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Specific Performance of "Unfulfillable" Plea Bargains

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SPECIFIC PERFORMANCE OF "UNFULFILLABLE" PLEA BARGAINS

Never promise more than you can perform.[1]

Plea bargains occasionally fall apart. A particularly difficult breakdown occurs when a prosecutor promises a defendant some benefit which the prosecutor lacks authority to provide — a situation known as an "unfulfillable" plea bargain.[2] A recent case before the Fifth Circuit, *Bauer v. United States*,[3] provides a powerful illustration. Federal prosecutors promised the defendant she would not be extradited to Switzerland, a promise which, if fulfilled, would violate the terms of a longstanding treaty with the Swiss government.[4] Defendant Bauer relied heavily on the non-extradition promise, testifying against a ring of international heroin smugglers at tremendous personal risk.[5] The stakes were high. If extradited, Bauer faced a murder con-

[1] PUBLIUS, Maxim 528 (fl. first century, B.C.).

[2] *See* Brady v. United States, 397 U.S. 742, 755 (1970) ("pleas of guilty . . . must stand unless induced by threats . . ., misrepresentation *(including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper . . .") (emphasis added). Obviously these bargains are not literally unfulfillable, since courts often order their fulfillment. *See* part I B *infra*. The term is used in this article as a shorthand expression for plea bargains including promises which exceed the prosecutor's authority. *Cf.* 28 U.S.C. § 547 (1976) (defining the duties of federal prosecutors).

[3] 627 F.2d 745 (5th Cir. 1980).

[4] The treaty provided for extradition on demand of specific types of criminals. For the precise terms of the treaty, see Treaty for the Extradition of Criminals, May 14, 1900, United States-Switzerland, 31 Stat. 1928, T.S. No. 354.

[5] In a letter to the State Department urging specific performance, Deputy Attorney General Peter F. Flaherty stated: "Ms. Bauer feared that if she were returned to Switzerland after having provided information on international heroin smuggling, she would be killed. Her fear seemed fully warranted to our officials at the time, as it would to anyone familiar with the sordid business of narcotics trafficking." Letter from Deputy Attorney General Peter F. Flaherty to Secretary of State Cyrus Vance (September 2, 1977), *reprinted in* Bauer v. United States, 627 F.2d 745, 751, n. 4 (5th Cir. 1980). For a behind-the-scenes account of Bauer's legal battle, see "Deadly Diplomacy?" THE NATIONAL LAW JOURNAL, Nov. 3, 1980, at 1, col. 2.

viction in Switzerland;[6] if the United States refused to extradite, Switzerland warned of international ramifications.[7] After six years of appeals and reversals, the United States Court of Appeals for the Fifth Circuit finally reached the bottom line: the State Department could not be ordered to withhold extradition based on the prosecutor's promise. Barring successful appeal to the United States Supreme Court, Josette Bauer's extradition to Switzerland is imminent.[8]

The conflict, of course, need not be this exotic. Unfulfillable plea bargains more often involve promises that the defendant be assigned to a certain prison[9] or be paroled in a certain amount of time.[10] More frequently, the result is an infringement on a sentencing judge or parole board, not the creation of an international incident. In any case, the court resolving the problem faces an unpleasant choice: order specific enforcement of the unauthorized promise and bind officials who took no part in the plea negotiations, or merely allow withdrawal of the guilty plea,[11] ignoring the consequences of the defendant's reliance on the bargain.

This article discusses how courts have handled the remedy dilemma presented by unfulfillable plea bargains. Part I analyzes the seminal Supreme Court opinion on the broken plea bargain question, *Santobello v. New York*.[12] This section concludes that

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[6] Bauer had been convicted for the murder of her father. Geisser v. United States, 513 F.2d 862, 864 (5th Cir. 1975), *on remand* Petition of Geisser, 414 F. Supp. 49 (S.D. Fla. 1976), *vacated on other grounds*, Geisser v. United States, 554 F.2d 698 (5th Cir. 1977), *rev'd*, Bauer v. United States, 627 F.2d 745 (5th Cir. 1980).

[7] In a letter to the Justice Department the Swiss government stated:

> The Swiss government continues to feel that the extradition of Ms. Geisser is called for by the United States' treaty obligations to Switzerland and by international law and that therefore the extradition should not be affected by internal United States matters. Further, from a practical viewpoint, the Swiss government feels that a *withdrawal of its request might itself cause harm to the extradition relations between the United States and Switzerland.* (Emphasis added).

Letter from the Swiss government to the United States government (March 15, 1976), *reprinted in* Bauer v. United States, 627 F.2d 745, 754, n. 7 (5th Cir. 1980).

[8] Ms. Bauer's arrest has already been ordered by a federal court. *See* "Arrest Ordered of Swiss Woman," THE NATIONAL LAW JOURNAL, Nov. 24, 1980, at 2, col. 3. Her attorney, William Marchiondo, has expressed his intention to appeal, "to the U.S. Supreme Court, if necessary." *Id.* at 7, col. 1.

[9] *See, e.g.*, Roe v. United States Attorney, 618 F.2d 980 (2d Cir. 1980).

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

[11] This article assumes that the defendant is seeking specific performance. A defendant's request for withdrawal raises different problems, beyond the scope of this article. *See generally* J. BOND, PLEA BARGAINING & GUILTY PLEAS §§ 7.02-7.18 (1978); Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366 (1955); Note, *Withdrawal of Guilty Pleas under Rule 32(d)*, 64 YALE L.J. 590 (1955).

[12] 404 U.S. 257 (1971).

choice-of-remedy is not entirely a matter of lower court discretion. Rather, *Santobello* delegates to lower courts the authority to develop a law of remedies which conforms to the underlying principles of that decision. Part I also focuses on what courts have done with this mandate, discussing the elements of decision courts have developed to remedy unfulfillable plea bargains. Finally, Part II suggests a model analysis, requiring a presumption of specific performance when the defendant can show detrimental reliance on the unfulfillable bargain.

I. REMEDIES FOR UNFULFILLABLE BARGAINS: THE ELEMENTS OF DECISION

A. Santobello v. New York *and the Defendant's Right to a Remedy*

The Supreme Court's apparent refusal to acknowledge the existence of plea bargaining undoubtedly hindered the development of a law of remedies for broken plea bargains.[13]

Until relatively recently, courts analyzed broken plea bargains under a hodgepodge of theories. Some judges based their opinions on the "voluntariness" of the plea;[14] others found that prosecutors' promises were "pledges of public faith" which must be upheld;[15] and still others held that "fairness" required enforcement.[16] In an attempt to impose a theoretical focus, courts often pressed contract or agency law principles into service,[17] notwith-

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[13] *See* Blackledge v. Allison, 431 U.S. 63, 76 (1977), in which the Court noted:

> Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in Santobello v. New York, 404 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.

[14] The voluntariness theory states that waivers of constitutional rights must be voluntary in order to be valid. For a thorough discussion of this theory, see Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 477-501 (1978).

[15] *See, e.g.*, Commonwealth v. St. John, 173 Mass. 566, 54 N.E. 254 (1899) ("When such promises are made by the public prosecutor . . . the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept.").

[16] For a discussion of the "fairness" and "pledge of public faith" rationales, see Note, *Binding Effect of Prosecutor's Agreement to Dismiss Prosecution*, 23 WAYNE L. REV. 1129 (1977). For a good overview of the early theories, see Note, *Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771 (1973).

