBIN, CONTRACTS § 1136 (1964) [hereinafter cited as A. CORBIN]. In the plea agreement context, however, there never will be an adequate money damage remedy for the defendant's injured expectations. There is no acceptable way to compute in terms of dollars how much better off the defendant would have been if the prosecutor had performed the promise. Therefore, if a remedy is to be given for the defendant's loss of expectations, it must be in the form of specific performance of the plea agreement:

> In contract cases the victim of a breach frequently has a choice of remedies; he can affirm the contract and seek damages, or disaffirm it and seek to be reinstated to the position he was in before it was consummated. As applied to plea bargaining, "affirming the contract" would, in effect, result in specific performance of the prosecutor's promise
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tended to suggest that defendants generally have a right to demand specific performance of broken plea agreements, it may be because the Court was implicitly recognizing a constitutional basis for the protection of a defendant's expectation interests. While it is not clear that this is what the Court intended in *Santobello*, it is certainly a reasonable interpretation of the decision. Indeed, it appears that this is precisely the interpretation the lower courts have adopted in fashioning relief for broken plea agreements.

We can begin with *Santobello* itself. After recognizing that defendants have a constitutional right to relief for broken plea agreements, the Court remanded to the New York state courts to determine whether specific performance of the state's promise or rescission of the plea was the appropriate remedy.[145] The Court thereby avoided deciding which form of relief was constitutionally required. Thus the remand may stand for the proposition that while the defendant has a constitutional right to some relief for a breached plea bargain, he has no constitutional right to any specific remedy. If this interpretation is correct, it means that *Santobello* rests solely on the intelligence requirement,[146] that the defendant has no constitutional protection for the expectations the state creates by its promises to him, and that the state is free to breach its promises to the defendant at no cost beyond rescission.

There are several difficulties with this interpretation of *Santobello*. First, it is not clear that the Court considered the choice of remedies to be entirely a matter of state law. To be sure, in his opinion for the Court, Chief Justice Burger left the choice of remedy "to the discretion of the state court."[147] Yet he also said that, in exercising its discretion, the state court should decide whether the circumstances of the case "require"[148] specific performance or whether they "require"[149] rescission, implying that the state court would exercise its discretion subject to some constitutional constraints. Rather than leaving the choice of remedies to state law, he may have merely intended to say that the state courts, being closer to the facts of the case, were in a "better position"[150] to make the initial choice of remedies, subject always to ultimate review in the Supreme Court.[151] That interpretation would

Stewart v. Cupp, 12 Or. App. 167, 173, 506 P.2d 503, 506 (1973) (citations omitted).

145. See text accompanying note 11 *supra*.

146. Even if *Santobello* rests solely upon the constitutional requirement that guilty pleas be "intelligent," the defendant may have a right to demand specific performance of the agreement in situations where his detrimental reliance makes rescission an inadequate remedy. See text accompanying notes 180-82 *infra*.

147. 404 U.S. at 263.

148. *Id.*

149. *Id.*

150. *Id.*

151. Unfortunately the subsequent history of *Santobello* casts no light on this hypothesis. When the state court, on remand, ordered that the state give specific performance on its promise,

explain why Justice Douglas—who clearly considered the choice of remedies to be a matter of constitutional law— was willing to concur in the remand.

Second, even if the Court intended to leave the choice of remedy to state law, the facts of the case did not directly require the Court to decide whether the defendant had a right to specific performance. Because of his peculiar circumstances,[152] the defendant Santobello pointedly asked the Court *not* to order specific performance, arguing that he had a right to demand rescission in lieu of specific performance. Indeed, it was the state, rather than the defendant, that urged the Court to provide for specific performance. Far from being asked to decide whether the defendant had a right to specific performance, the Court was asked to decide whether he had an absolute right to rescind—a question to which the answer should be no, whatever the constitutional basis of *Santobello*.[153] Therefore, the decision cannot be taken as a rejection of a defendant's right to demand specific performance when that is the remedy he seeks; nor can it be understood as a rejection of a defendant's claim for the protection of his expectations when that is the constitutional interest he asserts.

Finally, insofar as the Court in *Santobello* reached the defendant's right to specific performance, a majority of four members of the Court suggested that he might be entitled to specific performance if he requested it. Justice Douglas expressed the view that whether a defendant requests specific performance or rescission, his "preference" with respect to remedy should be given "considerable, if not controlling, weight."[154] Justice Marshall, joined by Justices Brennan and Stewart, stated that a defendant is definitely entitled to rescind his plea if that is the remedy he requests and that he "may" also be entitled to specific performance if that is what he prefers.[155] Thus, *Santobello* reflects substantial sentiment on the Court (albeit in dictum) that a defendant may have a constitutional right[156] to demand specific performance of broken plea agreements.

To be sure, it is difficult to put much weight on these separate opinions, because the same four members of the Court also took the

neither the defendant nor the state sought further review in the United States Supreme Court on the issue of remedies. See note 12 *supra*.

152. Subsequent to his guilty plea but prior to sentencing, Santobello obtained new counsel and, upon learning that some of the evidence against him was obtained by legally questionable means, he moved to withdraw his plea. He preferred the remedy of vacatur to that of specific performance, therefore, in the hope of excluding the questionable evidence at trial and obtaining an acquittal. 404 U.S. at 258.

153. See text accompanying notes 157-60 *infra*.

154. 404 U.S. at 267 (Douglas, J., concurring).

155. *Id.* at 268 (Marshall, J., dissenting).

156. *Id.* at 266.

position that even if the state is willing to perform on its original promise, a defendant may still have a constitutional right to demand the alternative remedy of rescission. Yet, whatever the constitutional basis for *Santobello*—whether it is to protect defendants from entering guilty pleas that are not intelligent or to enforce their state-created expectations—it does not justify giving a defendant a right or option to rescind if the state agrees to give him the benefit of the original bargain.[157] Insofar as *Santobello* rests on the intelligence requirement, that interest can be satisfied by the remedy of specific performance, because specific performance gives the defendant everything on which he relied in entering the plea.[158] Conversely, insofar as *Santobello* rests on the protection of the defendant's expectations, that interest too can be satisfied by giving him the specific benefit of the bargain.[159] In short, these four

157. *See* McAleney v. United States, 539 F.2d 282, 286 (1st Cir. 1976); United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973); Santos v. Laurie, 433 F. Supp. 195, 200 (D.R.I. 1977); People v. Newton, 42 Cal. App. 3d 292, 298, 116 Cal. Rptr. 690, 694 (5th Dist. 1974); People v. Gott, 43 Ill. App. 3d 137, 142, 356 N.E.2d 1102, 1106 (1976); People v. Hildabridle, 45 Mich. App. 93, 94-95, 206 N.W.2d 216, 217 (1973); Commonwealth v. Alvarado, 442 Pa. 516, 522-23, 276 A.2d 526, 529-30 (1971); McFadden v. State, 544 S.W.2d 159, 163 (Tex. Crim. App. 1976).

Admittedly, some courts have held to the contrary, that a defendant does have a right to choose rescission over specific performance. *See, e.g.*, Harris v. Superintendent, 518 F.2d 1173, 1174 (4th Cir. 1975); Schoultz v. Hocker, 469 F.2d 681 (9th Cir. 1972); Burroughs v. State, 30 Md. App. 669, 677-78, 354 A.2d 205, 210 (1976). But there was nothing in these cases to indicate that the prosecutor had any objection to rescission as opposed to specific performance. Consequently, these cases cannot be taken as authority for the proposition that a defendant has a right to insist on the remedy of rescission *over the state's objection.* In addition, there are some pre-*Santobello* decisions to the effect that a defendant has a right to rescind. *See* Miller v. State, 272 Md. 249, 254, 322 A.2d 527, 530 (1974) (collecting authorities). But those decisions are of questionable precedential value because they were based on the assumption that, as with other defects concerning guilty pleas, the breach of a plea agreement *requires* that the plea be treated as void. *See* Note, *Legitimation of Plea Bargaining*, *supra* note 2, at 792, 794 n.149.

To be sure, there is nothing to prevent a state from adopting a rule of domestic law—as opposed to constitutional law—that gives a defendant the right to choose either rescission or specific performance as he may prefer. Indeed, as a matter of domestic commercial law, many states now provide that in cases of serious breach, the promisee has an option either to stand on the contract or to rescind it at his election. *See* 5 A. CORBIN, *supra* note 144, §§ 1104-1105; Stewart v. Cupp, 12 Or. App. 167, 173, 506 P.2d 503, 506 (1973). But there is a fundamental difference between a domestic rule of that kind and a constitutional rule. When a state fashions a domestic law of remedies, it has a free hand, because it has general lawmaking power to create in the promisee whatever rights it wishes. But in fashioning a constitutional remedy, the courts do not have a free hand; rather, they must see that the remedy does not exceed what is necessary to protect the particular constitutional right at issue. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Here the only suggested constitutional interests at issue are the defendant's interest in entering a valid guilty plea and his interest in the protection of his expectations. Since the remedy of specific performance is sufficient to satisfy those two constitutional interests, the courts have no constitutional authority to go beyond it and provide for the additional remedy of rescission.

