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Recommended Citation

James P. Arrigo, *United States v. Robison and the Enforcement of Plea Bargains across Federal Jurisdictional Lines: To Bind or Not to Bind?*, 43 DePaul L. Rev. 909 (1994)
Available at: <https://via.library.depaul.edu/law-review/vol43/iss3/7>

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UNITED STATES v. ROBISON AND THE ENFORCEMENT OF PLEA BARGAINS ACROSS FEDERAL JURISDICTIONAL LINES: TO BIND OR NOT TO BIND?

INTRODUCTION

When a criminal defendant bargains for a promise from the federal government in exchange for a guilty plea, that defendant has a right to expect the government to follow through on the bargain.¹ The Supreme Court has clearly held as much.² What is not so clear, however, is which rules a court will follow in deciding just what the government has promised.

In interpreting plea bargains, some courts take their cue from the language of the Supreme Court's opinion in *Santobello v. New York*,³ and treat the plea agreement like a contract between the defendant and the prosecutor.⁴ Most courts, though, base their approach on a combination of modified contract law and the due process concerns enunciated by the Court in *Mabry v. Johnson*.⁵ A due process-based analysis focuses on the protection owed to defendants in exchange for the constitutional rights they bargain away.⁶ Where plea bargains are concerned, however, different courts and different circuits continue to put their own "spin" on the Court's rulings,⁷ with the result that defendants end up being the victims of judicial inconsistency and uncertainty. This inconsistency is clearly demonstrated in a situation in which the defendant's offense spans two or more federal judicial districts, and the defendant plea bargains in one jurisdiction on the charges stemming from the offense.

1. See *infra* notes 23-31 and accompanying text (explaining the "fundamental fairness" attendant to the government's participation in the plea bargaining process).

2. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

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

4. *Id.* at 262; see also *infra* notes 32-38 and accompanying text (discussing the *Santobello* decision and the contract principles used therein).

5. 467 U.S. 504, 507-09 (1984).

6. See *infra* notes 41-47 and accompanying text (discussing the *Mabry* court's explanation of the due process and waiver implications of plea agreements).

7. See *infra* notes 136-50 and accompanying text (discussing the Second Circuit's interpretation of the Court's statement, in *Giglio v. United States*, 405 U.S. 150 (1972), that the federal government is a single entity).

When a defendant bargains with the federal prosecutor in one judicial district and seeks to have his agreement enforced in another, different courts can assign completely opposite meanings to that bargain. As a result, the defendant may be left in a no-man's land between the dueling presumptions of diametrically opposed courts.⁸ *United States v. Robison*⁹ is such a case.

Robison was a disaster in the making. Although the defendant's plea bargain was approved by a judge in one circuit, it was later interpreted by judges in another circuit, where the court ignored the agreement's language and the defendant's expectations.¹⁰ This troubling result might have been predicted because the court which determined the meaning of the government's promises to the defendant used rules different from those of the court in which those promises were made.¹¹

The background section of this Note begins with a brief overview of plea bargains and the parties and policies they serve. Next, this section describes the differing approaches courts take when interpreting plea agreements, specifically those agreements sought to be made binding on other federal districts. This Note then examines the courts' erratic application of specific contract-law doctrines of ambiguity, reliance, and agency in interpreting these agreements, and considers the split in the circuits regarding the language necessary to bind other jurisdictions. A discussion of the Sixth Circuit's opinion in *Robison* follows.

The next section analyzes the *Robison* decision, first with respect to the court's faulty application of contract-law principles. This analysis includes a discussion of the apparent inconsistency between inherent constitutional concerns and the strict application of contract and agency principles where plea agreement binding is at issue. This Note then analyzes the due process and waiver concerns posed by the *Robison* court's approach, and suggests that the approach adopted by some other circuits addresses these concerns far

8. See *infra* notes 151-85 and accompanying text (contrasting the approaches of the Second and Fourth Circuits to interpreting plea agreements where defendants had sought to make them binding).

9. 924 F.2d 612 (6th Cir. 1991).

10. *Id.* at 613-14; see *infra* notes 202-22, 225-55 and accompanying text (pointing out the *Robison* court's lack of inquiry into the defendant's reasonable expectations concerning the plea agreement and the court's omission of any direct analysis of the language of the plea agreement).

11. See *infra* notes 202-22 and accompanying text (explaining the effect of the different rules in the Fourth and Sixth Circuits, where the plea agreement was approved and then reviewed, respectively).

more satisfactorily. Finally, this Note concludes with a discussion of the likely effect of *Robison*, pointing out the uncertain situation it creates for defendants who enter plea agreements with the government, particularly those defendants charged with multistate offenses.

I. BACKGROUND

A. Plea Bargains Generally

Plea bargains serve many interests and are subject to both statutory and judicial restraints. According to one definition, "Plea bargaining is the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence."¹² This definition focuses on the benefit granted to the defendant for negotiating a plea agreement. Other scholars define plea bargaining by focusing on a bargain's benefits to the state. According to this view:

[T]he state seeks to avoid trial in most prosecutions by inducing the defendant to plead guilty, . . . [and does so] by threatening to impose a harsher sentence should [the defendant] be convicted at trial than it would impose if they pleaded guilty. . . . The state's paramount motives in seeking to avoid trial are to save money and to assure conviction.¹³

The United States Supreme Court's definition of plea bargaining and its benefits combines these two views.¹⁴ No matter how it is defined, the practice of plea bargaining is acknowledged and provided for by federal law,¹⁵ and the Supreme Court has held that

12. MILTON HEUMANN, PLEA BARGAINING I (1978).

13. Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 893 (1980).

14. See *infra* notes 19-23 and accompanying text (noting the Supreme Court's view of plea bargaining and the attendant policy considerations).

15. The "Plea Agreement Procedure" contained in the federal rules provides:

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties,

plea bargaining and plea bargains are not constitutionally prohibited.¹⁶ There is, however, no absolute right to plea bargain,¹⁷ and courts are not required to accept a plea bargain negotiated between a defendant and the state.¹⁸

As a general matter, the Supreme Court has said that plea bargaining, "[p]roperly administered, . . . is to be encouraged."¹⁹ The Court has provided a number of policy justifications for encouraging plea bargaining. The Court in *Santobello* justified plea bargaining as "an essential component of the administration of justice."²⁰ Chief Justice Warren Burger further explained this justification by stating that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."²¹

the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties . . . that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

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

16. *Brady v. United States*, 397 U.S. 742, 752-53 (1970) (stating that guilty pleas are not constitutionally forbidden, and that "we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the state").

17. *Santobello v. New York*, 404 U.S. 257, 262 (1971) (stating that "[t]here is, of course, no absolute right to have a guilty plea accepted").

18. *Id.* (pointing out that a judge may reject a plea "in exercise of sound judicial discretion"); see FED. R. CRIM. P. 11(e)(3) (stating "[i]f the court accepts the plea agreement") (emphasis added).

19. *Santobello*, 404 U.S. at 260.

20. *Id.*

21. *Id.*; see also Priscilla Budieri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 160-62 (1981). This Comment quotes United States Court Administrative Office statistics for the twelve-year period ending June 30, 1980, which indicated that, on average, 77.1 percent of the defendants processed in federal court were convicted. Of these convictions, an average of 84.9 percent of these defendants

Finally, the Court has justified plea bargaining based on factors besides necessity, stating its advantages to both a defendant and the state.²² In addition, the Justices have held that "all of these [policy] considerations presuppose fairness in securing agreement between an accused and a prosecutor."²³

The Court's fairness concerns are based on the federal rules of procedure, which require that a defendant must enter his guilty plea intelligently²⁴ and voluntarily.²⁵ These requirements are, in turn,

had pleaded guilty, leaving only an average of 15.1 percent of federal convictions resulting from either jury or bench trials. *Id.* at 161 n.17. The author writes:

The great majority of criminal cases in federal courts are disposed of on pleas of guilty. Were this not so, the administration of the federal courts would be seriously threatened by breakdown. Neither the prosecution nor the judiciary could handle the caseload if a substantial number of defendants were to insist on being tried.

Id. at 162 n.19 (citation omitted).

22. Justice Byron White has noted:

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious — his exposure is reduced, the correctional process can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages — the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. 742, 752 (1970); *see also Santobello v. New York*, 404 U.S. 257 (1971). In *Santobello*, the Court pointed out that disposing of charges through plea bargains is highly desirable for many reasons, including that:

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial 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 pre-trial release; and by shortening the time between trial and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 261.

23. *Santobello*, 404 U.S. at 261.

24. The federal rules provide that:

Before accepting a plea of guilty . . . , the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including . . . that the court may also order the defendant to make restitution to any victim of the offense; and . . .

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right against compelled self-incrimination; and

(4) that if his plea of guilty . . . is accepted by the court there will not be a further trial of any kind, so that by pleading guilty . . . the defendant waives the right to a

based on the fact that a guilty plea constitutes a waiver of a defendant's important Fifth and Sixth Amendment rights.²⁶ In order for the courts to review the circumstances of such a waiver, where a defendant's plea was induced by promises, "the essence of those promises must in some way be made known."²⁷ The Supreme Court, consistent with the statute, requires that these disclosures and determinations be made on the record.²⁸ To help ensure that the defendant receives what he reasonably expected in exchange for his waiver, the Court has held that when a guilty plea rests in a meaningful degree on a prosecutor's promise, and the promise has induced the defendant's plea, that promise must be fulfilled.²⁹ Further, the Court has stated that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand"³⁰ Even where the prosecutor induces a guilty plea by making

trial; and

(5) if the court intends to question the defendant under oath, . . . that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

FED. R. CRIM. P. 11(c).