[17] Some courts depend heavily on contract principles. *See, e.g.*, United States v. Gorham, 523 F.2d 1088 (D.C. Cir. 1975), where the court stated that promises of immu-

standing the tension between commercial law principles and the constitutional implications of broken plea bargains.[18]

The 1971 landmark decision *Santobello v. New York*[19] settled much of the uncertainty. In an opinion remarkably supportive of the plea bargaining process, the Court acknowledged the benefits of a guilty plea to both prosecutor and defendant.[20] The practice, however, "presuppose[s] fairness in securing agreement between an accused and prosecutor,"[21] and, therefore "must be attended by safeguards to insure the defendant what is reasona-

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nity made to prisoners during an escape attempt would be void, even if authorized, because such promises would have "lacked the consideration of a knowing relinquishment of a constitutional right, involved the performance of a pre-existing duty, been voidable because of inducement by duress, and, because bargains involving the forbearance of prosecution are contrary to public policy . . . would have been *nudum pactum*." *Id.* at 1097 (footnote omitted). Others incorporate contract doctrines selectively. *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977), holding inappropriate on the grounds of "contract principles of estoppel" the government's analogy to the effect that Palermo gave "unlawful consideration" in exchange for plea concessions. *Id.* at 295. (footnote omitted). Still others expressly repudiate the application of contract law to criminal cases generally. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977) ("we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law."); Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979). For a complete discussion of courts' application of contract law principles to broken plea bargains, see Westen & Westin, *supra* note 14.

Courts have also applied other common law analogies to broken plea bargains. *See, e.g.*, United States v. Lieber, 473 F.Supp. 884 (E.D.N.Y. 1979) (applying RESTATEMENT (SECOND) OF AGENCY § 161 (1958), enforcing a federal prosecutor's promise to bind the Justice Department Tax Division and the Internal Revenue Service.)

[18] *Cf.* Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979) ("[w]e observe in the plea bargaining context what the Supreme Court has several times felt obliged to observe in others: that the temptation to take the relative certainties of established common law analogies too far in developing difficult constitutional doctrine is ever present and ever to be resisted.")

[19] 404 U.S. 257 (1971). In *Santobello*, the defendant pleaded guilty to a single gambling charge in exchange for the prosecutor's agreement to refrain from making any sentencing recommendation. After the court accepted the plea, but before sentencing, a new prosecutor replaced the one who had made the plea agreement with Santobello. The new prosecutor, unaware of the agreement, recommended the one-year maximum sentence. Santobello objected, but the judge sentenced him to one-year imprisonment, stating: "It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do." *Id.* at 259. The New York appellate courts upheld Santobello's conviction and sentence. 35 App. Div. 2d 1084, 316 N.Y.S. 2d 194 (1970) The United States Supreme Court reversed. *Santobello*, 404 U.S. at 263.

[20] The court stated that plea bargaining is not only "essential" but "highly desirable" because it leads to prompt disposition of cases; avoids the "corrosive impact of enforced idleness" during pretrial confinement; protects the public from defendants who might commit additional crimes while released from jail before trial; and enhances rehabilitative prospects by shortening the time between charge and disposition. *Santobello*, 404 U.S. at 261.

[21] *Id.* at 261.

bly due in the circumstances."[22] The Court concluded: "[w]hen 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."[23] The Court did not clarify the precise nature or origin of this right to relief,[24] but the decision must have been based on constitutional grounds.[25] Although lower courts continue to disagree over the precise source of the *Santobello* right,[26] the existence of the right is unquestionable, and the decision has been widely followed.[27]

The question of remedy is less certain. *Santobello* clearly requires *some* remedy when the prosecutor breaks a plea bargain, but the Court failed to specify standards for choosing between two possible remedies, withdrawal of the guilty plea and specific performance of the bargain.[28] The lower court's remedy decision

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[22] *Id.* at 262.

[23] *Id.*

[24] *Santobello* makes a number of references to "fairness," *see, e.g., Santobello,* 404 U.S. at 262, and Justice Douglas refers to due process in his concurring opinion, *Id.* at 267 (Douglas J., concurring). The right to relief established in *Santobello* nonetheless appears to be a constitutional right not rooted in any provision of the Constitution. Commentators have argued that recognizing the right as part of the due process clauses of the Fifth and Fourteenth Amendments would ensure that adequate weight be given to the defendant's interests. *See* Note, *Enforcing Unfulfillable Plea Bargaining Promises,* 13 WAKE FOREST L. REV. 842, 853-54 (1977) (maintaining that due process protection might require closer scrutiny of state plea bargaining procedures and could reduce the flexibility of the process, but would provide a more authoritative ground of relief). Other commentators have suggested an "emerging constitutional law of contracts" as a possible source of the right. *See* Westen & Westin, *supra* note 14, at 528-39.

[25] As Justice Douglas points out in his concurring opinion, the Court would not have had jurisdiction to reverse Santobello's conviction in state court *unless* the decision were based on constitutional grounds. *Santobello,* 404 U.S. at 266-67 (Douglas, J., concurring). *Cf.* 28 U.S.C. § 1257 (1970) (authorizing reversal of state court conviction only on grounds involving federal statutes or the Constitution).

[26] *Compare* State v. Kuchenreuther, 218 N.W. 2d 621, 624 (Iowa 1975) ("It is also worthy of note that *Santobello* was not adjudicated on any constitutional ground but rather by application of what might be termed a 'fair play standard.' ") *with* Cooper v. United States, 594 F.2d 12, 15 (4th Cir. 1979) ("the precise source and specific content of the right recognized and given protection in *[Santobello]* were not developed, but it was plain in context that the source was constitutional").

[27] *See* Westen & Westin, *supra* note 14. *See also* Fischer, *Beyond Santobello — Remedies for Reneged Plea Bargains,* 2 SAN FERN. V. L. REV. 121 (1973).

[28] The Court stated merely that the question of ultimate relief should be left 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 . . . 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." *Santobello,* 404 U.S. at 263. In *Santobello,* the state court ordered specific performance against Santobello's wishes. People v. Santobello, 39 App. Div. 2d 654, 655, 331 N.Y.S.2d 776, 777 (1972). The court held that "due process and the interests of justice will be fully served by . . . specific performance of the prosecutor's promise."

does not appear to be a matter of unfettered discretion, however. Significantly, *Santobello* states that the defendant, after a broken bargain, must receive what is "reasonably due in the circumstances."[29] Secondly, four of the seven Justices who heard *Santobello* maintained that the defendant's preference as to remedy should be given "considerable" if not "controlling" weight.[30] A lower court, then, could not simply order an "unreasonable" remedy or ignore the defendant's preference—and to do so might be reversible error.[31] The opinion of the Court, however, unquestionably denies a defendant the right to *choose* his or her remedy, suggesting that when the defendant seeks a particular form of relief, the lower court could deny it.[32]

This tension is reconciled by interpreting *Santobello* as *delegating* the remedy decision to lower courts. Under this analysis, appellate courts retain the ability to reverse when a remedy is unreasonable, not sufficiently based on the defendant's preference, or otherwise in conflict with *Santobello*'s basic principles. Since the Supreme Court has not further developed the *Santobello* doctrine,[33] a definitive answer remains impossible. This analysis, however, is consistent with both the holding and tenor of the *Santobello* opinions. Moreover, this analysis seems

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[29] *Santobello*, 404 U.S. at 262.