158. Santos v. Laurie, 433 F. Supp. 195, 200 (D.R.I. 1977). See text following note 140 *supra.*

159. To be sure, the state cannot insist on the remedy of specific enforcement if its promise can no longer be fully enforced. Thus, if the defendant can show that specific enforcement is no longer feasible and that he can no longer be given the full benefit of the state's promise, then he

members of the Court failed to provide a constitutional rationale for their view that a defendant has a right to insist on rescission simply because he prefers it to the remedy of specific performance.[160] Nevertheless, despite this misconception about a unilateral right of rescission, it is fair to say that *Santobello* does not deny the existence of constitutional protection for a defendant's expectation interests and, indeed, in suggesting that a defendant has a right to insist on specific performance, it provides some support for the existence of such protection.

The ambiguity in *Santobello* regarding the remedy for broken plea agreements forces us to turn elsewhere to determine whether there is indeed an emerging protection for expectation interests. Specifically, we can look to see how state and lower federal courts have interpreted *Santobello*.

State courts are, of course, bound by *Santobello*, because it is a

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may be entitled to rescind his guilty plea. *See* People v. Kaanehe, 19 Cal. 3d 1, 14, 559 P.2d 1028, 1037, 136 Cal. Rptr. 409, 418 (1977). Moreover, if the state deliberately breaches a promise in "bad faith," the courts may be justified in giving the defendant a constitutional right to demand whichever remedy is *dispreferred* from the state's point of view. Thus, if the state deliberately and maliciously breaches a promise and yet now prefers the remedy of specific performance, the defendant may have a right to demand the alternative remedy of rescission in order to "punish" the state for its misconduct. *See* note 177 *infra*. Aside from such cases, however, there is no *constitutional* justification for giving the defendant a right to demand rescission in lieu of specific performance or for giving him an option to choose whichever remedy he prefers.

160. It can be argued that a defendant has an automatic constitutional right to rescind *any* waiver, including a guilty plea, if he can show that the state will not be prejudiced by rescission. *See* Westen, *supra* note 51, at 1235-39, 1260-61. Indeed, it is quite possible that this principle of nonwaiver is precisely what the four controlling Justices in *Santobello* were referring to, because at least three of the same Justices have accepted the same principle elsewhere:

> A guilty plea, if it is to be consistent with these principles, should not be allowed to stand if the defendant upon reflection or additional developments seeks *in good faith* to exercise his right to trial. I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the government will not suffer substantial prejudice in restoring those rights.

Neeley v. Pennsylvania, 411 U.S. 954, 958 (1973) (Douglas, Stewart, & Marshall, J.J., dissenting from denial of certiorari) (emphasis in original). *Accord*, Dukes v. Warden, 406 U.S. 250, 257-58 (1972) (Stewart, J., concurring); *id.* at 264-71 (Marshall & Douglas, J.J., dissenting). In fact, in explaining why a defendant should have a right of rescission in *Santobello*, Justice Marshall emphasized that a defendant always has a right of rescission if "the government has not relied on the plea to its disadvantage." 404 U.S. at 267-68.

If it is true, however, that the right of rescission in the *Santobello* opinions rests on a notion of a lack of prejudice to the government, then it has two important implications. First, it means that the principle is not limited to the cases involving the breach of a plea agreement, but extends to *any* case in which a defendant seeks to rescind a guilty plea. Second and conversely, it means that the right of rescission does *not* apply in a case of breach if the state has changed its prosecutorial position in reliance on the defendant's plea of guilty. In *Santobello*, for example, it is possible that the state reasonably relied on the defendant's plea of guilty in the six months between entry of the plea and the defendant's attempt to rescind it. That may explain why subsequently, on remand from the Supreme Court, the lower court refused to allow the defendant to rescind his plea and held, instead, that he must be satisfied with specific performance of the state's promise. People v. Santobello, 39 App. Div. 2d 654, 655, 331 N.Y.S.2d 776, 777 (1972).

construction of the due process clause of the fourteenth amendment.[161] While they have not always spoken with one voice, the state courts have generally interpreted *Santobello* as constitutional authority for the protection of the defendant's expectations. In *State v. Tourtellotte*,[162] for example, the defendant entered a plea of guilty in return for the prosecutor's promise not to bring any additional charges against the defendant and not to make any official statements at the defendant's sentencing hearing. Subsequently, however, because of criticism by the victims of the defendant's crime, the prosecutor changed his mind about the wisdom of his promise. Accordingly, before the sentence could be imposed, the prosecutor advised the defendant that he would not adhere to his original promise, and then requested the trial court to rescind the defendant's guilty plea and hold him for trial on the additional charges. The trial court granted the prosecutor's request over the defendant's objection, and the defendant was tried and convicted on the additional charges.

In short, *Tourtellotte* was an ideal case for testing the sufficiency of rescission as a remedy for the breach of a plea agreement. The prosecutor argued that rescission was entirely adequate because it restored the defendant to the position he occupied before entering his plea. The defendant countered that rescission was inadequate because it denied him the benefit of the state's promise. The Washington Supreme Court agreed with the defendant, holding that "specific performance is the only adequate remedy available to the defendant."[163] Moreover, the court explained that specific performance was required, and rescission was inadequate, because specific performance was the only remedy

161. *Santobello* must be based on a constitutional rule because it resulted in the reversal of a state conviction. Nonetheless, it is unclear which particular constitutional provision the Court was construing. See text accompanying notes 9-12 *supra*. The decision may be a construction of substantive "due process" under the fourteenth amendment. *See* Santobello v. New York, 404 U.S. 257, 267 (1971) (Douglas, J., concurring). As such, *Santobello* could be a decision that substantive due process requires that the state treat defendants with dignity with respect to crucial choices affecting their welfare by apprising defendants of the consequences of pleading guilty. See note 121 *supra* and accompanying text. Or it could be a decision that substantive due process also requires that the state protect the expectations it creates in the minds of criminal defendants with respect to the disposition of their cases.

Alternatively, the decision may be a construction of the specific constitutional rights waived by a plea of guilty: the right against self-incrimination, the right to confront one's accusers, and the right to trial by jury. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969). These rights have been read as applying to the states by way of the fourteenth amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). Thus, the Court may be construing these specific rights as requiring for intelligent waiver that the defendant first be told what the rights consist of and what the consequences are of waiving them. If these specific rights are the source of the rule in *Santobello*, however, it is difficult to see how they could be understood to provide protection for the defendant's expectation interests. Therefore, if the Court genuinely intends to protect expectation interests, it must be basing its decision on the substantive commands of the due process clause.

162. 88 Wash. 2d 579, 564 P.2d 799 (1977).

163. *Id.* at 585, 564 P.2d at 803.

that safeguarded the defendant's expectation, created by the state, that he would not be charged with additional offenses. In the court's words, "[t]he defendant is entitled to the benefit of his original bargain."[164]

Similarly, other state courts have recognized the importance of protecting a defendant's expectations when providing relief under *Santobello* for broken plea agreements.[165] In choosing a remedy for the breach, these courts regularly provide relief under *Santobello* by ordering specific performance.[166] It is fair to conclude that at least some state courts interpret *Santobello* to provide constitutional protection for the expectation interests of defendants and, therefore, to require specific performance of broken plea agreements by the state.

The lower federal courts have not been as explicit as state courts in treating *Santobello* as constitutional authority for the protection of the defendant's expectation interests. Nonetheless, there is a definite trend among the lower federal courts toward ordering the remedy of specific performance for broken plea agreements whenever the defendant seeks that remedy.[167] Moreover, some courts have explicitly recognized that the purpose of ordering specific performance is to protect the defendant's bargained-for expectations. Thus, in *Palermo v. Warden, Green Haven State Prison*,[168] the Second Circuit enforced the defendant's plea agreement by releasing him from prison following the expiration of the sentence he was promised in return for pleading guilty. In doing so, the

164. *Id.*

165. *See, e.g.*, State v. Thomas, 61 N.J. 314, 320, 294 A.2d 57, 61 (1972) (essential fairness dictates that the defendant's expectations be protected); Commonwealth v. Zakrzewski, 460 Pa. 528, 533, 333 A.2d 898, 900 (1975) ("It is settled that where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain.").