25. The federal rules also state:

The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

Id. 11(d). The Supreme Court articulated the standard by which it judges the voluntariness of guilty pleas as follows:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Brady, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). However, the defendant's fear that he could face a possible death sentence if convicted did not constitute a threat during plea bargaining, and did not render the defendant's guilty plea involuntary or coerced. *Id.* at 745-47 (discussing *United States v. Jackson*, 390 U.S. 570 (1968)).

26. *Santobello*, 404 U.S. at 264 (Douglas, J., concurring).

27. *Id.* at 261-62.

28. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (noting that the phrase "on the record" means that the substance of a plea agreement must be determined by the judge hearing the plea, and thus be made a part of the court's permanent record).

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

30. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984). The court in *Santobello* pointed out that, when the government breaches a plea bargain, a court may choose between the remedies of grant-

promises which are impossible to fulfill, due process nonetheless requires that the court fulfill the promise or grant the defendant relief.³¹ In sum, if the government makes a promise to a defendant which sways his decision to plead guilty, that defendant has a right to expect that the promise be fulfilled, no matter what the promise is.

ing specific performance of the bargain or allowing the defendant to withdraw his tainted guilty plea and enter a new plea. *Santobello*, 404 U.S. at 262-63; *see also* *United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976) (holding that the defendant must be allowed to withdraw a guilty plea that was not voluntarily entered where the defendant reasonably misunderstood the maximum sentence he faced, and where that misunderstanding was based on an unfulfilled plea agreement with the prosecutor); *Correale v. United States*, 479 F.2d 944, 950 (1st Cir. 1973) (remanding a case for resentencing where the federal prosecutor's recommendation of a four- to eight-year sentence breached a plea agreement with the defendant — then incarcerated on a state conviction — whereby the government promised to recommend an effectively concurrent federal sentence, and where the minimum recommended sentence of four years was both longer than the defendant's remaining state sentence and not within sentencing guidelines). *But cf.* *United States v. Burns*, 893 F.2d 1343, 1348-49 (D.C. Cir. 1990) (denying the defendant's request to withdraw his plea where the plea agreement stated that it was void if the probation office or trial court calculated or recommended a sentence of more than thirty to thirty-seven months, but where the trial judge calculated the sentence at sixty months). In affirming the decision, the appellate court was "troubled" and "disturbed" by the ambiguity of the agreement and its result, but recommended only that prosecutors modify the language of future agreements, commenting that such vague language could leave a "serious question" as to whether the defendant reserved the right to withdraw his plea in a situation like this one. *Id.*

31. For example, a promise that is impossible to fulfill may be one in which the necessary performance is contrary to state statutes. *See, e.g., Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976) (affirming the grant of a writ of habeas corpus, and the plaintiff's unconditional release from prison, based on the nonfulfillment of a plea agreement even though the prosecutor's unfulfilled promise of parole may have been *ultra vires*). In *Palermo*, the court found that, where voluntariness concerns require relief when a prosecutor fails to fulfill promises within his power, the same reasoning equally applies to prosecutors making promises outside their power, since it is the defendant whose interests are compromised. *Id.* at 296.

Moreover, at least one court has held that the validity of a bargained-for guilty plea depends upon the voluntariness and intelligence with which the defendant, and not his counsel, entered his plea. *See United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986) (ruling that, even if derelictions on the part of defense counsel contribute to ambiguities and imprecisions in plea agreements, these failures may not be allowed to relieve the government of its primary responsibility for insuring precision in the agreement). Additionally, whether the breach of the agreement is occasioned by the prosecutor's good faith or bad faith may well be irrelevant. *See Santobello*, 404 U.S. at 262 (vacating the defendant's guilty plea after a replacement prosecutor unintentionally violated the plea agreement between his predecessor and the defendant, and noting that the fact that "the breach . . . was inadvertent [did] not lessen its impact"); *Correale*, 479 F.2d at 947 (holding that "[p]rosecutorial misrepresentations, though made in good faith, even to obtain a just, and here a mutually desired end, are not acceptable"); *United States v. Barrett*, 390 F. Supp. 1022, 1024 (D.N.C. 1975) (holding that interests in the "fair administration of the criminal process" and the "interests of justice" are not sufficient to permit the prosecution to violate, whether intentionally or unintentionally, promises made in the negotiation of guilty pleas); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that the suppression of material evidence by the state justified a new trial regardless of the good faith or bad faith of the prosecutor).

B. Interpreting Plea Agreements

In *Santobello v. New York*,³² the Supreme Court set forth a standard for enforcing plea bargains in language that seemed to indicate a link between plea agreements and contracts.³³ In *Santobello*, the defendant pleaded guilty to a lesser included offense as part of a plea agreement in which the state prosecutor promised to refrain from making a recommendation as to the defendant's sentence.³⁴ However, at Santobello's sentencing, a new prosecutor recommended, and the judge imposed, the maximum penalty.³⁵ The New York state appellate court affirmed Santobello's conviction,³⁶ but the United States Supreme Court vacated that ruling and remanded the case so that the state court could determine whether the proper remedy was to allow the defendant to withdraw his guilty plea or to grant specific performance of the agreement.³⁷ The Court ruled 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."³⁸ The Court's contract-style language in *Santobello* has led many lower courts to apply contract-law principles in interpreting the obligations embodied in plea bargains.³⁹ On the other hand, *Santobello*'s requirement of a "voluntary and knowing" waiver and its emphasis on "the interests of justice,"⁴⁰ coupled with the Court's more recent

32. 404 U.S. 257 (1971).

33. See *infra* note 38 and accompanying text (quoting the Court's language in *Santobello*).

34. *Santobello*, 404 U.S. at 258.

35. *Id.* at 259-60.

36. *Id.* at 260.

37. *Id.* at 263.

38. *Id.* at 262 (emphasis added).

39. See, e.g., *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) ("Fundamental contract principles establish that the written plea bargain was 'adopted by the parties as a complete and exclusive statement of the terms of the agreement.'"); *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) ("Although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and 'subject to contract-law standards.'"); *United States v. McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979) ("[W]here the content of a plea bargain and the authority for its offer are at issue, we think traditional precepts of contract and agency should apply.").

40. *Santobello*, 404 U.S. at 261-63. Some commentators have posited that Chief Justice Burger's analysis in *Santobello* must have been based at least partly on the Constitution, though he mentioned no specific provision of the Constitution that was implicated. E.g., Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 474-75 nn.10, 11 & 13 (1978); Daniel F. Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751, 754 n.13 (1985). Otherwise, the Court would have had no basis for jurisdiction over the New York state court's decision. *Santobello*, 404 U.S. at 267 (Douglas, J., concurring).

decision in *Mabry v. Johnson*,⁴¹ have prompted still more courts to conclude that due process, and not contract-law analysis, should govern the enforcement of plea bargains.⁴²

In *Mabry*, the defendant challenged his sentence after the state prosecutor withdrew a more favorable plea proposal before the defendant had entered his plea, but after the defendant had accepted the prosecutor's offer.⁴³ Justice John Paul Stevens's opinion rejected the Eighth Circuit's analysis, which stated that "fairness" dictated that an offer of a plea bargain, like an offer to contract, could not be withdrawn once accepted.⁴⁴ The Court instead held that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution."⁴⁵ Further, Justice Stevens stated that "only when it develops that the defendant was not fully appraised of its consequences can his plea be challenged under the Due Process Clause."⁴⁶ After *Mabry*, defendants who plea bargain no longer need to rely solely on contract-law principles when seeking relief.

41. 467 U.S. 504 (1984).

42. See, e.g., *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (noting that "[p]lea agreements . . . are 'unique contracts' and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause") (citation omitted); *Staten v. Neal*, 880 F.2d 962, 965 (7th Cir. 1989) (explaining that "[a]lthough contract and agency principles may provide some guidance in addressing plea bargaining issues, they are not controlling"); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (stating that "both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements"); *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (stating that "[t]he Government will not be allowed to avoid the obligation it thus incurred by claiming now that the language literally promises nothing to the defendant" and that "[a] plea agreement is not an appropriate context for the Government to resort to a rigidly literal . . . construction of language"); *United States v. Lieber*, 473 F. Supp. 884 (E.D.N.Y. 1979) (ruling that principles of due process and fairness require that courts should not strictly adhere to contract principles in the context of plea agreements).

43. *Mabry*, 467 U.S. at 506.

44. *Id.* at 506-07.

45. *Id.* at 507-08 (footnote omitted). Of course, any defendant may plead guilty if he so chooses. Only those guilty pleas entered as part of a bargain for a promise from the prosecutor are at issue here.

46. *Id.* at 509. Justice Stevens's opinion in *Mabry* finally tied plea agreement analysis to a specific constitutional provision — the Due Process Clause — and thus gave substance to the constitutional analysis implicit in *Santobello*. See *supra* note 40 and accompanying text (discussing the *Santobello* analysis as being based, at least in part, on the Constitution).

By requiring voluntarily-entered⁴⁷ plea bargains, the *Mabry* court extended the constitutional umbrella to protect defendants when the government breaches a promise upon which a defendant based his guilty plea. In the event of such a breach, a defendant is able to either withdraw his plea or obtain specific performance of the promise. Thus, when a court accepts a defendant's guilty plea and that plea is based on a bargain with the prosecutor, the Supreme Court has held that principles of due process, not merely those of contract law, control.