[30] Chief Justice Burger, joined by Justices White and Blackmun, did not discuss the defendant's preference in the opinion of the Court, presumably leaving the state court free to recognize or ignore the defendant's preference as it saw fit. Justice Douglas, in his concurring opinion, argued that a state court has discretion as to appropriate relief, but "ought to accord a defendant's preference considerable, if not controlling weight . . . ." *Santobello*, 404 U.S. at 267. (Douglas, J., concurring). Justice Marshall, joined by Justices Brennan and Stewart in partial dissent, stated that under the circumstances of the case, Santobello's preference controlled, that he had a right to withdraw his plea, and that specific performance could not be ordered against his protest. *Id.* at 267-69 (Marshall, J., dissenting). Thus, of the seven Justices who heard *Santobello*, a majority — Chief Justice Burger and Justices White, Blackmun and Douglas — held that the state court decides the appropriate remedy. At the same time, however, Justices Douglas, Marshall, Brennan, and Stewart form a "dictum majority" giving great weight to the defendant's preference.

[31] *See, e.g.*, State v. Freeman, 115 R.I. 523, 351 A.2d 824 (1976). The *Freeman* court stated that *Santobello* directed lower courts "not simply to reinstate the defendant's plea of not guilty, but . . . *to explore whether or not specific performance was the more appropriate remedy.*" *Id.* at 534, 351 A.2d at 829 (footnote omitted) (emphasis added). In reversing the lower court, the Rhode Island Supreme Court demarcated one ground for appellate reversal of remedy decisions under *Santobello:* complete failure to examine the circumstances.

[32] *See* note 30 *supra.*

[33] Individual Justices have commented upon the case. *See, e.g.*, Martinez v. Mancusi, Correctional Superintendent, 409 U.S. 959, 962 (1972) (Marshall, J., dissenting) ("The process by which [guilty pleas are] obtained must therefore be governed by a standard of absolute fairness," *citing* Santobello v. New York), but the Court has not re-examined *Santobello* in any depth.

also to be the current majority view.[34]

B. *The Lower Courts Respond: Standards for Appropriate Remedies*

Santobello allocates responsibility for the remedy decision between trial level and appellate courts. The trial court, being closer to the facts of the case, makes the initial determination; the appellate court retains responsibility for assuring the appropriateness of the remedy. *Santobello,* however, did not develop standards for defining "appropriate" remedies. The following exposition examines what courts have done with this open-ended mandate in the context of unfulfillable plea bargains.

1. *Who is bound by the agreement?* — The central difficulty with unfulfillable plea bargains concerns the binding of parties outside the prosecutor's usual sphere of influence.[35] The trend has been towards binding an increasingly wider circle of actors. Courts seem thoroughly willing to bind parties, such as trial or sentencing judges, who are part of the prosecutor's sphere of

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[34] Courts generally have treated *Santobello*'s "reasonably due in the circumstances" language as a constraint on their discretion. *See, e.g.,* Cooper v. United States, 594 F.2d 12, 19 (4th Cir. 1979) (referring to a "test of reasonableness" regarding the defendant's constitutional entitlement under *Santobello);* United States v. Lieber, 473 F. Supp. 884, 891 (E.D.N.Y. 1979) (contract principles should be applied in the court's analysis "insofar as their utilization will 'insure the defendant what is reasonably due in the circumstances' "); United States v. Galanis, 429 F. Supp. 1215, 1218 (D. Conn. 1977) (in fashioning an appropriate remedy, "[t]he task, as *Santobello* states, is to determine 'what is reasonably due in the circumstances.' "). Courts have also focused on factors in *Santobello* other than the "reasonableness" language. *See, e.g.,* United States v. Thalman, 457 F. Supp. 307, 310 (E.D. Wis. 1978) (the "guiding principle" in assessing remedies for broken plea bargains is " '*fairness* in securing agreement between an accused and a prosecutor' ") (emphasis added). Some courts, however, show a high degree of deference to the trial court's remedy assessment. *See, e.g.,* People v. Selikoff, 35 N.Y.2d 227, 239, 318 N.E.2d 784, 792, N.Y.S.2d 623, 634 (1974), *cert. denied,* 419 U.S. 1122 (1975) ("The *Santobello* case and the Appellate Division determination on remand to it suggest that the failure or inability to fulfill a promise requires either that the plea of guilty be vacated or the promise fulfilled, but there is no indicated preference for one course over the other . . ."). *See also* United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106 (8th Cir. 1977), and Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed,* 431 U.S. 911 (1977).

[35] Prosecutors routinely make promises restricting other members of their office or which bind their successors, and courts regularly enforce these. *Cf.* Giglio v. United States, 405 U.S. 150 (1972) (promise of immunity made by an assistant prosector was attributable to the government). *See also* J. BOND, *supra* note 2, at § 5.16 ("[T]he Supreme Court has lent its weight to the proposition that one prosecutor's promise should generally bind another prosecutor."). The promise in *Santobello* was enforced against the original prosecutor's successor, who was not involved in the negotiation and was unaware of the terms of the agreement. *Santobello,* 404 U.S. at 259.

everyday activity.[36] Moving outside the prosecutor/trial judge relationship, but still within the criminal justice system, courts have enforced promises purporting to bind prosecutors in other jurisdictions,[37] as well as parole boards.[38] Widening the circle further, courts have issued specific performance orders to independent government agencies, such as a liquor control board[39] and the Internal Revenue Service.[40]

At a certain point in this concentric expansion of enforcement, however, courts draw the line. In *Bauer v. United States*,[41] for example, the Fifth Circuit refused to force the State Department to abrogate the terms of an extradition treaty with Switzerland.[42] Courts have also refused to order specific performance when prosecutors have attempted to bind officials of other sovereign entities—usually a state prosecutor promising that federal charges will not be brought,[43] or vice versa.[44] Finally, courts have said in dicta that they would not enforce certain kinds of outra-

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[36] Courts often enforce prosecutors' promises that the defendant receive a specific sentence, even though prosecutors only have the power to *recommend* sentence. *See, e.g.*, State v. Poli, 112 N.J. Super. 374, 271 A.2d 447 (1970). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 1.1 Comment A. (Approved Draft, 1968), ("[A] clear majority of the jurisdictions in this country place responsibility for [sentencing decisions] exclusively with the trial judge."). Courts have even enforced promises that the defendant receive an illegal sentence. *See* Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (ordering specific performance of a plea bargain which violated federal minimum sentencing statute). Other courts, however, have simply allowed withdrawal of the plea in similar circumstances. *See* Smith v. United States, 321 F.2d 954 (9th Cir. 1963) (setting aside plea when prosecutor promised a sentence less than the statutory minimum.)

[37] *See* United States v. Carter, 454 F.2d 426 (4th Cir. 1972) *(en banc), aff'd without opinion*, 490 F.2d 1407 (4th Cir. 1974), *cert. denied*, 417 U.S. 933 (1974). (enforcing District of Columbia federal prosecutor's promise that defendant "would not be prosecuted anywhere else" against federal prosecutor in the Eastern District of Virginia). *But see* People v. Brooks, 396 Mich. 118, 240 N.W.2d 1 (1976), (prosecutor lacked authority to dismiss charges in neighboring county).