166. *See In re* Dodge Van, 24 Ariz. App. 337, 538 P.2d 766 (1975); People v. Newton, 42 Cal. App. 3d 292, 298, 116 Cal. Rptr. 690, 694 (5th Dist. 1974); Braxton v. United States, 328 A.2d 385, 386-87 (D.C. 1974); State *ex rel.* Gutierrez v. Baker, 276 So. 2d 470, 472 (Fla. 1973); Spalding v. State, 330 N.E.2d 774, 778 (Ind. Ct. App. 1975); State v. Brockman, 277 Md. 687, 700, 357 A.2d 376, 384 (1976); Miller v. State, 272 Md. 249, 255, 322 A.2d 527, 530 (1974); People v. DeWolfe, 36 App. Div. 2d 618, 318 N.Y.S.2d 810 (1971); Stewart v. Cupp, 12 Or. App. 167, 173, 506 P.2d 503, 506 (1973); Commonwealth v. Zuber, 466 Pa. 453, 457-62, 353 A.2d 441, 444-46 (Pa. 1976); Commonwealth v. Zakrzewski, 460 Pa. 528, 333 A.2d 898 (1975); Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (1971); State v. Freeman, 115 R.I. 523, 532-34, 351 A.2d 824, 829-30 (1976); State v. Tourtellotte, 88 Wash. 2d 579, 564 P.2d 799, 803 (1977). *But cf.* Davis v. State, 308 So. 2d 27, 29 (Fla. 1975) (defendant has no right to the specific enforcement of a promise made and breached by the judge rather than by the prosecutor).

167. *See* Petition of Geisser, 554 F.2d 698, 706 (5th Cir. 1977); United States *ex rel.* Baker v. Finkbeiner, 551 F.2d 180, 184 (7th Cir. 1977); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296-97 (2d Cir. 1976); United States v. Alessi, 536 F.2d 978, 981 (2d Cir. 1976) (dictum); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974); Correale v. United States, 479 F.2d 944, 949-50 (1st Cir. 1973); United States v. Hallam, 472 F.2d 168 (9th Cir. 1973); Mawson v. United States, 463 F.2d 29 (1st Cir. 1972); United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972); Karger v. United States, 388 F. Supp. 595, 599 (D. Mass. 1975); Lewis v. Mahoney, 380 F. Supp. 1370 (E.D.N.C. 1974). *See also* Note, *Legitimation of Plea Bargaining, supra* note 2, at 793.

168. 545 F.2d 286 (2d Cir. 1976).

court held "that where a defendant pleads guilty because he reasonably relies on promises by the prosecutors that are in fact unfulfillable, he has a right to have those promises fulfilled."[169] This tendency to order specific performance of breached plea agreements means that defendants generally receive the remedy of performance whenever they request it, rescission being ordered only where true agreement was never formed[170] or, if formed, was never breached,[171] or, if formed and breached, was not such that the defendant preferred or requested the remedy of specific performance rather than rescission.[172]

It might be argued that in remedying broken plea agreements, the federal courts are acting pursuant to their supervisory authority alone and that the tendency toward specific performance thus has no constitutional significance. This argument is supported by the fact that several federal courts, in considering habeas corpus petitions for relief from state convictions based on broken plea agreements, have deferred to the state courts' judgment with respect to the appropriate form of relief.[173] The strength of these cases is substantially diminished, how-

169. *Id.* at 296.

170. This is an Article about the remedies for plea agreements that have been formed and then breached, not an analysis of the constitutional principles that govern whether an agreement was ever formed in the first place. The latter is a complicated question that deserves an Article of its own. But once it has been determined that no agreement was ever formed, and that the state itself is not responsible for any expectations that the defendant may have formed, then it would be inappropriate to give the defendant a constitutional right to demand specific performance of a promise the state never made. *See* United States v. James, 532 F.2d 1161, 1163 (7th Cir. 1976); United States *ex rel.* Oliver v. Vincent, 498 F.2d 340, 346 (2d Cir. 1974). Nonetheless, the fact that a defendant has no right to specific performance or to the fulfillment of his misconceived expectations does not mean that he has no right to relief from his guilty plea; on the contrary, he may well be able to challenge the plea. *See* Mosher v. Lavallee, 491 F.2d 1346 (2d Cir.), *cert. denied,* 416 U.S. 905 (1974) (although the prosecutor never made the defendant any promises and although no plea agreement was, therefore, even formed, the defendant may challenge his guilty plea if he relied on his attorney's mistaken impressions about what the prosecutor actually represented). In that event, there are two possible remedies. Either the court can vacate the guilty plea, or the court can give the prosecutor the option of giving the defendant instead the benefit of what his attorney represented. *See* Santos v. Laurie, 433 F. Supp. 195, 200 (D.R.I. 1977); Dougherty v. United States, 367 F. Supp. 625, 631 n.11 (E.D. Pa. 1973) (court should accept the "prosecutor's preference"). In that respect, this situation is to be distinguished from the situation in which a plea agreement is first formed and then breached. There the prosecutor has no option regarding the choice of remedies, because the defendant has a right to demand specific performance if he desires it. Here, on the other hand, the defendant has no right to demand specific performance, but at the same time, he cannot complain about specific performance, because specific performance will necessarily protect his interest in entering an "intelligent" guilty plea. *See* McAleney v. United States, 539 F.2d 282, 286 (1st Cir. 1976) (prosecutor should have an "option" regarding remedy, because if he gives the defendant specific performance, "[the defendant] will obtain all he says he was promised and can then have no right to withdraw his plea"). *See also* note 157 *supra.*

171. *See, e.g.*, United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied,* 425 U.S. 951 (1976); United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730, 735 (3d Cir. 1972).

172. *See, e.g.*, United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975).

173. *See, e.g.*, Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173 (4th Cir. 1975); United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972). *See also* United

ever, by the fact that in each case the defendant either did not request specific performance,[174] or did not prove that a promise had even been breached.[175] In one case the court went so far as to say that the reason the defendant had no right to specific performance was because the prosecutor had not made a promise to the defendant of the kind that would create reasonable expectations of performance.[176] Moreover, in ordering specific performance of federal plea agreements, the federal courts explicitly rely on *Santobello*—an unquestionably *constitutional* decision. This certainly suggests that in protecting the defendant's expectations they are proceeding, not under their supervisory powers, but under the constitutional constraints of due process.

To be sure, it might be argued that the tendency of state and federal courts to grant specific performance of broken plea agreements is attributable to causes other than a newfound constitutional protection of expectations. Thus, it might be that the remedy of specific performance is designed, not only to protect a defendant from an unintelligent guilty plea, but also to punish the prosecutor for acts of "bad faith."[177] The argument would proceed as follows. It is true that a defendant's constitutional interest in the intelligence of his guilty plea can be adequately protected by either the remedy of rescission or the remedy of specific performance. But in the area of broken plea agreements, due process is concerned with more than redressing personal injuries to the defendant; it is also concerned with deterring acts of bad faith by the state. Indeed, that explains why, in cases where the state has willfully suppressed exculpatory evidence, the constitutional remedy is to dismiss the prosecution rather than to order a new trial.[178] Accordingly, where the state has willfully breached a plea agreement, the appropri-

States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975) (dictum), *cert. denied*, 425 U.S. 951 (1976).

174. See note 172 *supra*. If the defendant does not desire specific performance, then he cannot have any objection to giving the prosecution the option to choose between specific performance and vacatur, because either remedy will satisfy his constitutional interests. That is, since the defendant has waived any interest in getting the benefit of his bargain, his only remaining interest is in the "intelligence" of the plea, and that can be satisfied either by rescission or by specific performance. See note 157 *supra*.

175. See notes 170-71 *supra*.

176. United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 653 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

177. *See* State v. Pope, 17 Wash. App. 609, 564 P.2d 1179, 1182 (1977) (the trial court has "discretion" whether to grant a defendant rescission or specific performance, but "where bad faith is found to exist, the court should give considerable weight to the choice of remedy sought by defendant").

178. United States v. McCord, 509 F.2d 334, 348-51 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975) (upon a showing of gross misconduct by the state, a defendant may be entitled to demand that the prosecution against him be dismissed, even in the absence of a showing that the misconduct precludes him from receiving a fair trial). A comparable principle presumably underlies the exclusionary rule in fourth amendment cases, entitling a defendant to demand that illegally seized evidence be excluded. The purpose of the rule is not to repair the injury to the

ate remedy is one that both redresses the defendant's injury *and* penalizes the state for its misconduct. Thus, in deciding between rescission and specific performance, a court could appropriately grant specific performance for the very reason that it is the remedy that the state does *not* prefer.

There are several problems with this explanation. First, it fails to explain what is "bad" about a prosecutor's willful breach of a plea bargain. After all, to say that the state has an interest in punishing the prosecutor for acts of "bad faith" presupposes a notion of injury. It assumes that someone will be injured by the prosecutor's conduct and that the injury justifies the imposition of a sanction. Yet it is difficult to identify any injury here apart from the injury to the defendant's expectations. If the due process clause is not concerned with the protection of a defendant's expectations, then it is hard to see why the due process clause should give defendants the right to object when a prosecutor deliberately trifles with their expectations. Conversely, if it is true that a prosecutor should be punished for willfully breaching a plea agreement, then it appears that at some level, at least, the due process clause is concerned with the protection of expectation interests.