In analyzing sentencing promises in the plea context, one commentator has suggested that *Mabry* and *Santobello*, taken together, call for an approach to the formation and enforcement of plea bargains which combines elements of both constitutional waiver and contractual analysis.⁴⁸ Under this approach, a prosecutor's breach of a plea agreement violates due process if the defendant enters his plea pursuant to that promise.⁴⁹ However, courts are very inconsistent in applying this mixed approach to promises made by prosecutors in one jurisdiction with which defendants seek to bind another jurisdiction. This Note next considers the breadth of this inconsistency and the approaches courts take when interpreting these plea agreements.

1. *Contract-Law Analysis of Plea Agreements*

At least one court in the Seventh Circuit has taken the view that a "plea bargain is, in law, just another contract"⁵⁰ Other courts have relied on *Santobello's* language to suggest that they should only apply traditional contract-law principles of objective interpretation to determine what a prosecutor has promised.⁵¹ In

47. In this Note, the word "entered" is used to describe the situation in which a defendant submits a plea to the court and the court accepts that plea. Justice Stevens held that it is just such an "entered" plea which implicates the Constitution. *See supra* note 45 and accompanying text (quoting the Court's specific language in *Mabry*).

48. Kaplan, Comment, *supra* note 40, at 755.

49. *Id.*

50. *Brooks v. United States*, 708 F.2d 1280, 1281 (7th Cir. 1983) (holding that the government's opposition to the defendant's motion for a reduced sentence did not breach a plea agreement where the government promised not to make any recommendations at the defendant's sentencing hearing). Applying contract law principles, Judge Richard Posner found that the contract was not ambiguous and that the agreement contained no additional, implied term requiring the government to stand mute in response to the defendant's motion. *Id.* at 1281-82. Note that *Brooks* was decided before *Mabry* firmly established the due process line of analysis. *See supra* notes 43-46 and accompanying text (discussing the decision in *Mabry*).

51. *See United States v. Fentress*, 792 F.2d 461 (4th Cir. 1986) (affirming a judgment of resti-

United States v. Krasn,⁵² the Ninth Circuit stated this view clearly, ruling that “[a]lthough plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and subject to ‘contract-law standards’. Any dispute over the terms of the agreement is to be resolved by objective standards.”⁵³ Yet, as a threshold matter, contract law authorities cannot agree on a set standard for objective analysis.⁵⁴ Other courts have adopted individual doctrines or maxims from contract law, such as those dealing with ambiguous language, parol evidence, or promissory estoppel, and applied them to plea agreements.⁵⁵

a. “Objective” Contract Interpretation

Objectivist theory, of which Judge Learned Hand was a proponent, posits that the subjective intent of the parties to a contract is irrelevant.⁵⁶ In seeking to interpret⁵⁷ a contract, Judge Hand’s view

tution and a consecutive sentence where the court used “fundamental contract and agency principles” and “objective standards” to find the absence of implied agreements beyond the government’s written promise to recommend no more than a five-year prison sentence); *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980) (holding that the content of three letters between the Assistant U.S. Attorney and defense counsel showed, by objective contract standards, that the government had agreed to dismiss the defendant’s remaining counts and forego prosecution of the defendant’s bribes or gratuities and criminal violations of Internal Revenue laws in exchange for the defendant’s guilty plea, but that the government did not promise the defendant immunity from prosecution for all prior criminal acts).

52. 614 F.2d 1229 (9th Cir. 1980).

53. *Id.* at 1233. The court in *Krasn* additionally ruled that what the parties agreed to is a question of fact to be resolved by the district court, and subject to the “clearly erroneous” standard on review. *Id.*; see also *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (“Plea agreements are contracts, and their content and meaning are determined according to ordinary contract principles.”).

54. Some authorities would allow only a prospective evaluation of the parties’ objectively apparent intent, while others define objectivity in terms of a retrospective search of the circumstances for evidence of some shared meaning between the parties. See *infra* notes 60-63 and accompanying text (noting this distinction).

55. See, e.g., *United States v. Vergara*, 791 F. Supp. 1095 (N.D.W.Va. 1992) (holding that ambiguous language in a plea agreement is to be construed against the government because the government drafted the document); *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) (applying the parol evidence rule, the court held “that the written plea bargain was adopted by the parties as a complete and exclusive statement of the terms of the agreement,” and as such could not be supplemented with the unmentioned terms suggested by the defendant); *United States v. Barrett*, 390 F. Supp. 1022 (D.S.C. 1975) (finding that the defendant failed to meet his burden with respect to estoppel where he could not prove: (1) that the government made him a promise in exchange for his cooperation; (2) that defendant relied on this promise in pleading; and (3) that the promise had been disregarded).

56. E. ALLAN FARNSWORTH, *CONTRACTS* 485 (1982).

57. *Id.* Courts rarely distinguish between *interpreting* a contract and *construing* a contract, although these terms are not the same. *Id.* at 477-78. According to Farnsworth, *interpretation*

was that intent indicates only the parties' state of mind when the contract was made, not the legal extent of their obligations based on the reasonable meaning of the words used.⁵⁸ Most authorities, however, reject the strict objectivist view and instead support a theory of interpretation which seeks to divine the intent of the parties in terms of a common meaning shared by those parties and ascribe that intent to the words of the contract.⁵⁹ Courts often base their "objective" analysis on the reasonable meaning of the words of the plea agreement, viewed prospectively from the time the agreement was made.⁶⁰ In the plea bargain context, the Sixth Circuit has held that the language of a plea agreement will be interpreted "as a reasonable person would interpret the written word," without regard for what a party's subjective expectations were.⁶¹ Some courts, however, employ a retrospective mode of interpretation, in which the court seeks, under the label of objective analysis, to determine instead the

attempts to set the meaning parties give to the words of a contract, while *construction* sets the legal effect of those words. *Id.* While Farnsworth notes that both Arthur Corbin and Samuel Williston adhered to this distinction and defined construction similarly, he also points out that courts "more often ignore [the distinction] by characterizing the process of construction as that of 'interpretation' in order to obscure the extent of their control over private agreement." *Id.*

58. "Reasonable meaning" refers to what a reasonable person in the position of the parties would have thought the words meant. *Id.* at 485.

59. See RESTATEMENT (SECOND) OF CONTRACTS § 201 (1979) (providing that "[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning"). See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 3-10 (2d ed. 1977) (comparing and contrasting Williston's and Corbin's rules of interpretation and the stance adopted by the *Restatement of Contracts*).

60. 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 607 (3d ed. 1961). Professor Williston further stated that, in interpreting a written contract, courts "will look forward from the date when the parties entered the bargain, not backward from some vantage point of a future day." *Id.*; see also 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 560 (1960) (explaining that the crucial factors in interpreting the meaning of a contract are the time, place, and circumstances at which the particular person involved entered into the contract).

61. *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989); see *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1973) (holding that there was sufficient objective proof that the defendant misunderstood the sentence he was facing). The *Crusco* court stated that "[w]here the record shows that 'circumstances as they existed at the time of the guilty plea, judged by objective standards, reasonably justified his mistaken impression,' a defendant must be held to have entered his plea . . . involuntarily." *Id.* at 24 (quoting *Mosher v. Lavallee*, 491 F.2d 1346, 1348 (2d Cir. 1974)); see also *United States v. Harvey*, 791 F.2d 294, 303 (4th Cir. 1986) (relying on Fourth Circuit precedent to ignore a technically inaccurate identification of an agent and stating that "[w]e need not believe that Harvey and his counsel actually read this disputed plea agreement with this settled circuit law in mind" and that "[i]t suffices that they were entitled to so read it and may reasonably have done so"); *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985) (holding that, although due process concerns played some part, "[t]he court's inquiry [was] one of objective fact, not of subjective intent: whether the plea agreement [had] been violated *vel non*").

parties' *subjective* intent by looking, from a future vantage point, at the parties' actions which occurred *after* the parties made their agreement.⁶² This retrospective analysis is not, however, normally considered an objective one.⁶³

To a large extent, examining the literal words of an agreement to find the intent of the parties to a plea bargain involves reading these agreements as though both parties intended that each and every word be given effect. For example, in *In re Doe*,⁶⁴ an agent for the Federal Bureau of Investigation ("FBI") had promised the defendant that he would not be questioned in exchange for surrendering contraband. The court refused to allow a U.S. Attorney to substitute a promise of immunity from prosecution in place of the original promise not to question Doe.⁶⁵ Though the effect on the defendant may only have been to give the government a chance to subpoena him, the court did not allow the government to change the words of the agreement.⁶⁶ In *United States v. Fentress*,⁶⁷ the court applied

62. See *United States v. Robison*, 924 F.2d 612 (6th Cir. 1991) (holding that a plea agreement to abstain from further prosecution made in one federal judicial district did not bind a prosecutor in a different district, where the defendant's actions subsequent to entering his plea seemed to indicate to the court that the defendant did not expect the agreement to be binding). The *Robison* court also decided to look at what was *not* mentioned in the plea agreement as evidence of what the parties did *not* intend. See *id.* at 614 (noting that because the plea agreement did not mention Robison's indictment in Michigan, nor that the investigations were independent, the North Carolina prosecutor did *not* intend to bind his Michigan counterpart); see also *United States v. Harvey*, 791 F.2d 294, 302 (4th Cir. 1986) (considering the defendant's testimony to the court at his post-plea agreement sentencing hearing in determining his intent in entering into the plea agreement); *infra* notes 202-22 and accompanying text (discussing the *Robison* decision).

63. See 4 WILLISTON, *supra* note 60, § 607 ("If reasonableness were to be gauged by hindsight, [retrospectively redrafting a contract] would have some weight. Unfortunately . . . the wisdom of hindsight is not the test . . .").

64. 410 F. Supp. 1163 (E.D. Mich. 1976).

65. *Id.* at 1165.