[38] *See* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (federal court enforced state prosecutor's promise guaranteeing the defendant early parole by independent state parole board). For a more in-depth look at *Palermo*, see Note, *Enforcing Unfulfillable Plea Bargaining Promises*, 13 WAKE FOREST L. REV. 842 (1977); and Note, *Specific Performance of a Prosecutor's Unfulfillable Promise: A Right or Remedy?*, 9 CONN. L. REV. 483 (1977).

[39] *See* Chaipis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978).

[40] *See* United States v. Lieber, 473 F.Supp. 884 (E.D.N.Y. 1979).

[41] 627 F.2d 745 (5th Cir. 1980).

[42] *See* notes 2-8 and accompanying text *supra*.

[43] *See* United States v. Long, 511 F.2d 878 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975) (refusing to enforce state prosecutor's promise that "no gun charge would ever be made" regarding federal firearms violation).

[44] *See* Cederbaums v. Harris, 473 F.Supp. 1238 (S.D.N.Y. 1979) (refusing to enforce federal prosecutors' promise to intercede with state parole board and obtain defendant's release).

geous promises, such as a promise not to remove a judge from office for bribe-receiving.[45]

An unanswered question is why it is acceptable to hold certain parties responsible for prosecutors' unauthorized promises, but not others.[46] Ultimately, courts seem to be making *ad hoc* determinations as to the acceptability of prosecutors' treading on others' turf. A few general principles, nonetheless, can be dimly perceived. First, courts seem generally comfortable binding agents within the criminal justice system, as long as they are under the same sovereign.[47] Second, courts seem to agree that *some* level of serious disruption of societal interests can render a plea bargain unenforceable by specific performance. Courts may disagree as to the precise threshold,[48] but they agree there are limits to enforceability. Other than these vague generalizations, however, no guiding principle as to the boundaries of enforceability has emerged.

2. *Did the defendant rely on the promise?* — A strong counterweight to the intrusion on the bound party is the defendant's reliance on the unfulfillable plea bargain. Courts recognize that when a defendant has relied heavily on a prosecutor's promises, withdrawing the plea may not even approximate the *status quo ante*. When a broken bargain leaves the defendant in substantially worse shape than before plea bargaining began, specific

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[45] *See* Chaipis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 35-36, 404 N.Y.S.2d 76 (1978). *See also* Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968) (refusing to enforce promise by defendant not to bring police misconduct charges).

[46] *Compare* United States v. Bauer, 627 F.2d 745 (5th Cir. 1980) (refusing to enforce promise binding State Department) *with* United States v. Lieber, 473 F. Supp. 884 (E.D.N.Y. 1979) (enforcing promise binding Internal Revenue Service).

[47] *See, e.g.*, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d. Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (parole board); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) *(en banc), aff'd without opinion*, 490 F.2d 1407 (4th Cir.), *cert. denied*, 417 U.S. 933 (1974) (prosecutor in another federal district); Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (sentencing judge).

[48] *Compare* Boulier v. United States, 359 F. Supp. 165 (E.D.N.Y. 1972), *aff'd on other grounds sub nom.* United States v. Nathan, 476 F.2d 456 (2d Cir. 1973) (refusing to bind a New York federal prosecutor to a promise made by a federal prosecutor in Florida) *with* United States v. Carter, 454 F.2d 426 (4th Cir. 1972) *(en banc), aff'd without opinion*, 490 F.2d 1407 (4th Cir.), *cert. denied*, 417 U.S. 933 (1974) (binding a federal prosecutor in Virginia to a promise made by a District of Columbia federal prosecutor). *But see* People v. Brooks, 396 Mich. 118, 240 N.W.2d 1 (1976) (suggesting court would not have power to order specific performance of promises binding other prosecutors). *Compare also* Petition of Geisser, 414 F. Supp. 49 (S.D. Fla. 1976), *vacated on other grounds*, Geisser v. United States, 554 F.2d 698 (5th Cir. 1977), *rev'd*, Bauer v. United States, 627 F.2d 745 (5th Cir. 1980), ("The 'constitutional obligations owing Bauer' . . . must take precedence over any treaty obligations to a foreign nation") *with* Bauer v. United States, 627 F.2d 745, 755, (5th Cir. 1980) ("This Court cannot conclude that the case of Josette Bauer must take precedence over other important friendly and cooperative relationships between the two nations involved.").

performance may be the only effective relief available.

Courts will often order specific performance, for example, when the defendant has testified or offered information as part of the bargain.[49] Once given, information or testimony is impossible to retract. Effects of the testimony, however, usually persist: the defendant will have already incurred the expense and effort of testifying, and may have exposed the extent of his or her knowledge, losing a useful bargaining chip in subsequent plea negotiations. The testimony may also trigger unpleasant consequences for the defendant, such as vendettas by criminal associates.[50] Courts also seem responsive to situations where the defendant has spent time in jail based on the original plea.[51] In such cases, withdrawing the plea does nothing to compensate for the defendant's imprisonment; specific performance is required if the defendant is to receive a remedy at all. Finally, if forcing a defendant to withdraw his or her plea would result in prejudice at trial—if witnesses died, for example, or evidence disappeared while the defendant relied on not going to trial—then specific performance may also be the only adequate remedy.[52] In each of these three situations, courts cannot put the defendant in a position equivalent to the pre-plea position. This realization forces courts to order specific performance as the only remedy available.

Courts and commentators are not uniformly convinced that reliance is a prerequisite to specific performance. In *Cooper v. United States*,[53] for example, the court enforced a prosecutor's

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[49] *See* Geisser v. United States, 513 F.2d 862, 871 (5th Cir. 1975).

[50] A striking example of the possibility of retribution appears in Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977). In an ominous note to their dismissal of certiorari, the Supreme Court reported that Palermo was found dead at John F. Kennedy International Airport shortly after his release from prison following specific performance of his plea bargain. He had apparently been murdered. *See* Note, *Specific Performance of a Prosecutor's Unfulfillable Promise: A Right or Remedy?*, 9 CONN. L. REV. 483, 493 n. 47 (1977). Similarly, the defendant in Chaipis v. State Liquor Authority, 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978), faced the possibility of reprisals following his testimony at a police corruption trial.

[51] *See, e.g.*, Correale v. United States, 479 F.2d 944, 950 (1st Cir. 1973) (specific performance provided "the only just remedy . . .," because of the "rather unusual nature of the agreed-upon recommendation, the length of time already served, and more importantly, the length of time already served which is contrary to the recommendation."). *See also* Geisser v. United States, 513 F.2d 862, 871 (5th Cir. 1972) ("[T]he avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement.").

[52] *See, e.g.*, Williams v. State, 341 So.2d 214 (Fla. App. 1977) (specific performance ordered because defendant prejudiced by turn of events).