Second, if specific performance is designed, not to redress injury to the defendant, but rather to punish the prosecutor for acts of misconduct, then a court should select whichever of the two remedies the prosecutor finds less preferable. That is, the court should order specific performance only when the prosecutor would prefer rescission, and should grant rescission only if the prosecutor prefers to fulfill the promise. Yet that would mean that at least in some cases—*i.e.*, cases in which the prosecutor and the defendant both prefer the same remedy—the court would be required to prescribe a remedy that neither the prosecutor nor the defendant desired.

Finally, the "punitive" explanation of specific performance accounts only for those rare cases in which the state has acted in bad faith. In most cases the state's breach is either inadvertent or, if intentional, is arguably justified by some change in circumstances. In *Santobello*, for example, it was conceded that the state's failure to perform on its promise was "inadvertent."[179] Nonetheless, a majority of the Court said that the defendant might be entitled to specific performance if that were the remedy he preferred. Thus, the cases cannot be explained on the basis of bad faith.

Alternatively, it might be argued that the courts may be ordering specific performance simply because it is the only appropriate remedy

defendant's privacy, which has already occurred and cannot be redressed, but to penalize the state for its misconduct.

179. "That the breach of agreement was inadvertent does not lessen its impact." 404 U.S. at 262. *Accord*, United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973).

under the "circumstances" (in the language of the Court in *Santobello*).[180] Specifically, having pleaded guilty in return for a promised inducement, the defendant may have materially altered his position in such a way that he can no longer be returned to the status quo ante. In that event, the "remedy" of rescission (or vacatur) is wholly inadequate, because it returns him to a position substantially worse than his position prior to pleading guilty. Thus, even if the "intelligence" requirement is the only constitutional interest underlying *Santobello*, in some cases the only appropriate remedy for a broken plea agreement may be specific performance.

There is no doubt that courts sometimes order specific performance of broken plea agreements where the remedy of rescission would be inadequate. For example, courts have ordered specific performance where the defendant already has served a substantial portion of his sentence[181] or has given valuable information to the government at great personal risk.[182] In both cases, the defendant's change of position makes it impossible to restore him to the status quo ante. In both cases, specific enforcement is the only appropriate remedy, even without regard to the defendant's expectation interests.

Nevertheless, there are at least two difficulties with attempting to explain the frequent granting of specific performance by a defendant's change in position. First, the courts have not explicitly referred to such considerations in discussing the remedies of rescission and specific performance. On the contrary, if anything, they suggest a presumption in favor of specific performance as the preferred and customary remedy without reference to any change in position by the defendant.[183] Such a presumption seems inconsistent with the view that specific performance is granted only to protect the defendant from detrimental reliance.

Second, courts have granted specific performance of broken plea agreements even where the facts indicate that the defendant could be restored to the status quo ante by rescinding his plea.[184] In one typical case, the defendant pleaded guilty in exchange for a reduction of the charges and the prosecutor's promise not to oppose probation. Although the state complied with the promise at the initial sentencing, the

180. 404 U.S. at 263.

181. *See, e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (Coffin, C.J.).

182. *See, e.g.*, Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) (Brown, C.J.).

183. *See* Santobello v. New York, 404 U.S. at 263 ("the state court . . . is in a better position to decide whether the circumstances of this case require *only* that there be specific performance" (emphasis added)); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) ("defendant does not seek to withdraw his guilty plea but only asks the lesser relief of 'specific performance' of the plea bargain").

184. *See, e.g.*, United States v. Brown, 500 F.2d 375 (4th Cir. 1974); United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973); Karger v. United States, 388 F. Supp. 595, 599 (D. Mass. 1975); Lewis v. Mahoney, 380 F. Supp. 1370 (E.D.N.C. 1974). *See also* cases cited in note 167 *supra*.

promise was inadvertently breached at a subsequent hearing on the defendant's motion for a sentence reduction. Although it appears that the defendant could have been fully restored to his initial situation by vacating the guilty plea, the court of appeals gave specific enforcement of the prosecutor's promise by remanding for a new hearing on the motion at which the prosecutor would not oppose probation—thus giving the defendant the full benefit of his bargain.[185] It is fair to conclude that the courts' willingness to grant specific performance as the remedy for broken plea agreements cannot be fully explained by reference to changes in the defendant's position and that the courts are interpreting *Santobello* instead to provide constitutional protection for the legitimate expectations the state creates in defendants when it enters into plea agreements with them.

In addition to the views of the majority in *Santobello* and the interpretations of *Santobello* by the lower courts, common intuitions suggest that it is fundamentally unfair for the state to create and then destroy a defendant's expectations. We generally assume that people ought to keep their promises, at least in the absence of unusual circumstances. Because of the extraordinary power of the state and the critical nature of promises concerning criminal consequences, this obligation applies with special force to representatives of the state who enter into plea agreements with individual defendants.[186] To be sure, the Constitution does not purport to serve as a general protector of the morals of society. Nonetheless, the standards of substantive due process hold the state to a particularly high duty of care when it makes promises to defendants in criminal cases. As the Court of Appeals for the Second Circuit said in the course of holding the state to such a promise, "fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.' "[187] This high standard means that at least some of the actions we perceive to be unfair in a moral sense are also prohibited by the Constitution. It is hardly unthinkable, therefore, that such prohibited actions should include the state's failure to keep its promises

185. United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973). *Accord,* United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1111-12 (8th Cir. 1977) (although defendants could have been restored to the status quo ante by rescinding their guilty pleas and suppressing their interim incriminating statements, they are entitled under *Santobello* to demand the specific benefit of the state's promise not to prosecute them on additional charges). *See also In re* Doe, 410 F. Supp. 1163 (E.D. Mich. 1976) ("Neither may the government insist that Doe [the defendant] demonstrate some prejudice before claiming a violation of his rights in the government's broken promise.").

186. It was precisely this notion of unfairness that so disturbed the court in Geisser v. United States: "This is an extraordinary case calling for extraordinary action. It is a case of the *great* United States going back on its word in a plea bargain made by the Department of Justice . . . ." 513 F.2d 862, 863 (5th Cir. 1975) (emphasis added).

187. Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976).

after the defendant has fulfilled his part of an agreement by pleading guilty in reliance on the promise.

It might be thought that the substantive unfairness of permitting the prosecutor to breach his promise could be remedied by rescinding the agreement and, wherever possible, returning the defendant to his initial position. That is, our sense of unfairness may be grounded in the feeling that even if the state is not to be punished for breaking its promises,[188] it should not be allowed to profit from its own broken promises. Since most plea agreements are "unilateral" contracts in which the state makes a promise in return for the defendant's act of pleading guilty,[189] and since the effect of the defendant's act (which takes only a few minutes of court time) can be completely undone by setting aside the plea and providing immunity for anything the defendant may have said at the arraignment,[190] the court can almost always

188. See text accompanying note 179 *supra.*

189. It has been said that it is inappropriate to compel a prosecutor to perform on his promise in a situation where the defendant could not be compelled to plead guilty. *See* Wynn v. State, 22 Md. App. 165, 172, 322 A.2d 564, 568 (1974). Indeed, such "mutuality" is often emphasized in contract law, particularly when equitable relief (such as specific performance) is requested. *See* 5A A. CORBIN, *supra* note 144, § 1179. There are at least two reasons why this concept of mutuality is not jeopardized by requiring specific performance of the prosecutor. First, most plea agreements arise in the form of "unilateral" contracts and, therefore, do not require mutuality. That is, in most plea agreements, the consideration given for the prosecutor's promise is not the defendant's promise to plead guilty, but rather the defendant's actual performance in so pleading. Under such an agreement, the prosecutor agrees to perform if and when the defendant performs and neither bargains for, nor purports to enjoy, the right to compel the defendant to perform. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 4-15 (2d ed. 1977). That explains why it is appropriate to hold the prosecutor to his promise after the defendant pleads guilty even though the defendant cannot be ordered to plead guilty. That also explains why the prosecutor may be allowed to rescind his promise (or offer) before the defendant "accepts" the offer by pleading guilty. *See* Shields v. State, 374 A.2d 816, 818-19 (Del. Super. Ct. 1977).

Second, if the parties actually choose to enter into a "bilateral" contract, where the consideration given for the prosecutor's promise is the defendant's *promise* to plead guilty, the doctrine of mutuality can be given its full effect. That is, if a defendant actually agrees to plead guilty in return for a prosecutor's promise, there is nothing to prevent the defendant from being compelled to perform on the promise. To be sure, in that case the making of the agreement itself would constitute the act of "pleading guilty" for purposes of Boykin v. Alabama, 395 U.S. 238 (1969), and, to be valid, would have to be preceded by the full *Boykin* warning and inquiry. If that were done, however, there would be no constitutional bar to holding the defendant to the agreement to plead guilty, just as there is presently no constitutional bar to upholding the plea of a defendant who has pleaded guilty and now wishes to vacate the plea. *See, e.g.*, United States v. Levine, 457 F.2d 1186 (10th Cir. 1972); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964); J. BOND, *supra* note 2, at 309. *Cf.* Butler v. Florida, 228 So. 2d 421, 424-25 (Fla. App. 1969) (suggesting that a defendant, having agreed to plead guilty if he fails a polygraph test, can be held to that promise if he subsequently fails the test).