66. *Id.* at 1166; see *United States v. Salazar*, 909 F.2d 1447 (10th Cir. 1990) (finding that the government's recommendation of a heavy sentence did not breach their agreement to refrain from bringing further charges against the defendant); *United States v. Fox*, 889 F.2d 357 (1st Cir. 1989) (holding that the prosecutor did not breach a promise to drop four of five counts against the defendant and to refrain from making a sentence recommendation in exchange for a plea where the prosecutor merely informed the court about the other four offenses at the defendant's sentencing hearing); see also THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 370-71 (Supp. 1991) (surveying the circuits' interpretation of sentencing plea bargains and noting that the Sixth, as well as the First and District of Columbia Circuits, have interpreted plea agreement language quite narrowly).

In a twist on this practice of literal interpretation, however, some courts have implied that fairness concerns may prohibit the government from making "end-runs" around its plea agreements by using hyper-literal readings of those promises. *E.g.*, *United States v. Voccola*, 600 F. Supp. 1534 (D.R.I. 1985). But as a practical matter, few interpretations are literal enough to be considered end-runs. See *United States v. Mata-Grullon*, 887 F.2d 23 (1st Cir. 1989) (finding no

the ultimate contract-law rule of literal interpretation — that of parol evidence⁶⁸ — in holding that “[a]s a fully integrated agreement, the described exchange may not be supplemented with unmentioned terms.”⁶⁹ In sum, objective contract interpretation generally comprises a prospective analysis of the reasonable meaning the parties gave to the literal words of their agreement.

b. Contract Doctrines Applied to Plea Bargains

When courts undertake a contract-law analysis of a plea bargain, they often apply doctrines or rules developed through the common law of contracts. These rules of interpretation include the doctrines of ambiguity and promissory estoppel.

i. Ambiguity

In a further extension of contract principles to the context of plea bargains, courts often use a variation on the maxim that ambiguities in contract language are construed against their drafter,⁷⁰ and thus construe ambiguities in plea agreements against the government. As one court noted, “in the absence of an agreement ‘*clearly* understood by all of the parties, *carefully* memorialized, and *fully* disclosed to the Court,’ the government must bear the disadvantage of ambiguity or omission.”⁷¹ Courts routinely apply this doctrine in the

“end-run” where the government promised to recommend the lowest sentence within the “appropriate” sentencing range, but where the government’s comments on the seriousness of the offense caused the court to raise its finding as to what range was “appropriate”); *Voccola*, 600 F. Supp. at 1538 (finding no “end-run” where the government promised not to recommend any jail sentence, but told the court how the defendant’s conduct had been harmful to consumers while the court was in the process of determining the defendant’s fine). *But see* *United States v. Bowler*, 585 F.2d 851, 853-54 (7th Cir. 1978) (holding that the government breached a plea agreement by not considering mitigating factors in its sentence recommendation, where the agreement mentioned those factors but did not specifically require their use).

67. 792 F.2d 461 (4th Cir. 1986).

68. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1979) (setting forth the parol evidence rule).

69. *Fentress*, 792 F.2d at 464 (citing RESTATEMENT (SECOND) OF CONTRACTS § 210 (1979)); *see* *United States v. Ingram*, 979 F.2d 1179 (7th Cir. 1992) (stating that extrinsic evidence is inadmissible to prove the meaning of a contract unambiguous on its face, and disallowing the appellant’s attempt to introduce parol evidence regarding a facially unambiguous plea agreement); *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) (“To allow defendant to attempt to prove by affidavit that the agreement is otherwise than it appears, unambiguously, on a thorough record would violate established contract-law standards.”).

70. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979).

71. *United States v. Vergara*, 791 F. Supp. 1095, 1099-1100 (N.D. W.Va. 1992) (quoting *United States v. Gianakakis*, 671 F. Supp. 64, 72 (D. Me. 1987)); *see also* *United States v.*

commercial setting to deter ambiguous contract language.⁷² However, courts are inconsistent in their application of the ambiguity doctrine to plea bargains, as the case of *United States v. Burns*⁷³ illustrates. In *Burns*, the Court of Appeals for the District of Columbia Circuit went so far as to suggest that “it would be appropriate for prosecutors to modify the plea bargain agreement language [at bar] to make clear” what the bargain contemplated because the court was “disturbed by the ambiguity in the language of [this] plea agreement”⁷⁴ Nevertheless, the court did not find the defendant’s guilty plea invalid under the circumstances.⁷⁵ In other words, courts interpreting plea agreements do not always construe ambiguous language in such agreements against the government, the drafter of the language.

Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (holding the government to a greater degree of responsibility than the defendant — or parties to commercial contracts — for ambiguities in plea agreements).

72. See, e.g., *Phillips v. Lincoln Nat’l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1992) (stating that under either state or federal common law contract interpretation, ambiguous terms in an insurance contract will be strictly construed in favor of the insured); *Glocker v. W. R. Grace & Co.*, 974 F.2d 540 (4th Cir. 1992) (construing ambiguities in an insurance contract against the insurance company that drafted the language in the contract); *Milk ‘N’ More, Inc. v. Beavert*, 963 F.2d 1342 (10th Cir. 1992) (stating that the court should construe any ambiguity in the contract against the drafter); *Delk v. Durham Life Ins. Co.*, 959 F.2d 104 (8th Cir. 1992) (finding that construing ambiguities against the drafter is part of federal common law contract interpretation); *McLain v. Metropolitan Life Ins. Co.*, 820 F. Supp. 169 (D.N.J. 1993) (noting that ambiguities are construed against the drafter as a matter of course). *But see* *COB Shipping Canada, Inc. v. Trans Mktg. Houston, Inc.*, 1993 U.S. Dist. LEXIS 10795, at *12 (S.D.N.Y. Aug. 4, 1993) (noting that, in some instances, ambiguities should not be construed against the drafter because “[c]ontracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances” and because “[p]articular words should be considered, not as if isolated from context, but in the light of the obligation as a whole and the intention of the parties manifested thereby”) (quoting *William C. Atwater & Co. v. Panama R.R. Co.*, 159 N.E. 418, 419 (N.Y. 1927)).

73. 893 F.2d 1343 (D.C. Cir. 1990).

74. *Id.* at 1349.

75. *Id.* In *Burns*, the U.S. Attorney had promised that the defendant could nullify his plea agreement and withdraw his guilty plea unless the government reached a sentencing calculation of thirty to thirty-seven months. *Id.* at 1345. Though the prosecutor did *calculate* the sentence as agreed, the sentencing judge departed from this calculation to impose a sixty-month sentence on the defendant. *Id.* at 1344-45 (emphasis added). The appellate court found that the sentencing judge had good reasons for departing from the prosecutor’s sentencing recommendation, and that federal sentencing guidelines permitted such departures. *Id.* at 1345, 1347. Moreover, the court also found that the plea agreement failed to specify any remedy for the defendant if the *judge*, rather than the prosecutor’s office, departed from the agreed calculation, and thus found no breach of the plea agreement. *Id.* at 1348-49 (emphasis added).

ii. Promissory estoppel

Another traditional contract-law principle which courts sometimes find relevant in the plea bargain context is promissory estoppel, or "reliance." In its most basic form, the "equity doctrine of estoppel prevents disavowal of a contract after one party in good faith relies to his own detriment on the representations of the other."⁷⁶ In *Palermo v. Warden*,⁷⁷ the prosecutor promised to free the defendant on parole — the defendant having been jailed for an unrelated crime — if the defendant returned jewels stolen in the instant offense.⁷⁸ Once the defendant returned the jewels, however, the prosecutor refused to make good on his promise, arguing that the return of stolen property was unlawful consideration for the bargain.⁷⁹ In granting the defendant specific performance on the plea agreement, the court held that the government was estopped from denying the sufficiency of the defendant's consideration since he had already incriminated himself by returning the jewels in reliance on the bargain.⁸⁰

In order to bind a U.S. Attorney to a promise allegedly made by an agent of the government in another department, the district court in *United States v. Barrett*⁸¹ ruled that the defendant must show reliance by proving: (1) that the promise was in fact made; (2) that the defendant relied on that promise; and (3) that the government failed to keep the promise.⁸² Despite Barrett's inability to prove reliance, the test which the court imposed was still less stringent than that required in *Palermo*.⁸³

The Supreme Court made clear in *Santobello* that a defendant

76. *Palermo v. Warden*, 545 F.2d 286, 295 n.12 (2d Cir. 1976) (citing 1 WILLISTON, *supra* note 60, §§ 139-40 (3d ed. Supp. 1975)).

77. 545 F.2d 286 (2d Cir. 1976).

78. *Id.* at 290-91.

79. *Id.* at 295.

80. *Id.* at 294-97.

81. 390 F. Supp. 1022 (D.S.C. 1975).

82. *Id.* at 1025. The court found that the defendant had failed to meet this burden of proof. *Id.* at 1026.

83. 545 F.2d 286 (2d Cir. 1976). Compare *supra* note 76 and accompanying text with *supra* note 82 and accompanying text (illustrating that the *Barrett* court did not require the detrimental reliance which characterized the traditional contract law doctrine.) The *Palermo* court had never reached these concerns, however, and even had the defendant not relied to his detriment, the court had other grounds for affirming the lower court's grant of specific performance. See *supra* note 80 and accompanying text (noting the reason for the court's grant of specific performance); see also RESTATEMENT (SECOND) OF CONTRACTS §§ 90, 139 (1979) (setting forth the requirements for reliance and estoppel, respectively).

need not have been prejudiced by the government's nonperformance to be entitled to relief for breach of a plea agreement.⁸⁴ The Court in *Santobello* noted that the sentencing judge stated in the record that he was not at all influenced by the second prosecutor's proscribed sentence recommendation, yet the existence of the prosecutor's breach was sufficient to warrant a vacation of the defendant's plea.⁸⁵ The Court concluded that the interests of justice, and appropriate recognition of the prosecution's duties in relation to promises made in negotiating guilty pleas, are best served by providing the defendant relief.⁸⁶ To the extent that *Palermo's* detrimental reliance test is at odds with *Santobello*, it highlights an inherent pitfall in applying the rigid contract-law principle of estoppel in the plea bargain setting. Under *Santobello*, however, a defendant claiming reliance on a plea bargain need only show that the government breached the agreement in order to estop the government from avoiding it altogether. *Palermo* notwithstanding, the defendant need not show that he was harmed by the breach to prove reliance.