[53] 594 F.2d 12 (4th Cir. 1979).

plea bargaining offer despite the defendant's lack of reliance.[54] Commentators have further suggested that *Santobello* may protect defendants' *expectation* interests in fulfillment of plea bargains,[55] a view which would also require specific performance in the absence of reliance.[56] Overall, however, the trend of authority favors requiring reliance. The Fourth Circuit has already begun to cut back on *Cooper v. United States,* limiting its no-reliance rule to the facts of the case.[57] In *Government of the Virgin Islands v. Scotland,*[58] the Third Circuit explicitly rejected the *Cooper* approach, holding that an unconsummated plea bargain need not be specifically enforced in the absence of detrimental reliance.[59] More to the point, in *Roe v. United States Attorney,*[60] the Court of Appeals for the Second Circuit refused to apply *Cooper* to an unfulfillable plea bargain. The defendant, already convicted of murder and rape, had been promised he would be transferred to a minimum security prison. The court held that unless the defendant furnished information or otherwise detrimentally relied on the promise, the defendant had no due process or other right to specific performance of the transfer.[61]

II. A PROPOSED FRAMEWORK FOR ANALYSIS

The elements of courts' remedy thinking can be gleaned from the growing number of cases dealing with unfulfillable plea bar-

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[54] In *Cooper,* the prosecution withdrew its plea bargaining offer before the defendant's lawyer could accept it. Cooper insisted that the plea bargain be kept open, and the court agreed, ordering specific performance. *Id.* at 21. The court noted that reliance is usually required, but that Cooper's case demonstrated a "lack of any tangible detrimental reliance by the defendant, who at this point had been able to do no more than form the subjective intent to accept the offer and experience whatever expectations of benefit had been created by anticipation of its fulfillment." *Id.* at 16. For a critical look at *Cooper,* see Note, *Constitutional Recognition for Defendant's Plea Bargaining Expectations in the Absence of Detrimental Reliance,* 58 N.C. L. REV. 599 (1980). *See also* Note, *Constitution Held to Afford Criminal Defendants a Right to Specific Performance of Plea Proposals under Appropriate Circumstances,* 9 U. BALT. L. REV. 295 (1980), which supports the *Cooper* result.

[55] *See* Westen & Westin, *supra* note 14, at 512-28.

[56] Under this analysis, primarily advanced by Professors Peter Westen and David Westin in their recent article, *supra* note 14, specific performance is not merely a remedy, but part of a substantive constitutional right which cannot be subject to a reliance requirement.

[57] *See* United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979).

[58] 614 F.2d 360 (3d Cir. 1980).

[59] *Id.* at 365.

[60] 618 F.2d 980 (2d Cir. 1980).

[61] *Id.* at 982.

gains. Individual opinions, however, rarely approach remedy problems cohesively.[62] What is needed is a law of remedies for broken plea bargains. The following discussion incorporates the basic *Santobello* remedy principle—insuring the defendant what is "reasonably due in the circumstances"—into a procedure for remedying unfulfillable plea bargains.

A. When the Defendant Demonstrates Reliance on the Unfulfillable Bargain, Courts Should Presume Specific Performance to Be the Appropriate Remedy

Although neither the prosecutor nor the defendant has a formal burden of proof on the remedy question, as a practical matter the risk of nonpersuasion[63] falls on the defendant. In cases involving unfulfillable plea bargaining promises, courts are unlikely to order the more burdensome remedy of specific performance unless convinced that it is necessary—and the prosecution is unlikely to do the convincing.[64] When the defendant can show reliance on the bargain, however, the only remedy then remain-

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[62] The single factor which has most contributed to the confusion is the use of common law analogies. Even if courts limited themselves to analogies from the law of contracts between private parties, they can choose from an enormous variety of approaches. Take, for example, the unfulfillable parole promise in Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977). *See* note 38 *supra*. The prosecutor's promise to bind the state parole board could be viewed in terms of fraud (the prosecutor purposefully misled the defendant), mutual mistake (both prosecutor and defendant thought the promise was fulfillable), unilateral mistake (the prosecutor made only a promise to recommend parole but the defendant thought a definite promise had been made), impossibility (refusal of the parole board to follow the prosecutor's recommendation rendered performance impossible), failure of consideration (Palermo was under an obligation to return the stolen jewelry, and his performance was thus a pre-existing duty), estoppel (detrimental reliance by the defendant required relief), or illegality (prosecutor's promise was void as against public policy), depending on the inferences drawn from the factual record. Some of these approaches would yield similar results: *compare* impossibility of performance under RESTATEMENT OF CONTRACTS § 456 (1934) *with* unilateral mistake under *id.* § 503 (under both approaches, formation and enforceability hinge on the parties' awareness of the situation). The result could also depend, however, on which analysis the court selected. *Compare* unilateral mistake (probably no enforcement under the facts of *Palermo*, unless the prosecutor knew the defendant was under a false impression of the terms) *with* an analysis based on estoppel under *id.* § 90 (enforcement would hinge on the degree of the defendant's reliance, whether the prosecutor should reasonably have expected the defendant to rely, and the degree of injustice created by nonenforcement, all of which would point *toward* enforcement in the *Palermo* situation). The temptation for courts to use contract analogies is clear from the examples above: depending on the analogy chosen, *any* result is possible.

[63] *See* 9 J. WIGMORE, EVIDENCE § 2485 (3d ed. 1940), defining the risk of nonpersuasion as "the risk of [the decisionmaker's] non-action because of doubt."

[64] This seems generally acceptable in terms of traditional criteria for allocating burdens of proof. *See* James, *Burdens of Proof*, 47 VA. L. REV. 51, 51-63 (1961).

ing is specific performance. Since *Santobello* unequivocally entitles the defendant to *some* remedy for a broken plea bargain,[65] specific performance must be the appropriate remedy by process of elimination, absent strong countervailing considerations.

A presumption favoring specific performance would recognize this fundamental implication of *Santobello*'s constitutional right to a remedy. The presumption would work as follows. The defendant would first be required to make a preliminary showing that the unfulfillable plea bargain was made as alleged;[66] that the defendant substantially performed his or her side of the bargain;[67] and that the prosecution broke the agreement.[68] Given the intrusiveness of enforcing an unfulfillable plea bargain, it seems reasonable that the defendant bear this initial burden. Having met this preliminary showing, the defendant seeking specific performance would have to demonstrate that he or she had changed position in reliance on the plea bargain in such a way that withdrawing the plea would not substantially restore the *status quo ante*. Showing that the defendant provided testimony or information, spent time in jail, or would suffer prejudice at trial would definitely count as inability to restore the status quo; other forms of reliance might as well, which

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[65] 404 U.S. at 262. *See* notes 28-34 and accompanying text *supra*.

[66] Many courts apply an objective test regarding the existence of the plea bargain. *See* United States v. Minnesota Mining and Mfg. Co., 551 F.2d 1106, 1111 (8th Cir. 1977); Johnson v. Beto, 466 F.2d 478, 479 (5th Cir. 1972). Other courts look to the defendant's subjective belief. State v. Poli, 112 N.J. Super. 374, 380, 271 A.2d 447, 450 (1970).