190. Indeed, by its own force, the defendant's privilege against self-incrimination may already require that statements he makes in the course of plea bargaining or as a condition for a plea agreement be excluded from any subsequent trial. *See* Mobley *ex rel.* Ross v. Meek, 531 F.2d 924 (8th Cir. 1976). *Cf.* Hutto v. Ross, 429 U.S. 28, 30 & n.3 (1976) (confession subsequent to an agreed upon plea bargain is not *per se* inadmissible). But even if the privilege does not *require* that such statements be excluded in every case, the courts certainly have the authority to provide for such an exclusion wherever necessary to assure that the remedy of vacatur (as a substitute for

prevent the state from profiting from its broken promises simply by vacating the defendant's plea.

The trouble with this argument is that our sense of unfairness is not limited to cases in which the state profits from its broken promises; it also extends to cases in which defendants are injured by broken agreements. Even if the state does not benefit from its failure to perform, it severely injures defendants' expectations about the criminal consequences facing them. In all these cases, defendants are purposely led to expect that their cases have been settled and that the charges will be resolved in a certain way. The severity of the psychological injury in the form of disappointed expectations is particularly great for criminal defendants because of the seriousness of the consequences and the nature of the resources and expertise arrayed against them. Allowing only the remedy of vacatur for such disappointment places defendants at the mercy of prosecutors who are free to repudiate their promises through negligence[191] or even bad faith.[192] In such circumstances, it seems strikingly cruel to allow the state to encourage false hopes and then destroy them at will.[193] If these intuitions about fundamental fairness are correct, they would support a rule that protects a defendant's expectations by providing for specific performance of broken plea agreements.

This analysis not only explains judicial interpretations of *Santobello* and satisfies our intuitions of fairness, but also comports with the existing protection for expectations in other areas of constitutional law. The contract clause,[194] for example, prohibits the states

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specific performance) is adequate to protect the defendant's constitutional rights. *See* United States *ex rel.* Anolik v. Commissioner, 393 F. Supp. 48, 51-52 (S.D.N.Y. 1975), *remanded on other grounds*, 524 F.2d 650 (2d Cir. 1976). *Cf.* United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (statements by defendant in the course of plea discussions are inadmissible as evidence against him in federal trials).

It can be argued that vacatur can *never* be an adequate remedy because, by pleading guilty, the defendant discloses a "guilty" state of mind that may subtly influence the prosecutor and the judge (if the judge knows of the plea) in any subsequent trial or sentence in the case. *See* State v. Freimann, 115 R.I. 523, 351 A.2d 824 (1976). Although this argument is hardly frivolous, the Supreme Court has implicitly rejected it by routinely assuming that vacatur is adequate as a remedy for defective guilty pleas. *See* Santobello v. United States, 404 U.S. 257, 263 n.2 (1971) (suggesting that if the defendant's plea were vacated he could be retried on the original charges). Indeed, if this argument were accepted, it would lead to startling results. It would mean that whenever a defendant could show that his guilty plea was invalid, he would be entitled to object to the limited remedy of vacatur and to demand, instead, that his conviction be set aside and the case against him dismissed with prejudice. In any event it would mean that no judge who had accepted a plea by a defendant could ever preside over his trial if the plea were later invalidated or withdrawn.

191. *See* Santobello v. New York, 404 U.S. at 260.

192. *See* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 294 (2d Cir. 1976).

193. *See* J. BOND, *supra* note 2, at 349-50.

194. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. The due process clause of the fifth amendment is the "federal counterpart" of the impairment clause. United States Trust Co. v. New Jersey, 431 U.S. 1, 53 n.16 (1977) (Brennan, J., dissenting).

from impairing the "expectations"[195] created in persons by privately negotiated contracts. The same principle prohibits the states from reneging on their own contracts in the commercial area. In fact, there is reason to believe that the standard governing the state's obligation to fulfill the expectations it creates through its own negotiated contracts is particularly high.[196] As Professor Laurence Tribe has said, "When the government [signals its trustworthiness], a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*"[197]

This constitutional protection is not limited to the commercial area, but also extends to state-created expectations in the area of criminal procedure. The double jeopardy clause, for example, gives specific protection to the expectations the state creates in defendants with respect to conviction and its consequences. Thus, the clause protects the defendant's interest in having the case decided once and for all by the first jury impanelled by assuring him that once the trial commences it will not be stopped and recommenced later, except for the strongest reasons.[198] The double jeopardy clause also protects the defendant's interest in knowing the full extent of his sentence by assuring him that, once a sentence has been imposed, it will not subsequently be increased at the state's initiative.[199] In each case, the purpose of the clause is to protect the defendant's state-created expectations of finality.[200] Since the double jeopardy clause provides specific protection against the substantive unfairness of uncertainty regarding criminal conviction and its consequences, it is not unreasonable to assume that the due process clause provides general protection against the substantive unfairness of uncertainty regarding plea agreements.[201]

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195. United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977).

196. *Id.* at 53 n.16 (Brennan, J., dissenting).

197. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 470 (1978) (emphasis in original).

198. "The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one." Illinois v. Somerville, 410 U.S. 458, 471 (1973).

199. "The law is well settled that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy." United States v. Turner, 518 F.2d 14, 15 (7th Cir. 1975).

200. *See* Green v. United States, 355 U.S. 184, 187 (1957) (the idea underlying the fifth amendment protection against double jeopardy is "that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ."). *Accord,* Schulhofer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449, 454 (1977); J. SIGLER, DOUBLE JEOPARDY 39 (1969): "Once acquitted or convicted of a crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment."

201. In United States v. Hallam, 472 F.2d 168 (9th Cir. 1973) the court of appeals gave

In sum, there is increasing reason to believe that we are witnessing the emergence of a new constitutional right: the right of criminal defendants to protection of the reasonable expectations created in them by plea agreements with the state. This is not to say that it was the actual intent of the Court in *Santobello* or the lower courts to recognize a new constitutional principle dealing with expectations. It is possible that the decisions were intended to be based on the traditional requirement that guilty pleas be "intelligent." It is even more likely that the courts never directly inquired into the constitutional foundations for the enforcement of plea agreements.

Regardless of whether the courts considered the issue, the result of the decisions is to imply constitutional protection for a defendant's expectation interests. This hypothesis provides the most plausible explanation for the decision in *Santobello* and the tendency of state and lower federal courts to order that broken plea agreements be remedied by specific performance rather than by rescission. It is also consistent with our basic intuitions of fundamental fairness and with the importance placed on expectations in other constitutional contexts. If the courts are ready to acknowledge that defendants have a constitutional interest in the protection of their reasonable expectations, they will conclude that a defendant has a right to demand specific performance as a remedy for broken plea agreements.

V

A CONSTITUTIONAL LAW OF CONTRACTS

If a new constitutional protection for defendants' expectations emerges from *Santobello* and its progeny, at least two ramifications should be considered. First, a considerable body of learning in the area of government and commercial contracts may become pertinent to this emerging law of plea agreements. Second, the state's obligation to fulfill its promises will not be limited to promises given in return for guilty pleas, but will almost certainly extend to other types of promises involving "criminal" consequences and may conceivably extend to promises involving "civil" consequences.

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explicit recognition to the defendant's interest in the finality of a plea agreement that had been fully performed by both the defendant and the government. In that case, the defendant had agreed to plead guilty to one of two counts in exchange for the prosecutor's promise to dismiss the remaining count. Both sides performed, but at a subsequent hearing the government moved to set aside the plea—and the agreement—when it became concerned with the sufficiency of the indictment on the charge to which the defendant had pleaded guilty. In refusing to upset the plea, the court cited *Santobello* and held that "due respect for the integrity of plea bargains demands that once a defendant has carried out his part of the bargain the Government must fulfill its part." 472 F.2d at 169. If the Government cannot explicitly rescind after performing on its promise, it is difficult to understand why it should be able to refuse to perform and similarly upset the finality of the agreement.

The general law of contracts may become pertinent to the formulation of a constitutional law of plea agreements on several levels. At the very least *Santobello* stands for the proposition that plea agreements are constitutionally enforceable and that defendants are entitled to some remedy when the state breaches a promise given in return for a plea of guilty. Even if that is the broadest statement that can be made of the rule in *Santobello*, the courts must "constitutionalize" the preliminary contractual questions of formation and breach. That is, in order to decide whether a defendant is entitled to relief for a broken plea agreement, the courts must first decide whether the evidence offered to prove the existence of a promise is admissible for that purpose;[202] whether such evidence shows that a promise was made;[203] whether the person who made the promise had authority to create an enforceable obligation on behalf of the state;[204] what were the terms of the promise;[205] whether the promise operated to induce the defendant to plead guilty;[206] whether the state rescinded its promise before the defendant pleaded guilty;[207] whether the state actually breached its promise;[208] and whether the state is excused from its breach because of duress[209] or

202. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may introduce evidence of an oral promise by the state, even though the existence of such a promise contradicts the integrated terms of the defendant's plea as recorded at the arraignment).