2. Agency Analysis of Plea Agreements

Another concept derived from the arena of contract interpretation, and one that courts employ inconsistently in the plea bargain context, is agency.⁸⁷ In the setting of commercial contracts, or even commercial government contracts, the concept of agency can often be very different from agency as courts apply it to plea bargains. In *Dresser v. United States*,⁸⁸ the defendant corporation had undertaken an internal investigation of "questionable foreign payments" at the insistence of the Securities and Exchange Commission ("SEC").⁸⁹ In exchange, the director of the SEC's Corporate Fi-

84. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

85. *Id.* at 259.

86. *Id.* at 262; see *In re Doe*, 410 F. Supp. 1163 (E.D. Mich. 1976) (holding that the defendant did not have to suffer any harm resulting from a post-agreement change in the government's promise for the court to require that the government's promise be fulfilled); see also *United States v. Voccola*, 600 F. Supp. 1534 (D.R.I. 1985) (confirming that the defendants might have been eligible for specific performance if the government had breached its promise, even though the defendants had eschewed an opportunity to withdraw their guilty pleas).

87. Though usually treated as an area of the law separate from the traditional study of contracts, for purposes of interpreting plea bargains in their often quasi-constitutional context, issues of who promised what and under what if any authority, when coupled with concerns about voluntariness or reliance, do take on contractual significance.

88. 596 F.2d 1231 (5th Cir. 1979).

89. *Id.* at 1233.

nance Division promised that the information Dresser turned up would be kept confidential and that the SEC would not conduct its own investigation.⁹⁰ Nonetheless, the SEC turned over the information and documents it had received from Dresser to the Justice Department upon subpoena, and even assisted in the investigation ordered by that department.⁹¹ Stating the general rule that the "federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his *actual authority*,"⁹² the Fifth Circuit Court of Appeals held in *Dresser* that the SEC could not bind the Justice Department to a promise not to investigate the defendant corporation.⁹³ A federal court came to a similar conclusion in the plea bargain context in *United States v. McIntosh*.⁹⁴ There, Circuit Judge Kenneth Hall explained that a state prosecutor could not bind a U.S. Attorney with a promise of immunity from prosecution because the state's attorney was not an agent of the federal government and thus had no actual authority to do so.⁹⁵

Some courts rely on the principle of "inherent agency" when considering plea agreements which purport to bind the government, but which lack the "actual authority" to do so. In the interests of fair dealing with the government, courts have treated some situations where defendants plea bargain with persons having all the "indicia of authority" to enter into the agreement as a form of reliance.⁹⁶

90. *Id.*

91. *Id.* at 1234.

92. *Dresser v. United States*, 596 F.2d 1231, 1236 (5th Cir. 1979) (emphasis added).

93. *Id.* at 1237 (concluding that the SEC's agents lacked the actual authority to contractually limit the prosecutorial function of the Justice Department, and that any such agreement with Dresser would have been unenforceable). The situation in *Dresser* was very different from a plea agreement in two respects: the government had filed no charges, and Dresser asserted the existence of the promise as part of a preemptive suit by the corporation to forestall disclosure of sensitive documents. *Id.* at 1233.

94. 612 F.2d 835 (4th Cir. 1979). The court stated that:

With predictability and reliance as the foundation of plea bargaining itself, we must apply fundamental contract and agency principles to plea bargains as the best means to fair enforcement of the parties' agreed obligations. . . . [H]ere, where the content of a plea bargain and the authority for its offer are at issue, we think traditional precepts of contract and agency should apply.

Id. at 837.

95. *Id.* at 836. *But see supra* notes 30-31 and accompanying text (discussing the due process concerns which favor the granting of relief for breach of even unfulfillable promises when plea agreements are involved).

96. *United States v. Lieber*, 473 F. Supp. 844, 892 (E.D.N.Y. 1979) (pointing out that, in the agency setting, the government's standard of fairness or fair dealing should be no lower than that required in the commercial world, where a party would likely be justified in relying on the repre-

But in deference to perceived due process concerns, the Fourth Circuit has said that “[t]he solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney to bind another United States Attorney”⁹⁷ Thus, courts may not require that a government representative meet every formal requirement of agency before they bind the government to his plea agreement. In sum, although the decision in *Santobello* has led the courts to apply a traditional style of contract interpretation to plea agreements, subsequent case law has softened the impact of various contract-law doctrines in this context.

3. *Due Process Analysis of Plea Agreements*

The Supreme Court’s decision in *Mabry v. Johnson*⁹⁸ stands for the proposition that courts may not analyze plea agreements strictly by contract principles, because once the defendant has fully performed, his bargain receives constitutional protection under the Due Process Clause.⁹⁹ In addition, courts have freed the government of its obligations under a plea agreement where the defendant breached by failing to perform his part of the bargain.¹⁰⁰ In some cases, where a plea agreement also comprises an ongoing element — such as cooperating with the government or testifying — of an investigation, the defendant’s constitutional protection is not complete until his performance is complete.¹⁰¹ Granting specific performance of an illegal or unfulfillable government promise may only be justified under due process analysis.¹⁰² Under a commercial contract

sentations of a person having all the indicia of authority as an inherent agent).

97. *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972).

98. 467 U.S. 504 (1984); *see supra* notes 41-47 and accompanying text (discussing the *Mabry* decision).

99. *Mabry*, 467 U.S. at 507-08; *see Kaplan*, Comment, *supra* note 40, at 752 (addressing the role of plea bargain promises with respect to sentencing and subsequent sentence-reduction hearings, and stating that “a more appropriate mode of interpreting the scope of disputed plea bargains only begins, but does not end, with the application of contract-law principles; recent Supreme Court decisions, invoking due process concerns . . . require that ordinary contract analysis not be the exclusive touchstone for interpreting such agreements”).

100. *United States v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988).

101. *See United States v. Boulter*, 359 F. Supp. 165 (E.D.N.Y. 1972) (rejecting the argument that the government breached a plea agreement where a federal prosecutor in Florida promised that the defendant’s New York indictment would be dismissed if he pleaded guilty in Florida and cooperated with the government, and upholding the defendant’s subsequent trial in New York after the defendant refused to provide the government any useful information), *aff’d sub nom. United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied sub nom. Brown v. United States*, 414 U.S. 823 (1973).

102. *See Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (holding that where a defend-

analysis, on the other hand, an unfulfillable or illegal promise by one party may render the bargain unenforceable based either on a failure of consideration or on public policy.¹⁰³ Some commentators have suggested the existence of a "constitutional law of contracts," and have pointed out two types of illegal promises that are directly relevant to plea bargaining.¹⁰⁴ The first is a promise which a prosecutor has no authority to make;¹⁰⁵ the second is a promise that no government official has the authority to deliver.¹⁰⁶ Both of these types of otherwise illegal promises may, nonetheless, be enforced in the plea bargaining context after *Mabry*.¹⁰⁷

Under due process analysis, courts have held that government bargains inducing pleas which bring the government very little benefit must nonetheless be fulfilled.¹⁰⁸ In the same vein, bargains inducing pleas based on governmental mistakes must likewise be enforced.¹⁰⁹ As Justice Oliver Wendell Holmes stated, "[I]t is a lesser evil 'that some criminals should escape than that the government should play an ignoble part.'"¹¹⁰

Again, the reason due process is implicated in a plea bargain situ-

ant pleads guilty because he relied on the prosecutor's promise, even though it is impossible to fulfill, the defendant has a right to have that promise fulfilled).

103. See generally FARNSWORTH, *supra* note 56, at 43-46, 325-30 (discussing consideration as a bargained-for exchange and public policy).

104. See Westin & Westin, *supra* note 40, at 528-38 (discussing the usefulness of contract law in making constitutional judgments in deciding whether a defendant is entitled to relief for a broken plea agreement).

105. See *infra* notes 115-27 and accompanying text (discussing *Staten v. Neal*, 880 F.2d 962 (7th Cir. 1989)).

106. Westin & Westin, *supra* note 40, at 531-35; see, e.g., *Correale v. United States*, 479 F.2d 944, 948 (1st Cir. 1973) (finding that, in exchange for the defendant's guilty plea, the prosecutor promised that he would recommend a four- to eight-year sentence, but that the promised sentence range was outside of the federal sentencing guidelines); *United States v. Carter*, 454 F.2d 426, 427 (4th Cir. 1972) (noting that the prosecutor in one federal district promised that, in exchange for the defendant's guilty plea, charges against him would be dropped in another federal district).

107. See *infra* notes 108-13 and accompanying text (discussing how application of a due process analysis may result in enforcement of what may be illegal promises).

108. See e.g., *United States v. Lieber*, 473 F. Supp. 884, 893-94 (E.D.N.Y. 1979) (stating that the fact that the government struck a bad bargain should not weigh against the defendants, where the prosecutor had promised to dismiss indictments on felony Internal Revenue Code violations in exchange for the defendants' agreement to plead guilty to misdemeanor tax charges).