[67] Courts will often deny relief because of the defendant's failure to perform. *See, e.g.*, United States v. Boulier, 359 F.Supp. 165 (E.D.N.Y. 1972), *aff'd sub nom.* United States v. Nathan, 476 F.2d 456 (2d Cir. 1973). In *Boulier*, the defendant had agreed to cooperate in the apprehension of cocaine distributors. The defendant, however, "gave useless and worthless information" about cocaine distribution, conditioning further information on "outrageous demands" for large sums of money, a luxury apartment, and an unsupervised trip to South America to contact cocaine sources. 359 F.Supp. at 169. The court noted dryly that the defendant's failure to fulfill his portion of the agreement was "not [a] compelling reason for requiring the government to abide by a bargain it did not make." *Id.* Considering whether the parties "deserve" relief is similar to a traditional consideration in equity, the "clean hands" doctrine. See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 16-16 (2d ed. 1977) (definition of what constitutes "unclean hands" has been used "very broadly to encompass cases where the plaintiff has been guilty of inequitable conduct such as misrepresentation and nondisclosure," or "[m]ore narrowly . . . to conduct bordering on illegality"). A danger, of course, is that courts will focus on insignificant elements of the defendant's performance as pretext for denying relief. As long as courts limit their analysis to substantial breaches of performance or instances of misconduct, though, a clean hands requirement seems a valid part of the preliminary showing.

[68] Whether or not the prosecution broke the agreement will usually be clear. In some cases, however, the *quality* of the prosecution's performance may be in doubt. *See, e.g.*, United States v. Brown, 500 F.2d 375 (4th Cir. 1974) (half-hearted sentence recommendation is not sufficient performance).

courts can determine on a case-by-case basis.[69]

The judicial response thus far has been largely to disregard "garden variety" forms of reliance, and to require that the defendant have testified, cooperated with authorities, served time in prison, or otherwise served above and beyond the call-of-duty.[70] Defendants should not be required, however, to demonstrate extraordinary acts of reliance in order to trigger the presumption suggested here. Testifying or cooperating with authorities, while certainly sufficient for a finding of reliance should not be necessary. The touchstone, rather, should be *restoration of the status quo ante.* If the defendant has changed position so that withdrawal will not result in a substantial return to the pre-plea position, then specific performance is mandated.

No remedy, of course, will ever *completely* restore the status quo[71]—and no set of rules can anticipate the possible factual variations which might constitute "substantial return." The point is that courts should not exclude forms of reliance, such as

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[69] One problem courts may face is in determining the amount of reliance sufficiently "detrimental" to trigger the presumption of specific performance. Some reliance is involved in *any* guilty plea—by definition, the defendant waives important constitutional rights. As Justice Douglas noted in *Santobello,* a guilty plea always "constitutes a waiver of the fundamental rights to a jury trial . . . to confront one's accusers . . . to present witnesses in one's defense . . . to remain silent . . . and to be convicted by proof beyond all reasonable doubt . . . ." 404 U.S. at 264 (Douglas, J., concurring). These effects, of course, can be partially remedied by allowing withdrawal of the plea. But withdrawal does not eradicate *all* effects of pleading guilty. The defendant's bargaining position following withdrawal of the original plea, for example, will often be weakened because the prosecution has learned the terms upon which the defendant will agree. The Supreme Court has held that defendants have no constitutional right to plea bargain. *See* Weatherford v. Bursey, 429 U.S. 545 (1976). Nonetheless, a weakened bargaining position is still reliance. Further, some states allow into evidence the fact that the defendant withdrew a guilty plea before going to trial. *See, e.g.,* State v. Nichols, 167 Kan. 565, 577, 207 P.2d 469, 478 (1949); State v. Hadley, 249 S.W. 2d 857, 860 (Mo. 1952). While the more common rule is to the contrary, *see, e.g.,* FED. R. EVID. 410 (offers to plead guilty and withdrawn guilty pleas inadmissible), the possibility that this potentially damaging information will be introduced in later proceedings is another detrimental effect of pleading guilty which withdrawal fails to obviate. Of course, the defendant will have always incurred expenses in pleading guilty. And finally, the defendant may have suffered anxiety or been the object of notoriety as a result of a guilty plea. *See, e.g.,* United States v. Hammerman, 528 F.2d 326, 327 (4th Cir. 1975) (defendant characterized on national television as one of a group of " 'liars' and 'small men willing to do anything to save their own skins.' ").

[70] *See, e.g.,* United States v. Thalman, 457 F. Supp. 307, 309 (E.D. Wisc. 1978) (rejecting defendant's argument that he "suffered a change of position to his substantial and irrevocable detriment" in the form of "adverse publicity . . . additional attorney's fees and prolonged mental anguish"). *But see* United States v. Lieber, 473 F. Supp. 884, 894-95 (E.D.N.Y. 1979) (defendants "reorder(ing) their lives in 1975 to adjust to their anticipated public entry of guilty pleas" is sufficient detrimental reliance to justify relief).

[71] See note 69 *supra.*

the expense of pleading guilty or the effects of publicity, simply because they are present in any guilty plea.[72]

B. The Presumption of Specific Performance Should be Rebuttable Upon a Showing of Immediate Compelling Harm to the Bound Party or Others Affected by the Bargain

Promises to commit murder, bribe judges, or perform other blatantly wrongful acts should never be enforced by a court. Within a narrow band of thoroughly outrageous promises, courts will have few qualms about refusing enforcement no matter how heavy the defendant's reliance. Outside this narrow band, however, the judgment calls can get pretty close.

The point at which a plea bargaining promise crosses the line from "intrusive" or "burdensome" to "unacceptable" seems impossible to define precisely.[73] The standard offered here is based on *harms to the bound party,* or others who would be affected by specific performance. The harm would have to be *immediate* harm to real persons or interests—not potential or merely cumulative harms. In *Roe v. United States Attorney,*[74] for example, the prosecutor promised a defendant convicted of rape and murder that he would be transferred to a minimum security prison. Under the analysis proposed here, the remedy inquiry would fo-

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[72] Moreover, courts should not necessarily require that the defendant's reliance be embodied in a guilty plea. Prosecutors often make unfulfillable promises outside the guilty plea context, and defendants often rely on them. *See, e.g.,* In *re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977) (refusing to enforce prosecutor's promise of nondisbarment made in exchange for lawyer's testimony in a political corruption trial). The distinction between plea bargaining promises and other types of prosecutorial commitments is historically rooted, stemming primarily from United States v. Ford *("The Whiskey Cases"),* 99 U.S. 594 (1878). *See generally* Note, *Judicial Enforcement of Nonstatutory "Immunity Grants": Abrogation by Analogy,* 25 HASTINGS L.J. 435, 453-54 (1974). Courts have started to enforce non-plea-bargain promises when the defendant has relied on them, a development which makes good sense. *See, e.g.,* In *re* Doe, 410 F. Supp. 1163 (E.D. Mich. 1976) (enforcing promise that defendant would not be questioned by federal agents if he voluntarily surrendered contraband). *See generally* Note, *Judicial Supervision of Non-Statutory Immunity,* 65 J. CRIM. L. & CRIMINOLOGY 334 (1974).

[73] The legality of the promise seems a poor criterion. The technical violation of a sentencing statute is certainly illegal, but a court might want to enforce a plea bargain which included such a term. *See* Correale v. United States, 479 F.2d 944 (1st Cir. 1973). The point is somehow to prohibit "really illegal" conduct—but defining "real" illegality is likely to be as fruitless as applying the timeworn distinction between acts *malum in se* and *malum prohibitum. See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 6 (1972).

[74] 618 F.2d 980 (2d Cir. 1980).

cus on whether transferring that particular prisoner to a particular minimum security prison would harm the persons most directly affected—the prisoners and employees of the "bound" prison.