203. *Compare* United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975) (the prosecutor's statements to the defendant about the sentence he could expect to receive constituted a promise that the defendant would receive a certain sentence), *with* United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 653 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (the judge's comments to the defendant about the sentence the judge expected to impose did not constitute a promise that the judge would impose that particular sentence).

204. *Compare* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976) (state prosecutor can create enforceable obligations on behalf of the state parole authority because he had apparent authority to speak on its behalf), *with* United States v. Long, 511 F.2d 878 (7th Cir. 1975) (state prosecutor cannot create enforceable obligations on behalf of the federal prosecutor because he had no actual authority to speak for the federal government).

205. *See, e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (dispute as to whether the prosecutor promised to recommend a sentence of four to eight years or a sentence concurrent with the defendant's existing state sentence).

206. *Compare* United States v. Hammerman, 528 F.2d 326, 331 (4th Cir. 1975) (the state's promise was an inducement for the defendant's plea), *with* United States v. Lombardozzi, 467 F.2d 160 (2d Cir. 1972) (the state's promise was not an inducement for the defendant's plea).

207. *See, e.g.*, Shields v. State, 374 A.2d 816, 818-19 (Del. Super. Ct. 1977) (state may rescind its promise at any time prior to the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement).

208. *Compare* Bergman v. Lefkowitz, 569 F.2d 705 (2d Cir. 1977) (permitting a plea bargain to be avoided as a denial of due process, because the prosecutor's recommendation lacked adequate gusto, would not promote the sound administration of criminal justice), *with* United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974) (prosecutor breached his promise to make a sentencing recommendation in the defendant's favor because of the "halfheartedness" of his statements to the sentencing judge).

209. *Compare* United States v. Bridgeman, 523 F.2d 1099, 1110 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976) (the state's promise is not enforceable because the defendant elicited it by threatening violence to third persons), *with* Palermo v. Warden, Green Haven State Prison, 545

fraud[210] by the defendant, or because the defendant failed to perform his part of the bargain.[211]

These are all constitutional questions because they are necessary parts of the constitutional rule that a defendant has a constitutional right to relief for a broken plea agreement.[212] Yet they are also the kinds of questions that typically arise under the general law of contracts. It should come as no surprise, therefore, that in making these constitutional judgments, courts find it useful to consult the law of contracts.[213]

We have seen, however, that *Santobello* may be construed more broadly. It may also stand for the proposition that when the state breaches a plea agreement, the defendant is constitutionally entitled to a remedy that protects his expectation interests. In that event, *Santobello* constitutionalizes not only the preliminary questions of formation and breach, but also the question of remedy. That is, if the defendant is constitutionally entitled to a remedy that protects his expectations, then whether a particular remedy places him in the same position he would have occupied had the state performed on its promise becomes a constitutional question.[214] Yet, again, that is precisely the

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F.2d 286, 295 (2d Cir. 1976) (the state's promise made in exchange for defendant's promise to return stolen property was not made under "extreme duress" and was therefore enforceable).

210. *See, e.g.*, People v. Selikoff, 35 N.Y.2d 227, 238, 318 N.E.2d 784, 791, 360 N.Y.S.2d 623, 633 (1974) (state's promise is not enforceable because of "fraud in the inducement"), *aff'd on other grounds*, 524 F.2d 650 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

211. *Compare* United States v. Boulier, 359 F. Supp. 165, 170 (E.D.N.Y. 1972), *aff'd*, 476 F.2d 456, 459 (2d Cir. 1973) (state's promise is not enforceable because the defendant did not perform his part of the bargain), *with* State v. Brockman, 277 Md. 687, 698, 357 A.2d 376, 383 (1976) (state's promise is enforceable because the defendant "substantially" performed his part of the bargain).

212. They are constitutional questions for the same reason that the questions concerning the "harmlessness" or "prejudicial nature" of constitutional violations are themselves constitutional questions. *See* Chapman v. California, 386 U.S. 18, 21 (1967) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.") *But cf. id.* at 46-51 (Harlan, J., dissenting) (state court application of a constitutionally proper state harmless-error rule should constitute an adequate state ground for judgment).

213. "[T]he decision in *Santobello*. . . involved fundamental principles of contract law, notably those concerning mutually binding promises freely given in exchange for valid consideration." United States v. Bridgeman, 523 F.2d 1099, 1109-10 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). *See also* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 295-97 (2d Cir. 1976); J. BOND, *supra* note 2, at 55-57. *But see* United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert denied*, 425 U.S. 951 (1976) (principles of contract law are "inapposite" to criminal proceedings); State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 383 (1976) ("[t]he rigid application of contract law to plea negotiations would be incongruous . . .").

214. In cases where specific performance of the state's original promise is no longer feasible, the court will try to "approximate" the relief the defendant would have received if the state had fulfilled its part of the agreement even if that means placing the defendant in a more favorable

question that the general law of remedies is designed to answer.[215]

This is not the place for a comprehensive analysis of the plea agreement as a "constitutional contract." To suggest a starting point, however, it may be helpful to examine one way in which the general law of contracts may usefully be brought to bear on the analysis of plea agreements. Perhaps the most problematic issue confronting courts today in remedying broken plea agreements is how to treat the illegal prosecutorial promise. This problem can arise either where a prosecutor promises the defendant something that the prosecutor himself has no legal authority to deliver,[216] or where a prosecutor promises the defendant something no government official has legal authority to deliver.[217] In such cases, some courts have granted specific performance despite the illegality,[218] while others have resorted instead to the alternative remedy of rescission.[219]

According to classic contract doctrine, agreements based on illegal promises are generally void, and the aggrieved party often has no official recourse for enforcing them.[220] There are some circumstances, however, in which relief will be given despite the illegality of the agreement. One authority states that "[b]efore granting or refusing a remedy, the courts have always considered the degree of the offense, the extent of public harm that may be involved, and the moral quality of the conduct of the parties in the light of the prevailing mores and standards of the community."[221] There is also authority that, in determining whether relief is required for the breach of an illegal agreement, the courts should consider the relative culpability of the parties to the agreement.[222]

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position than he might have been in if the promise had been fulfilled. *See* Correale v. United States, 479 F.2d 944, 950 (1st Cir. 1973).

215. *See* J. CALAMARI & J. PERILLO, *supra* note 189, § 14-4 ("For breach of contract the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed."); 5 A. CORBIN, *supra* note 144, § 992; RESTATEMENT OF CONTRACTS § 329 (1932); C. MCCORMICK, DAMAGES 560 (1935). For specific reference to the expectation interest of the aggrieved party, see Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 373 (1936-1937).

216. *See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (prosecutor in one federal district promised the defendant that, in return for a guilty plea, certain charges against him in another federal district would be dismissed).

217. *See, e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (prosecutor promised the defendant that, in return for a guilty plea, the prosecutor would recommend a sentence of four to eight years, a sentence not authorized by federal law for the crime charged).

218. *See* cases cited in note 239 *infra*.

219. *See, e.g.*, People v. Lopez, 28 N.Y.2d 148, 269 N.E.2d 28, 320 N.Y.S.2d 235 (1971) (court reversed conviction based on plea agreement including illegal sentence).

220. *See* J. CALAMARI & J. PERILLO, *supra* note 189, at § 22-3 ("As a general rule an illegal bargain is void."); RESTATEMENT OF CONTRACTS, *supra* note 215, at §§ 598, 607.

221. 6A A. CORBIN, *supra* note 144, § 1534, at 816.

222. *See* J. CALAMARI & J. PERILLO, *supra* note 189, at § 22-12 (under the doctrine of pari delicto, "[a] party who has performed under an illegal bargain is entitled to a quasi-contractual

When this analysis is applied to the illegal plea agreement, it appears that in some cases, at least, the defendant is entitled to relief even though the prosecutor's promise was illegal, especially when the promise is one pertaining to the charging or sentencing of the defendant. First, the degree of the prosecutor's offense seems minimal in light of the broad discretion already allowed the prosecutor in deciding whether to charge a defendant at all, whether to charge at a certain level, and (if the defendant is charged and convicted) whether to recommend clemency. Similarly, the public interest cannot be very seriously jeopardized by an illegally low sentence if the prosecutor could have produced precisely the same result legally, either by reducing the original charges before conviction or by commuting the defendant's sentence after conviction. Second, as between the prosecutor and the defendant the prosecutor may well be the more culpable in making an illegal agreement; if anyone is charged with knowledge of the law of sentencing, it is the prosecutor.[223] Therefore, ordinary contract doctrine provides theoretical support for enforcing at least some illegal promises in the area of plea agreements.