109. *United States v. Partida-Parra*, 859 F.2d 629, 632-33 (9th Cir. 1988) (holding that the government could not rescind a plea agreement on the grounds that the prosecutor had mistakenly charged the defendant with a misdemeanor, rather than a felony, after the defendant had entered his plea); *Correale*, 479 F.2d at 947 (holding that the government was bound to perform its bargain where the prosecutor inadvertently promised the defendant a sentence outside of the federal sentencing statute in exchange for the defendant's guilty plea).

110. *United States v. Salazar*, 909 F.2d 1447, 1448 (10th Cir. 1990) (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928)).

ation is that the criminal defendant, in exchange for whatever promise the government has made, has agreed to give up certain constitutional safeguards which help assure him fair treatment at the hands of the government.¹¹¹ Simply stated, the guilty plea is the antithesis of the right against self-incrimination.¹¹² Once a defendant has waived this and other rights based on government promises, the Supreme Court has said that those promises must be fulfilled in the interests of fundamental fairness as long as the defendant was informed of the content of the promises and his waiver was truly voluntary.¹¹³ Thus, whether or not a prosecutor's promise is enforceable under traditional contract or agency law in a non-plea context may be immaterial where a plea bargain is, in fact, at issue and due process concerns hold sway.

C. Plea Agreements Which Seek to Bind Other Jurisdictions

Issues of both due process and contractual analysis are called into play when a defendant seeks to make plea agreements negotiated by prosecutors in one federal district binding on federal prosecutors in other districts. In deciding the scope and content of the agreements in such cases, courts frequently — although inconsistently — apply principles of agency and various other methods of interpretation. In attempting to see how courts respond to these cases, it is useful to explore the ways in which courts apply agency and contract principles to three plea bargaining situations. This agency section considers how courts apply these principles: first, to agreements by state prosecutors which defendants seek to make binding on other states or on U.S. Attorneys; second, to agreements by other federal departments sought to be made binding on U.S. Attorneys; and third, to agreements sought to be made binding on U.S. Attorneys in different districts. It then explores the inconsistencies and divisions among the circuits in interpreting the language of plea bargains which do and do not bind the federal government.

111. See *supra* notes 32-49 and accompanying text (discussing the *Santobello* and *Mabry* decisions and at what point due process is implicated).

112. The right against self-incrimination is embodied in the Fifth Amendment, which provides: "No person . . . shall be compelled in any criminal case to be a witness against himself" U.S. CONST. amend. V.

113. *Mabry v. Johnson*, 467 U.S. 504, 508-11 (1984).

1. Agency and the Authority to Bind

Though the area of binding plea agreements is dominated by due process fairness concerns, many courts nonetheless look to agency law for help in deciding what a plea-bargaining defendant may fairly expect.

a. State and Federal Prosecutorial Promises

Federal courts have ruled that promises made by state's attorneys generally do not impose binding obligations on prosecutors from other states or on United States Attorneys.¹¹⁴ In *Staten v. Neal*,¹¹⁵ the petitioner, Gary Staten, had escaped from a work-release program in Champaign County, Illinois, after his transfer there from a prison in Fayette County, Illinois.¹¹⁶ When Staten was later arrested on robbery charges in Iowa, prosecutors there secured the Fayette County state's attorney's waiver of escape charges as part of a plea bargain with the petitioner in Iowa.¹¹⁷ After Staten had served his Iowa sentence, the Champaign County state's attorney prosecuted him on escape charges in Illinois.¹¹⁸ Champaign County convicted Staten, and the federal district court denied his petition for a writ of habeas corpus.¹¹⁹ The Seventh Circuit affirmed, holding that an Illinois statute placed strict limits on the *actual authority* of state prosecutors.¹²⁰ While noting that agency and contract principles guide the disposition of Staten's due process claim, Judge Wood said that the state's attorney did not have the power to make the promise that he made.¹²¹ The court found that Staten could not have fairly relied upon that promise in pleading guilty to charges in Iowa because such reliance would be contrary to clear statutory expression.¹²² The court also rejected Staten's inherent agency argument, stating that inherent agency extends only to actions which would normally be

114. See, e.g., *Staten v. Neal*, 880 F.2d 962, 966 (7th Cir. 1989) (finding that a state's attorney's actual authority extends as a statutory matter only to the county in which he was appointed, and not to the entire state, surrounding states, or the federal government).

115. 880 F.2d 962 (7th Cir. 1989).

116. *Id.* at 962.

117. *Id.* at 963.

118. *Id.*

119. *Id.* at 962.

120. *Id.* at 966; see 55 ILCS 5/3-9005 (1993) ("The duty of each State's attorney shall be: (1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.").

121. *Staten*, 880 F.2d at 966.

122. *Id.* at 965-66.

part of the agent's activities.¹²³ Finally, the court rejected Staten's apparent agency argument, finding that Illinois had never represented that the state's attorney had the power to act as an agent for making promises outside his own county.¹²⁴ In affirming the decision, the Seventh Circuit found that the Supreme Court's rule in *Santobello* — that a prosecutor's promise which induces a guilty plea must be fulfilled¹²⁵ — had not been violated.¹²⁶ Thus, where a state statute clearly limits the scope of a state prosecutor's authority, a defendant's reliance on a promise which is contrary to that authority will not be considered reasonable.¹²⁷ Further, that reliance will not rise to the level of inducement required by *Santobello*.

b. Promises by Other Federal Departments

When courts address the issue of whether promises made by other departments of the federal government are binding on U.S. Attorneys and the Justice Department, the results are quite inconsistent. In *United States v. Rodman*,¹²⁸ the First Circuit dismissed the defendant's indictment and held that a promise made by the SEC that it would recommend that the defendant not be indicted in exchange for making incriminating statements was binding on the government.¹²⁹ The court based its decision on fairness concerns and Rodman's reliance on the promise.¹³⁰ In *Dresser v. United States*,¹³¹ the

123. *Id.* at 966. In assessing the state's attorney's inherent authority, the court pointed out the somewhat circular logic making it impossible for one to have inherent authority unless he had actual authority, since making unauthorized bargains was not a normal part of the agent's activities. *Id.*

124. *Id.*

125. *Santobello v. New York*, 404 U.S. 257, 262 (1971); see *supra* notes 24-31 and accompanying text (discussing the due process concerns behind the Court's rule in *Santobello*); see also *United States v. Long*, 511 F.2d 878 (7th Cir. 1975) (applying "hornbook law" to hold that no agency existed to bind a U.S. Attorney to a promise of immunity from prosecution issued by an agent of the Illinois Bureau of Investigation). "The government is not bound by acts of persons who never have been, or in fact have ceased to be, its agents." *Id.* at 881 (quoting *Newman v. United States*, 28 F.2d 681, 682 (9th Cir. 1928)).

126. *Staten*, 880 F.2d at 966-67.

127. *Id.*

128. 519 F.2d 1058 (1st Cir. 1975).

129. *Id.* at 1059-60.

130. *Id.* at 1059; see *United States v. Barrett*, 390 F. Supp. 1022 (D.S.C. 1975) (ruling that a government agent other than a prosecutor may, under the proper circumstances, bind the entire government to the terms of his plea-inducing promise). In *Barrett*, a Drug Enforcement Administration ("DEA") agent allegedly promised the defendant special consideration and assistance in exchange for his pre-indictment cooperation with the DEA. However, when that agent was relieved from the investigation after the defendant had cooperated, no "special consideration" was given. *Id.* at 1024. The court would have been willing to bind the government to the DEA agent's

Fifth Circuit came to an opposite result with respect to the SEC, though under very different circumstances. Unlike *Rodman*, the corporation in *Dresser* did not face charges and had not yet incriminated itself when it sued the SEC and the Justice Department to forestall its own disclosure of documents.¹³² The court held that a contract between Dresser and the SEC, under which the SEC could not release the results of Dresser's in-house investigation, did not prevent the Justice Department from issuing subpoenas for those records.¹³³ The court's decision was based on its ruling that the SEC was not an agent of the Justice Department and thus had no actual authority to bind the government.¹³⁴ The court did not consider the

alleged plea agreement promise had the defendant met his burden in proving its existence and his reliance on it. *Id.* at 1024-25. However, the defendant failed to prove by a preponderance of the evidence that the agent had made the promise. *Id.* at 1026. The *Barrett* court stated: "There can be no distinction between promises made by prosecutors in the Attorney General's office and promises made by agents of the Drug Enforcement Administration. . . . [T]he government must abide by the terms of a promise made to a defendant." *Id.* at 1024; see *supra* note 82 and accompanying text (noting the requirements for proving reliance in the plea bargain context); see also *United States v. Lieber*, 473 F. Supp. 884, 892 n.17 (E.D.N.Y. 1979) (explaining that, as a matter of policy as of 1979, the Tax Division of the Justice Department abided by unauthorized plea agreements affecting its prosecutions reached by United States Attorneys). *Cf. In re Doe*, 410 F. Supp. 1163, 1166 (E.D. Mich. 1976) (holding that "the government may not rely upon distinctions between express, implied, and apparent authority among its agents in avoiding the effect of its promise" and that "[t]hese distinctions have meaning for the legal technician, not for the layman dealing with the 'government' in his negotiations"). In *Doe*, the defendant had turned cocaine over to FBI agents in exchange for their promise that he would not be subject to questioning by the government. *Id.* at 1165. In order to question Doe before a grand jury, however, the U.S. Attorney sought to substitute the original promise with a grant of immunity from prosecution. To prevent his having to testify, Doe moved to vacate the immunity order. *Id.* The district court granted Doe's motion, upheld the FBI's promise on due process grounds, and rejected the prosecutor's argument that the FBI agent had no authority under agency law to bind the U.S. Attorney's Office. *Id.* at 1165-66. The court noted that the promise in *Doe* was so closely analogous to a plea bargain that the principles of *Santobello v. New York*, 404 U.S. 257 (1971), controlled. *Id.*; see *supra* notes 32-38 and accompanying text (discussing the decision in *Santobello*). But see *United States v. Lombardo*, 467 F.2d 160 (2d Cir. 1972) (holding that the promise of an FBI agent did not bind the Justice Department where the court determined that the defendant understood that the agent was not authorized to bind the Justice Department before the defendant entered his plea).