The court would *not* analyze the effect of the specific performance order on the Bureau of Prisons' jurisdiction, the propriety of *generally* assigning dangerous criminals to low-security institutions, or other speculative analyses of long-term effects. As with other "slippery slope" arguments, these can too easily become hollow reasons for denying specific performance in individual cases. Since intra-office reforms often follow on the heels of a major unfulfillable plea bargain case,[75] arguments against specific performance based on long-term erosion of the bound party's authority should be viewed skeptically.

Two beneficial results would arise from the use of this standard. First, hard cases become easier ones. The New York Court of Appeals in *Chaipis v. State Liquor Authority*,[76] for example, seemed reluctant to order an independent state agency to grant the defendant a liquor license, as the prosecutor had promised.[77] Under the test proposed here, specific performance is the clear choice of remedy in *Chaipis:* ordering the granting of a single liquor license is hardly a compelling immediate harm. *Chaipis* became a "difficult" case only when the court became enmeshed in *abstract* considerations of intergovernmental promise-keeping.[78] Secondly, this test would allow specific performance in situations where courts have been reluctant to order it. The federalism implications[79] of binding a federal prosecutor to a state

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[75] For example, following United States v. Carter, 454 F.2d 426 (4th Cir. 1972) *(en banc), aff'd without opinion,* 490 F.2d 1407 (4th Cir.), *cert. denied,* 417 U.S. 933 (1974), the Justice Department established internal procedures requiring that plea bargains with potential interstate ramifications be approved by the prosecutors in the affected districts. *See* United States Attorneys' Manual, Title 9 Criminal Division § 9-2.148 (October 20, 1978). Following Bauer v. United States, 627 F.2d 745 (5th Cir. 1980), the Justice Department further amended its United States Attorneys' Manual to prevent conflicts with treaty obligations. In addition, "officials insist that the Bauer case, while explosive, is now an isolated incident with no value as precedent. " THE NATIONAL LAW JOURNAL, Nov. 3, 1980, at 22, col. 1.

[76] 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978).

[77] *Id.*

[78] In discussing the propriety of binding the State Liquor Authority, the court noted:

> Only the authority, of course, unless it acts arbitrarily, has the power to cancel or renew a liquor license. The discretion vested in the authority may not be abrogated by a prosecutor or by this court. But the authority may not, by self-imposed blinders, ignore its responsibility as an arm of the State, but only one among many.

Chaipis, 44 N.Y.2d at 66, 375 N.E.2d at 37, 404 N.Y.S.2d at 81 (1976).

[79] Mr. Justice Black has defined the concerns of federalism as:

prosecutor's promise, or vice versa, have presented a strong barrier to enforcement of intersovereign plea bargains.[80] Under the test proposed here, a court would examine enforceability in terms of *actual harm* to federal-state relations. The defendant's remedy should not hinge on a scholarly debate over federalism. Since most individual cases will not have a significant impact on federal-state relations,[81] the test proposed here might militate in favor of specific performance where many courts would deny relief.

Ultimately, courts will have to grapple with defining "unacceptable" intrusion on a case-by-case basis. The factual situations presented in *Bauer v. United States*[82] and *Roe v. United States Attorney*[83] form good initial precedents for immediacy of harm—imminent interference with foreign relations, and physical danger to individuals. By focusing on these kinds of immediate harm to the bound party, courts should be able to reach consistently satisfying results more often than by struggling with abstract notions of "acceptability."

C. Considerations Other Than Reliance and Immediate Harm Should Be of Limited Significance

In assessing appropriate remedies, courts often analyze collat-

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> [a] continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . . [T]he concept . . . represent[s] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, *always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.*

Younger v. Harris, 401 U.S. 37, 44 (1971) (emphasis added).

[80] *Cf.* Cederbaums v. Harris, 473 F. Supp. 1238, 1241 n.4 (S.D.N.Y. 1979) ("[n]o court has ever held that the promise made by an official of one sovereign is binding on another sovereign absent an agency relationship").

[81] It might be argued that *any* interference with another sovereign's criminal justice system is a serious matter. The point that administration of criminal justice is a crucial component of sovereignty is powerfully made by Alexander Hamilton: "There is one transcendent advantage belonging to the province of the State governments . . . the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment." A. HAMILTON, THE FEDERALIST No. 17 at 120 (Mentor, ed. 1961). Enforcement of intersovereign plea bargains would not affect anyone's obedience to or respect for the bound sovereign, unless the practice reached epidemic proportions; or, unless a particular incident became a *cause célèbre*. The effect on federal-state relations should therefore be a factual determination, which will vary from case to case.

[82] 627 F.2d 745 (5th Cir. 1980). *See* notes 3-8 and accompanying text *supra*.

[83] 618 F.2d 980 (2d Cir. 1980).

eral factors such as the knowledge of the parties,[84] the certainty of the plea bargain terms,[85] or the need to protect "judicial integrity."[86] Some of these factors are retained in the proposed model analysis. As part of the defendant's preliminary showing,[87] courts would consider certainty of plea bargain terms, the defendant's performance, and whether the bargain was really breached. Once these prerequisites are established, however,

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[84] Some judges consider the defendant's knowledge relevant to the question of relief. *See, e.g., Palermo,* 545 F.2d at 297 (Bartels, J., dissenting) (questioning enforcement of the promise "even though it would seem questionable to the ordinary reasonable man whether such a promise when made was within the power, authority or jurisdiction of the district attorney . . ."); United States v. Lieber, 473 F. Supp. 884, 892 (E.D.N.Y. 1979) (defendants "reasonably lead *[sic]* to believe" that prosecutors' promises would bind the Justice Department Tax Division and the Internal Revenue Service); United States v. Martin, 480 F. Supp. 880, 884 (S.D. Tex. 1979) (defendants reasonably believed that SEC attorneys, as a practical matter, controlled the future course of any criminal prosecution."). Other courts, however, have said the defendant's knowledge is not a central consideration in the remedy decision. *See* Correale v. United States, 479 F.2d 944, 949 (1st Cir. 1973) (counsel's ignorance of the sentencing statute which made the plea bargain unfulfillable was "inexcusable, although perhaps understandable in light of his reliance on the government attorney's presumed knowledge of the available options" but "not the legally relevant concern.").

[85] Courts are often reluctant to order enforcement if there is a chance that the promise was never really made as alleged. This problem often arises in sentencing agreements—a razor-thin distinction exists between a fulfillable promise *to recommend* a sentence and an unfulfillable promise *to grant* a sentence. Courts clearly have an interest in insuring that fabricated agreements are not enforced. It is unfair, however, to penalize the defendant for the uncertainty inherent in oral agreements, at least as long as plea negotiations are conducted informally. The better view, therefore, would be for courts to adopt a standard of certainty tailored to the plea bargaining context, recognizing that defendants may be reluctant to insist on clarification of terms because of their highly unequal bargaining position. The regular use of written plea agreements might be an even more desirable solution, which would largely eliminate the need for this factor in remedy decisions. In the military criminal justice system, for example, plea bargains must always be in writing. *See* McMenamin, *Plea Bargaining in the Military,* 10 AM. CRIM. L. REV. 93 (1971). Other, more far-reaching reforms would also reduce disagreement over plea bargain terms. *See* Note, *Restructuring the Plea Bargain,* 82 YALE L. J. 286 (1972) (advocates replacing unstructured bargaining between defendant and prosecutor with more formalized negotiation in court).