To be sure, there are differences between the illegal promises of private persons and the illegal promises of public officials. The enormous power of public officials, the frequency with which they exercise it, and the absence of a comparable self-interest in restraint may all support limitations on the enforcement of illegal promises by the state. Still, there is no reason to assume that those factors are dispositive or that individual defendants should always have to bear the consequences of the state's illegality. There are alternative ways to guard against the abuse of state authority, including "tighter administrative controls within the executive branch,"[224] and notice to defendants of the scope of the state's authority.[225] In this area, as in others,[226] the

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recovery, if he was not guilty of serious moral turpitude and, although blameworthy, is not equally as guilty as the other party to the illegal bargain"); RESTATEMENT OF CONTRACTS, *supra* note 215, at § 604. *See generally* Grodecki, *In Pari Delicto Potior est Conditio Defendentis*, 71 L.Q. REV. 254 (1955).

223. In Correale v. United States, 479 F.2d 944, 947-49 (1st Cir. 1973), the prosecutor promised to recommend a sentence that was beyond the legal authority of the court to grant. On appeal, the prosecutor argued that this promise should be treated as void—rather than as specifically enforceable—because the defendant should have known that the sentence was illegal. The court of appeals rejected the argument. Although it did not absolve the defendant of responsibility, the court enforced the promise, apparently on the ground that the prosecutor's "ignorance of the law" was the more culpable.

224. In this limited context government may not rely upon distinctions between express, implied, and apparent authority among its agents in avoiding the effect of its promise. These distinctions have meaning for the legal technician, not for the layman dealing with the "government" in his negotiations. The solution to agents who bargain away the government's rights is tighter administrative control within the executive branch.

In re Doe, 410 F. Supp. 1163, 1166 (E.D. Mich. 1976).

225. A defendant cannot ask that a promise be enforced if he knew or should have known

state must sometimes be estopped from relying on the illegality of its own promises in order to avoid fulfilling them.

In *Petition of Geisser*,[227] for example, the Justice Department entered into negotiations with the defendant ending in a multifaceted agreement. In return for a plea of guilty by the defendant and further cooperation in providing evidence against her confederates, the Justice Department promised that the United States would make its "best efforts" to prevent her from being extradited to Switzerland following her release from prison.[228] After the defendant had fully performed her part of the bargain, she sued for specific performance of the agreement, requesting the district court to cancel an extradition order that the Swiss government had obtained pursuant to a treaty between the two nations. The United States challenged the enforceability of the agreement, arguing that the Justice Department had neither informed nor consulted with the State Department before making the agreement, that the Justice Department had no legal authority to make binding promises on behalf of the State Department, and, even if it did, that the State Department had no "discretion" under the treaty to resist the Swiss request for extradition.

The Fifth Circuit rejected the Government's arguments. The court held that despite the fact that the Justice Department had no legal authority to speak for the State Department, the promise to the defendant must be fulfilled. Moreover, with respect to the State Department's lack of legal authority to resist the Swiss request, the court held that the United States had a constitutional obligation to respect the plea agreement, and, in the event of conflict between the agreement and the treaty, the agreement could prevail on the ground that individual con-

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that it was illegal or beyond the scope of the promiser's authority. United States v. Wilkins, 281 F.2d 707, 712 (2d Cir. 1960) ("particularly where the defendant is represented by counsel or is experienced in the ways of the criminal courts, [he] must be supposed to know . . . that such a promise in no way binding on the court . . . ."). *But cf.* Correale v. United States, 479 F.2d 944, 949 (1st Cir. 1974) (remedy approximating specific performance is appropriate even where prosecutor's promise was contrary to federal statute). To be sure, it may be difficult to provide notice to defendants until the scope of the state's authority has been clarified by decision; but once such a decision is rendered, the decision itself will tend "to make the reliance of later defendants on the same type of misleading [promise] unreasonable." Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046, 1059 n.50 (1969).

226. *See* Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969).

227. 554 F.2d 698 (5th Cir. 1977), *following remand ordered in* 513 F.2d 862 (5th Cir. 1975).

228. The Justice Department also agreed that the defendant would be paroled after three years. The district court held that the defendant was entitled to specific performance of that part of the agreement, too, despite the fact that the United States Attorney had no legal authority to speak for the United States Board of Parole. The court of appeals, in turn, reserved the question of the enforceability of that promise on the first appeal, 513 F.2d at 871, and then dismissed the question as moot on the second appeal. 554 F.2d at 700 n.1. Other courts have held that such promises are enforceable, despite the prosecutor's lack of legal authority to speak for the parole agency. *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976).

stitutional rights are superior to the government's treaty obligation.[229] Accordingly, the court concluded that despite the defects in formation, the defendant was entitled to specific performance of the promise.[230] As the court put it:

> What we are saying is that the United States Government must in light of the commitment made by its prosecutorial arm look carefully at the constitutional obligations owing [the defendant]. When it looks—whether through the advocative eyes of the Attorney General or through those of the Secretary of State, whose oath of office calls for support of the same constitution—all will see *Santobello* as a lion in the streets.[231]

The same approach has been taken by other courts.[232]

The problem of the illegal prosecutorial promise, then, provides one example where traditional learning in the area of contracts may be fruitfully applied to plea agreement disputes. This is not to suggest, of course, that the law of contracts will supply readymade answers for the criminal context, for there are obvious and significant differences between commercial contracts and plea agreements. The subject of the former is civil in nature and typically takes the form of an agreement between private parties; the subject of the latter is criminal in nature and invariably represents an agreement between a private individual and the state. Furthermore, as one court has noted, the ultimate ends of criminal justice are obviously different from those of commercial contracts.[233] In resorting to the general principles of contracts, therefore, the courts must adapt them to the particular nature of plea agreements.[234] In the words of the Supreme Court, one looks to the law of contracts as "*an analogy*"[235] for solving the problems of plea bargain-

229. 513 F.2d at 869 n.11.

230. 554 F.2d at 706 ("We conclude that a narrowly drawn remedy specifically enforcing the Government's 'best efforts' agreement is required.").

231. 513 F.2d at 870.

232. *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976) (ordering specific performance of the prosecutor's promise that the defendant would be paroled, despite the fact that the prosecutor had no legal authority to speak for the parole agency); Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (ordering specific performance of the prosecutor's promise to recommend a four to eight year sentence, despite the fact neither the prosecutor nor the judge had legal authority to impose such a sentence for the particular crime charged); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (ordering specific performance of the prosecutor's promise to drop charges pending against the defendant in another federal district, despite the fact that the prosecutor had no legal authority to make commitments for the other district).

233. United States *ex rel.* Selikoff v. Commissoner of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

234. For an example of the way general contract principles can be adapted to the requirements of plea bargaining, *see* United States v. Owen, 492 F.2d 1100, 1107-09 (5th Cir. 1974).

235. Blackledge v. Allison, 431 U.S. 63, 75 n.6. (1977) (in deciding whether a defendant may contradict the integrated terms of his guilty plea as reflected in the record of his arraignment by introducing evidence of extrinsic oral agreements, the Court found an "analogy" in the "parol evidence rule" of the "law of contracts") (emphasis added).

ing. Nonetheless, insofar as both the criminal justice system and the commercial world share a concern—albeit for different reasons—for the protection of expectations arising out of bargained-for agreements, the mature body of learning already developed for commercial agreements should help illuminate the formation of a law of plea agreements.[236]

To turn to the second ramification of *Santobello*, if the decision is understood as providing constitutional protection for state-created expectations, it cannot be limited to expectations created in the context of plea agreements. It almost surely extends to the enforcement of other kinds of agreements in the area of criminal procedure, and may also extend to the enforcement of "civil" agreements between individuals and the state.

As previously discussed, the Constitution protects defendants from the loss of constitutional rights by regulating the manner and terms by which their rights may be waived. These constraints take the form of requirements that the waiver of rights be both voluntary and intelligent. Obviously, therefore, these constitutional protections are inextricably linked to waivers in general and to the waivers implicit in guilty pleas in particular. But if the Constitution also protects defendants from the disappointment of their state-created expectations, then the latter protection presumably operates without regard to the context in which the expectation is created. Therefore, if the Constitution prohibits the state from creating and destroying expectations in criminal defendants, the protection cannot be confined solely to expectations created in the course of plea bargaining. The protection must extend to other comparable expectations that the state creates in defendants with respect to criminal conviction and its consequences.

To be sure, the courts may wish to limit the protection to expectations of unusual strength and certainty; and to do so, they may require that the expectation be induced by a promise that is clothed with a certain formality or accompanied by some "consideration" or detrimental reliance by the defendant. But there is no reason to believe that a formal plea of guilty is required for that purpose. It should suffice that the defendant has given some substantial performance or has promised performance in exchange for the prosecutor's promise.

Significantly, this is precisely the position taken by some courts. In

236. Admittedly, the reasons for seeking to preserve expectations in commercial contract law may greatly differ from those relevant to plea agreements. For example, the primary concern in remedying broken contracts may be preservation of a regularized system for commercial trade. While similar concerns may be apposite to plea bargaining, the foremost interest behind preserving the defendant's expectations is more likely some notion of fundamental fairness. Irrespective of such differences, however, it is important to note that the same mechanism—expectation interests—may be used in both contexts to achieve the possibly divergent ends. This similarity forms a basis for using parallel types of analysis in the two situations.