131. 596 F.2d 1231 (5th Cir. 1979).

132. *Id.* at 1233.

133. *Id.* at 1234-35.

134. *Id.* at 1236-37. The court said:

It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority. . . .

If the rule were otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department.

fairness concerns enunciated in *Santobello*¹³⁵ — concerns like those which had governed the *Rodman* case with respect to plea agreements — controlling in *Dresser*, because no charges had yet been filed against Dresser and because Dresser had not relied on a promise with respect to any prosecution. In other words, when courts are dealing with promises made by federal governmental agencies regarding a plea bargain, or a situation sufficiently analogous to a plea bargain, due process concerns will be given more weight than technical aspects of agency law.

c. Promises Made by United States Attorneys

In perhaps the most confused area of binding plea agreements, some courts appear to agree that a plea agreement made by a United States Attorney in one judicial district can bind federal prosecutors in other judicial districts. The greatest confusion among the courts in this area centers on differing definitions of the circumstances under which a United States Attorney may bind the entire government to his promise. More specifically, the circuits vary widely in defining what words, if any, a prosecutor is required to use in order to bind other prosecutors to his promise.

In *Giglio v. United States*,¹³⁶ the United States Supreme Court said that “[t]he prosecutor’s office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.”¹³⁷ This passage seems to be a clear and definitive statement on the agency status of U.S. Attorneys with respect to the Attorney General’s office, the government, and each other. Nevertheless, some circuit courts maintain a contrary view of a prosecutor’s agency.¹³⁸ Furthermore, even those circuits which espouse this same analysis rarely cite *Giglio* as precedent in binding one prosecutor to the promises of another.¹³⁹

Id.

135. 404 U.S. 257 (1971); *see supra* notes 23-31 and accompanying text (discussing the Supreme Court’s concerns with fairness).

136. 405 U.S. 150 (1972).

137. *Id.* at 154.

138. *See, e.g.*, *United States v. Turner*, 936 F.2d 221, 225-26 (6th Cir. 1991) (“[E]ven if the Turners were promised that they would not ever be prosecuted by the government, it is unclear that a United States Attorney in one judicial district has the power to bind another United States Attorney in another judicial district.”).

139. *See, e.g.*, *United States v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) (citing *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972)).

In *Giglio*, after the petitioner had been convicted and was awaiting appeal, the district court discovered that an Assistant U.S. Attorney had made a previously undisclosed promise of immunity to one of the witnesses who testified for the government at the petitioner's original trial.¹⁴⁰ On appeal of the trial court's denial of the defendant's motion for a new trial, the Supreme Court ruled that the suppression of that material evidence justified a new trial "irrespective of the good faith or bad faith of the prosecution."¹⁴¹ The district court had proceeded on the theory that any promise made by the assistant U.S. Attorney had been unauthorized, and thus carried little weight.¹⁴² However, Chief Justice Burger stated that, "[i]n the circumstances shown by [the] record, neither [the assistant U.S. Attorney's] authority nor his failure to inform his superiors or his associates [was] controlling. Moreover, . . . the nondisclosure . . . [was] the responsibility of the prosecutor."¹⁴³ Though the Court's words that "the prosecutor's office is an entity" seem clear in the context of the *Giglio* case, they are ambiguous enough that the circuits consider the issue unsettled in other contexts.¹⁴⁴ In what the appellate courts clearly consider to be the absence of a statement on this agency issue by the Supreme Court, the circuits have been left to decide this fundamental issue on their own.

The clearest statement on the agency issue to come from the circuits, and one consistent with the reasoning in *Giglio*, appears in *United States v. Carter*.¹⁴⁵ In *Carter*, the defendant asserted that he was immune from prosecution in the Eastern District of Virginia based on a promise made in exchange for his cooperation in the

140. *Giglio*, 405 U.S. at 152.

141. *Id.* at 153.

142. *Id.*

143. *Id.* at 154.

144. *Id.* Little has been written on this agency aspect of *Giglio*, as most commentators focus on the case for its evidentiary suppression implications. See, e.g., George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 290 n.241 (1975) (stating that a prosecutor is constitutionally required to reveal evidence of contingent compensations paid to an undercover investigator); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 920 n.306 (1979) (discussing the setting aside of a conviction if it was obtained by the prosecutor's knowing use of perjured testimony); Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 608 n.112 (1971) (discussing the suppression of material exculpatory evidence). But see Charles A. Pulaski, Jr., *Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez*, 123 U. PA. L. REV. 750, 791 n.172 (1975) (interpreting *Giglio* as holding "that the government is bound by the knowledge or promises of any of its representatives, even if unknown to his associates or superiors") (emphasis added).

145. 454 F.2d 426 (4th Cir. 1972). This case was decided less than one month before *Giglio*.

District of Columbia.¹⁴⁶ The Fourth Circuit Court of Appeals agreed, holding that the government should be held to the terms of its promise, notwithstanding the fact that the Virginia district court had not even known of the promise.¹⁴⁷ The Fourth Circuit reaffirmed *Carter* with its decision in *United States v. Harvey*,¹⁴⁸ explaining:

[T]hough the Government negotiates its plea agreements through the agency of specific United States Attorneys — as necessarily it must — the agreements reached are those of the Government. It is the Government at large — not just specific United States Attorneys or United States “Districts” — that is bound by plea agreements negotiated by agents of Government.¹⁴⁹

The Second Circuit has expressly declined to follow the Fourth Circuit’s reasoning in *Carter* and *Harvey*, instead holding that plea agreements bind “only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader” application.¹⁵⁰ However, the Second Circuit view does not foreclose the possibility that one prosecutor may bind another. Instead, it requires an ex-

146. *Id.* at 427.

147. *Id.* at 428. The court stated:

The United States government is the United States government throughout all of the states and districts. If the United States government in the District of Columbia, acting through one of its apparently authorized agents, promised that the sole prosecution against defendant would be the misdemeanor charge in that jurisdiction, and defendant relied on the promise to his prejudice[,] . . . we will not permit the United States government in the Eastern District of Virginia to breach the promise.

Id.

148. 791 F.2d 294 (4th Cir. 1986).

149. *Id.* at 302-03.

150. *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985); *see also United States v. Abbamonte*, 759 F.2d 1065 (2d Cir. 1985); *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976). *Abbamonte* and *Alessi* require that the prosecutors in both the district in which the plea was entered and in the district in which the agreement is sought to be bound must both have overtly communicated their intent to be bound.

At least one district court within the Second Circuit has refused to bind other districts to plea agreements, in part based on 28 U.S.C. § 519 (1988 & Supp. III 1991), which sets out the authority of the United States Attorney General to supervise and direct all United States Attorneys, including the power of approval for all dismissals of indictments. *United States v. Boulrier*, 359 F. Supp. 165 (E.D.N.Y. 1972), *aff’d sub nom. United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied sub nom. Brown v. United States*, 414 U.S. 823 (1973). *But see United States v. Lieber*, 473 F. Supp. 884 (E.D.N.Y. 1979) (binding the Internal Revenue Service and the Tax Division of the Justice Department to the unauthorized promise of a United States Attorney where the defendants believed that the prosecutor had been given the authority to execute the plea agreement, an analysis leaning heavily on reliance and inherent agency principles). It is interesting to note that the same judge authored both the *Boulrier* and *Lieber* district court opinions.

plicit and intentional act by one U.S. Attorney to bind another, and does not make such binding subject to the expectations of defendants.

2. *The Language of Binding Plea Agreements: Dueling Presumptions*

There are two main views concerning the interpretation of plea bargain language and whether a plea bargain will bind prosecutors outside the district in which the plea was entered. The circuits are clearly split, and most either explicitly or implicitly follow one or the other of these views. The Second Circuit's holding presumes that plea bargains do not bind others absent an affirmative indication that they are intended to do so. In contrast, the Fourth Circuit presumes that plea bargains bind others absent a clear indication that they do not.

a. The Second Circuit's View

A precursor to the Second Circuit's rule for analyzing plea agreements appears in *United States v. Boulter*.¹⁵¹ There, the promise of the prosecutor for the Southern District of Florida to dismiss the defendant's indictment was held not to bind the prosecutor for the Eastern District of New York because no one in the United States Attorney's office in New York knew about the promise.¹⁵² Further, no one in New York had *authorized* the Florida prosecutor to speak for them.¹⁵³

More recently, in *United States v. Annabi*,¹⁵⁴ the Second Circuit's statement that "a plea agreement whereby a federal prosecutor agrees that 'the Government' will dismiss counts of an indictment other than the ones to which guilty pleas are entered," would appear to bar the United States from reprosecuting the dismissed charges in any other judicial district, unless the agreement is expressly limited to the district in which the charges were brought.¹⁵⁵ The court, however, explained that Second Circuit law "has developed to the contrary. A plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it

151. 359 F. Supp. 165 (E.D.N.Y. 1972).

152. *Id.* at 168.

153. *Id.* at 170.