[86] Courts often express policy preferences by asserting the need to protect "judicial integrity" as a ground for their remedy decision. *See, e.g.,* United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) ("There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."). The judicial integrity rationale is deeply rooted. Professor Laurence Tribe has ascribed constitutional dimensions to the principle that *"government must keep its word,"* which seems at the heart of the judicial integrity rationale. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 470 (1978). Nonetheless, judicial integrity is flawed as a remedy standard. Arguments relating to judicial integrity can work to the advantage of both proponents and opponents of specific performance in the same case. *Compare* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976) *with Palermo,* 545 F.2d at 298 (Bartels, J., dissenting).

[87] *See* notes 66-69 and accompanying text *supra.*

they should vanish from the remedy equation. The parties' knowledge, or a particular judge's conception of "judicial integrity" seem irrelevant to the choice between specific performance and withdrawal of the plea, and should not swing the remedy decision one way or the other.

One collateral consideration survives under this proposal—misconduct by either the prosecution or the defense. Although most unfulfillable plea bargains are mistakes,[88] some cases do involve intentional deception. Prosecutors, for example, may make unfulfillable plea bargains in order to get valuable information or sensational convictions.[89] Similarly, the defense might suggest an unfulfillable bargain to gain otherwise unobtainable benefits, or purposely fail to correct a prosecutor's unfulfillable offer for the same reason. Clearly, courts need to address this type of intentional misconduct in assessing appropriate remedies.

When the defendant had actual knowledge that the plea bargain was unfulfillable, courts should deny specific performance.[90] The defendant can hardly complain when the court refuses to enforce a bargain he or she knew was beyond the prosecutor's authority in the first place.[91] Misconduct by the prosecution

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[88] *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION (Approved Draft, 1971) § 4.3(b) ("[m]ore often [misrepresentation] is not so much a matter of intentional deception by the prosecutor as that he has failed to make clear that he is without power to effect a particular disposition by the court.").

[89] *Cf.* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 291 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977) (prosecutor's unfulfillable promises may have been designed to further his political advancement; following recovery of four million dollars worth of stolen jewelry based on the plea bargain, the prosecutor issued press releases proclaiming it to be the "largest recovery of stolen property in the history of law enforcement").

[90] Courts might be tempted to consider whether the defense or prosecution *should* have known the bargain to be unfulfillable. This approach seems misguided. The unfulfillable promises involved in the reported cases are usually not so obvious that all lawyers, or even all criminal defense lawyers, could be charged with knowledge fairly. Moreover, courts seem tolerant of a high degree of attorney incompetence when defendants seek to challenge their convictions because of inadequate assistance of counsel. *See, e.g.*, United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970) (refusing to find incompetence where the lawyer fell asleep during examination of prosecution witnesses); *see generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973). It would therefore be disingenuous for courts to set higher standards for what attorneys "ought to know" in the context of plea bargaining offers. Finally, even when courts would be willing to charge the defense with knowledge, they would have to charge the prosecution with knowledge too, since prosecutors are in a *better* position to know the limits of their power. The defendant's remedy should not be prejudiced when both parties are charged with knowledge.

[91] A tougher question would be when the defendant does not know the plea bargain to be unfulfillable, but his lawyer does. Defense attorneys, as officers of the court, seem

presents a more difficult problem. The court's remedy decision will not directly affect the errant prosecutor, who may have already obtained information or additional convictions, or enjoyed other benefits from the unfulfillable plea bargain. Ordering either specific performance or withdrawal of the plea does nothing to recover these benefits, and does little to punish the misconduct.

Choice of remedy, however, can play a useful role in *deterring* misconduct. In cases involving prosecutorial misconduct, a policy favoring specific performance could serve as a strong deterrent to subsequent unfulfillable plea bargains. Specific performance subjects the prosecutor to the practical and political costs of intruding on trial judges, parole boards, or other parties bound by unauthorized promises. Members of the criminal justice establishment "burned" by a prosecutor's promise are likely to exert pressure on the prosecutor not to make unfulfillable promises again—and this is more potent pressure than from defendants, who have no mechanism for influencing prosecutors' future conduct. Withdrawal, on the other hand, allows the prosecution to retain the benefits of the bargain without paying the price of intruding on the bound party.

This policy arguably could make prosecutors feel they have a newly-found power to bind anyone they please. Unscrupulous prosecutors, however, can get better results abusing traditional powers such as charging authority or discretion to prosecute. Also, the same controls which prevent abuse of traditional powers ostensibly would curb the misconduct stemming from a policy of generally enforcing unfulfillable plea bargains.[92] A policy

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obliged not to accept offers known to be unfulfillabile. *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 7-23 ("Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so . . . ."). There is little reason, however, to punish *the defendant* for his lawyer's uncommunicated knowledge. The lawyer's impropriety can be handled through traditional disciplinary channels. Further, there inevitably will be unpleasant consequences of defrauding a prosecutor, especially in terms of future dealings with the same office. These should be sufficient to deter attorney misconduct. When questions of actual knowledge arise, they should affect choice of remedy only when the defendant actually knows.

[92] Controls on the prosecutor's discretion include: restrictions contained in the prosecutor's intra-office manual, *see* ABA PROSECUTION STANDARDS, *supra* note 7, § 2.5; more centralized administrative controls, such as guidelines from state Attorneys General or from the United States Department of Justice, *see* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, THE OFFICE OF THE ATTORNEY GENERAL 127-36 (1971), removal from office, *see* Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1075-77 (describing differences in state removal procedures); and political safeguards such as community, media, and electoral pressure. It might be argued, of course, that these safeguards are not sufficient to prevent abuses, but this is a criticism which goes to the inadequacy of controls on

of enforcement for misconduct might also lull the defense bar into inaction, discouraging them from screening unfulfillable bargains during plea negotiations. Given the uncertainty of banking on *any* future judicial decision, though, plus the possibility of delay in seeking enforcement, defense attorneys are unlikely to be lax in insuring that their client's plea bargain is a fulfillable one.

CONCLUSION

Under the model analysis suggested in this article, courts faced with an unfulfillable plea bargain would first require the defendant seeking specific performance to show detrimental reliance on the bargain. If the defendant does so, demonstrating that the pre-plea situation cannot be restored by withdrawing the plea, the court would presume specific performance to be the appropriate remedy. This presumption would be rebutted if the prosecution, in turn, can show that immediate, compelling harm to the bound party would result from enforcement. This analysis pares the remedy decision down to its essential components: reliance by the defendant versus harm to the party bound by the bargain. This approach will force courts to think more clearly about unfulfillable plea bargains.

The analysis proposed here would favor the remedy preference of a defendant who relies on an unfulfillable plea bargain. This result, however, seems mandated by fundamental fairness and the Supreme Court's decision in *Santobello v. New York.* Unfulfillable plea bargains do not occur often, but when they do, courts should make extraordinary efforts to provide an adequate remedy. A full panoply of constitutional protection surrounds the infrequently-asserted right to a jury trial; a policy of *laissez faire* should not apply to plea bargaining.

—*Stuart L. Gasner*

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prosecutorial discretion generally, which should not affect the question of appropriate relief in an individual case. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).