People v. Reagan,[237] for example, the defendant agreed to undergo a polygraph test in exchange for the prosecutor's promise to dismiss the charges if the test confirmed the defendant's innocence. Following the examination, the prosecutor dismissed the charges in accordance with the agreement, but subsequently regretted the decision and reinstated the charges. Following conviction, the defendant appealed on the ground that the prosecutor had a constitutional obligation to keep his promise. The Michigan Supreme Court recognized that the agreement did not involve a plea of guilty. Nonetheless, citing *Santobello*, it ordered specific performance of the prosecutor's promise by reversing the defendant's conviction and dismissing the prosecution.

> In our view, a pledge of public faith in this instance gave force to an unwise agreement which became binding upon trial court approval of *nolle prosequi*. . . .
>
> Law enforcement processes are committed to civilized courses of action. When mistakes of significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed.[238]

The result in *Reagan* is perfectly consistent with the analysis developed in this Article. The state, by promising to drop the prosecution if the polygraph results were affirmative, created significant expectations in the defendant. The defendant, in turn, gave consideration for the prosecutor's promise by submitting to the lie detector test. In such circumstances, it should make no difference that the agreement giving rise to the expectations did not include a guilty plea. Insofar as the due process clause provides substantive protection for the important expectations of criminal defendants, such protection should extend to all agreements between prosecutor and defendant, provided they reflect the formality or consideration required to guarantee the legitimacy of the expectations, irrespective of whether the agreement includes a plea of guilty. Significantly, this is precisely the approach now taken by a majority of courts.[239]

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237. 395 Mich. 306, 235 N.W.2d 581 (1975). For similar cases in which courts have ordered specific performance of the state's promise outside the context of a plea agreement, *see* United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975) (by reversing the defendant's conviction, the court gave specific performance of a "deferred prosecution agreement" whereby the prosecutor promised either to seek an indictment against the defendant within 150 days of the defendant's failure to produce a narcotics dealer or not prosecute him at all); Commonwealth *ex rel.* Hancock v. Melton, 510 S.W.2d 250 (Ct. App. Ky. 1974) (the court refused to reverse an ultra vires grant of probation to the defendant because to do so would breach an agreement whereby the defendant would receive probation in exchange for dropping an appeal of his conviction).

238. 395 Mich. at 318-19, 235 N.W.2d at 587 (1975).

239. This case does not arise in a guilty plea context. However, judicial integrity and "the interests of justice," both themes of *Santobello*, would be offended if the court ratified the government's broken promise to Doe [the defendant] . . . . For whatever reason, Doe agreed to surrender contraband in return for immunity from questioning. Federal agents agreed and accepted the cocaine. The government may not now breach

Moreover, if due process provides substantive protection against the disappointment of state-created expectations, the protection may also apply outside the criminal area. Besides the expectations it creates in criminal defendants concerning life and liberty, the state regularly creates expectations in individuals concerning their property and status. Some of those expectations are based on mutual representations in the form of government contracts; others are based on unilateral representations by the government (such as by the taxing authority) on which individuals rely. In each case, the state leads individuals to anticipate that the state will behave in certain ways with respect to their property or status and, by disappointing those expectations, causes measurable injury. Interestingly, there is already some authority for the proposition that where an individual relies on misrepresentations by the government concerning his property or status, "justice and fair play"[240] require that the government pay compensation for the injury.

Nonetheless, there is a significant constitutional distinction between "criminal" and "civil" matters that may justify limiting the protection of *Santobello* to expectations regarding "criminal" consequences. Many of the specific protections of the Bill of Rights are pres-

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this promise with the court's aid by substituting immunity from prosecution for immunity from questioning.

In re Doe, 410 F. Supp. 1163, 1166 (E.D. Mich 1976). *See also* United States v. Millet, 559 F.2d 253, 256-57 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (prosecutor's promise to supply the defendant with certain items of evidence before trial, held enforceable) (dictum); United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1112 (8th Cir. 1977) (prosecutor's promise that in return for the defendant's coming forward with evidence of wrongdoing, defendant would not be prosecuted; held enforceable); United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975) (prosecutor's promise that in return for defendant's waiver of his speedy trial objections, prosecutor would not bring charges against him after a certain fixed period of time; held enforceable); *In re* Snoonian, 502 F.2d 110 (1st Cir. 1974) (prosecutor's promise that in return for a witness' testimony, the prosecutor would not use any of the witness' testimony against the witness' wife; held enforceable); United States v. Vale, 496 F.2d 365, 367-68 (5th Cir. 1974) (prosecutor's promise, after the defendant pleaded guilty, that the prosecutor would recommend a five-year sentence; held enforceable); United States v. Scanland, 495 F.2d 1104 (5th Cir. 1974) (prosecutor's promise at a pretrial hearing that he would not use certain evidence against the defendant at trial, held enforceable); United States v. Phillips Petroleum Co., 435 F. Supp. 622, 640 (N.D. Okla. 1977) (*same as Minnesota Mining & Mfg. Co., supra*); State v. Carlisle, 111 Ariz. 233, 236, 527 P.2d 278, 281 (1974) (prosecutor's and judge's promise that in return for the defendant's submitting his case for trial by the court, the judge would consider the case solely on the basis of the preliminary hearing transcript; held enforceable); Sturgis v. State, 25 Md. App. 628, 636, 336 A.2d 803, 807 (1975) (prosecutor's promise that in return for the defendant's submitting the case for trial on a stipulated record, the prosecutor would make no sentencing recommendation; held enforceable). *But see* United States v. Bethea, 483 F.2d 1024, 1027 (4th Cir. 1973) (prosecutor's promise that in return for the defendant's submitting himself for induction, the prosecutor would recommend that draft evasion charges be dismissed; held nonenforceable because *Santobello* applies only to promises given in return for guilty pleas); People v. Martin, 38 Ill. App. 3d 209, 214-15, 347 N.E.2d 200, 205 (1976) (prosecutor's promise that if the defendant submitted himself to a lie detector test and passed, the prosecutor would dismiss charges against him; held nonenforceable).

240. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), *discussed in* Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?*, 45 FORDHAM L. REV. 497, 510-11 (1976).

ently reserved for "criminal" actions. The privilege against self-incrimination, for example, protects witnesses from being compelled to make statements that would subject them to "criminal" (as opposed to civil) liability;[241] the procedural protections of the sixth amendment—jury, counsel, and witnesses— apply only in "criminal" (as opposed to civil) actions;[242] the protection against cruel and unusual punishments applies only to "criminal" punishments.[243] These specific reservations are evidently based on the assumption that, because of their seriousness, "criminal" matters deserve special constitutional protection.[244] On that assumption it is reasonable to conclude that it is only a person's expectations regarding "criminal" matters that deserve constitutional protection.

CONCLUSION

The Supreme Court was recently presented with the question whether a confession—which had been taken from a defendant in violation of an express agreement between the police and the defendant's lawyer—could be used as evidence against the defendant at trial.[245] The Court eventually disposed of the case on other grounds and thus avoided deciding whether the prosecutor could be held to his promise. But in doing so, the Court touched in a curious way upon the theme of this Article. In the course of reserving the question of the enforceability of the state's promise, the Court had this to say: "It is argued that this agreement may not have been an enforceable one. But we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law."[246]

The Article has both a specific and a general purpose. While its specific purpose is to fashion a constitutional law of remedies for broken plea bargains, its general purpose is to expose a fallacy—the fallacy, reflected above, of contrasting the "law of contracts" with "constitutional law" as if the one had nothing to do with the other. For as long as criminal defendants have a constitutional right to enforce plea agreements with the state (as *Santobello* squarely held), the Court will confront the constitutional task of deciding whether plea agree-

241. *See* Ullmann v. United States, 350 U.S. 422 (1956).

242. *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

243. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

244. For an extended effort to distinguish "civil" proceedings from "criminal" proceedings for constitutional purposes, *see* Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

245. Brewer v. Williams, 430 U.S. 387 (1977). Professor Yale Kamisar, in a masterful analysis of the inherent deficiencies of the factual record in *Brewer*, has demonstrated that the prosecutor actually made *no such promise* and that the Court's assumption to the contrary was erroneous. Kamisar, Brewer v. Williams—*A Hard Look at a Discomfitting Record*, 66 GEO. L.J. 209, 212 n.23, 229 n.88 (1977).

246. 430 U.S. at 401 n.8.

ments exist, whether the agreements have been breached, and whether their breach gives rise to particular remedies. In other words, it will have to face the fact that a plea agreement is ultimately a *constitutional contract.* Of course, the Court may prefer to eschew the traditional language of "offer" and "acceptance," and it may discover that the general principles of contracts have to be adapted to the special nature of plea agreements. But it cannot deny that the law of contracts and constitutional law are both concerned with agreements and that, in the area of plea agreements, the law of contracts informs our judgments of constitutional law.