154. 771 F.2d 670 (2d Cir. 1985).

155. *Id.* at 672.

affirmatively appears that the agreement contemplates a broader restriction."¹⁵⁶ At least one Sixth Circuit panel, in *United States v. Robison*,¹⁵⁷ — the subject opinion of this Note — has followed the Second Circuit's reasoning and its general rule which presumes plea agreements are not binding on other federal jurisdictions.

b. The Fourth Circuit's View

The Fourth Circuit's rule for interpreting plea agreements has its origin in *United States v. Carter*.¹⁵⁸ There, the court enunciated a presumption that plea agreements made by one United States Attorney bind the government as a whole, in every state and district, and suggested that only clear words to the contrary could rebut that presumption.¹⁵⁹ A more recent Fourth Circuit case reaffirming the rule in *Carter* is *United States v. Harvey*,¹⁶⁰ in which a plea agreement found to be ambiguous did not overcome the presumption that it was binding on the government.¹⁶¹

The court held the plea agreement in *Harvey*, which provided that the "Eastern District of Virginia further agrees not to prosecute [the defendant] for any other possible violations of criminal law arising from the offenses set out in the indictment or the investigation giving rise to those charges" to be ambiguous in scope.¹⁶² Under a maxim of contract interpretation, this ambiguity was construed against the drafter of the plea bargain — the government.¹⁶³ The court also found that although the prosecutor could have worded the agreement unambiguously in order to bind only the

156. *Id.* The *Annabi* court held that a plea agreement mentioning specific counts to be dropped in the Eastern District of New York did not bind the Southern District of New York as to similar charges brought two years later, where the agreement did not specifically state that it extended to other districts or similar charges. *Id.*

157. 924 F.2d 612, 613 (6th Cir. 1991) (ruling that a plea bargain in which the "Government agree[d] . . . [t]hat the defendant [would] not be further prosecuted for any activities which arose in the Western District of Louisiana" did not clearly contemplate binding other U.S. Attorneys).

158. 454 F.2d 426 (4th Cir. 1972).

159. *Id.* at 428.

160. 791 F.2d 294 (4th Cir. 1986).

161. *Id.* at 303.

162. *Id.* at 296 n.1. The court found the words "Eastern District of Virginia further agrees" to be ambiguous where it referred to the unit making the agreement on the government's side. *Id.* at 301.

163. *Id.* at 303; see *supra* notes 70-75 and accompanying text (discussing the maxim of contract law that ambiguity is construed against the drafter, and its variations).

Eastern District of Virginia, he chose not to do so.¹⁶⁴

The Eighth Circuit also appears to apply the *Carter* standard to plea agreements. In *United States v. Robinson*,¹⁶⁵ the court of appeals held that a plea agreement was not binding on the Southern District of Iowa as it was expressly limited to the Southern District of Ohio.¹⁶⁶ Likewise, the Sixth Circuit employed the *Carter* analysis to overcome the presumption and hold plea bargains non-binding in two cases. The plea agreement in *United States v. Turner*¹⁶⁷ was limited by its plain words to the Southern District of Florida, and therefore the court held that it did not affect a prosecution in Michigan.¹⁶⁸ In *United States v. Ykema*,¹⁶⁹ the court assumed that a plea agreement providing that “[n]o additional charges will be issued against the defendant in the Western District of Michigan” was sufficiently limited in geographic scope so as not to bind any other districts.¹⁷⁰ This holding was consistent with the Fourth Circuit’s general rule, which presumes plea agreements bind prosecutors in all federal jurisdictions absent express words to the contrary.

While it has not explicitly aligned itself with either the Second or the Fourth Circuit, the Seventh Circuit, in *United States v. Ingram*,¹⁷¹ also applied reasoning consistent with the Fourth Circuit’s approach. In that case, the defendant, George Ingram, was serving a sentence for state drug violations in a Colorado prison when he was transferred to a federal prison in Wisconsin in 1986 to serve part of a 1985 federal sentence.¹⁷² In 1987, FBI agents and Wisconsin federal prison officials secretly recorded Ingram’s telephone calls to members of the “Miller [drug] Organization” in Colorado as part of an investigation into the continued smuggling of drugs into the Wis-

164. *Harvey*, 791 F.2d at 301.

165. 774 F.2d 261 (8th Cir. 1985).

166. *Id.* at 268. The agreement provided: “Defendant . . . expressly understands that this Agreement applies only to the Indictment filed in this particular case in the Southern District of Ohio and that it does not relate or apply to any other Judicial District of the United States.” *Id.*; see *United States v. Nevils*, 897 F.2d 300 (8th Cir. 1990) (analyzing a plea agreement consistent with *Carter* and holding, without quoting language from the plea bargain, that it only concerned specific acts charged in the defendant’s California indictment, and not any subsequent charges brought in St. Louis).

167. 936 F.2d 221 (6th Cir. 1991).

168. *Id.* at 225.

169. 887 F.2d 697 (6th Cir. 1989).

170. *Id.* at 698-99 (explaining that the government’s only promise was not to bring additional charges in the Western District of Michigan).

171. 979 F.2d 1179 (7th Cir. 1992).

172. *Id.* at 1180.

consin prison.¹⁷³ Ingram was unaware of the Wisconsin recordings and investigation when he was transferred back to the Colorado state prison in May of 1987.¹⁷⁴

After Ingram's release from prison in late 1987, a Colorado federal grand jury returned a fifteen count indictment against the Miller Organization and Ingram for drug violations which allegedly took place in Colorado after Ingram's transfer back there.¹⁷⁵ During subsequent plea negotiations, the Assistant U.S. Attorney for Colorado told Ingram's lawyers that their client was under investigation for possible criminal violations outside of Colorado.¹⁷⁶ The Colorado prosecutor knew about the Wisconsin recordings, but also told Ingram's attorneys that he was "neither willing nor authorized to bind any federal district other than the District of Colorado" to any plea agreement.¹⁷⁷ The defendant's attorneys acknowledged the limited scope of the prosecutor's promise.¹⁷⁸ Ingram then agreed to plead guilty to one drug count in exchange for the U.S. Attorney's promise to dismiss the other counts against him, and his further promise not to file any additional criminal charges *in the District of Colorado* for criminal activities known to the prosecutor to have arisen in the District of Colorado.¹⁷⁹

In May of 1991, a Wisconsin grand jury indicted Ingram and several others for alleged Wisconsin drug violations.¹⁸⁰ Ingram then moved the Wisconsin court to dismiss that indictment as a violation of his Colorado plea agreement.¹⁸¹ The Federal District Court for the Western District of Wisconsin, rejecting a magistrate's recommendation in favor of the defendant, denied Ingram's motion,¹⁸² and the Court of Appeals for the Seventh Circuit affirmed the decision.¹⁸³

In its opinion, the Seventh Circuit noted the "tension" between the Fourth and Second Circuits regarding ambiguous plea agree-

173. *Id.* at 1180-81.

174. *Id.* at 1181.

175. *Id.*

176. *Id.* at 1182.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1183.

181. *Id.*

182. *Id.*

183. *Id.* at 1187.

ments.¹⁸⁴ However, the court declined to expressly adopt either the Second or the Fourth Circuit's approach in holding that the plea agreement at issue unambiguously bound only the District of Colorado.¹⁸⁵ Nonetheless, the Seventh Circuit's holding is consistent with the Fourth Circuit's view, under which a prosecutor may overcome the presumption that a plea agreement binds all federal districts only with words clearly limiting the geographic scope of that agreement.

As a result of this split in the circuits, two courts may interpret the scope of a single plea agreement in diametrically opposed ways. The subject opinion of this Note, which follows, is one such case. *United States v. Robison*¹⁸⁶ is an example of what can happen when an alleged crime crosses federal jurisdictional lines and implicates the circuits' dueling presumptions.

II. SUBJECT OPINION: *United States v. Robison*

In *Robison*, a panel of the Sixth Circuit Court of Appeals sat, ostensibly, to decide whether a sentence imposed by the Federal District Court for the Eastern District of Michigan violated a plea agreement entered in the Eastern District of North Carolina.¹⁸⁷ The court applied principles of contract interpretation and held that the agreement had not been breached.¹⁸⁸ The court also implicitly presumed that, although a plea agreement entered into by one federal prosecutor could bind prosecutors in other districts, such agreements were not binding absent a clear expression of a contrary intent.¹⁸⁹

A. Facts

The appellant, Jack Robison, had been part of a scheme to distribute some 300,000 pounds of marijuana — imported into Louisiana on a boat called the "Bull Dog" — throughout several states.¹⁹⁰

184. *Id.* at 1185.

185. *Id.* The court of appeals also stated that the government need not inform a criminal defendant about all known evidence regarding uncharged offenses in order that he may negotiate to specifically preclude them through the plea agreement. *Id.* at 1186. Furthermore, the defendant's attorneys acknowledged that neither they nor the defendant believed that the plea agreement foreclosed prosecution based on investigations known to be under way in other districts. *Id.*

186. 924 F.2d 612 (6th Cir. 1991).

187. *Id.* at 612.

188. *Id.* at 613.

189. *Id.* at 614.

190. *Id.* at 613. These states included North Carolina and Michigan. *Id.*

In the process of arranging to have the marijuana transported by truck to Detroit, Michigan, Robison also went from Detroit to Louisiana to haul one load of the drugs himself.¹⁹¹ While hauling these drugs, Robison passed through the state of North Carolina.¹⁹² On June 13, 1986, the Eastern District of North Carolina indicted Robison on charges of interstate travel in aid of racketeering.¹⁹³ Seven days later, Robison was indicted by the Eastern District of Michigan on marijuana trafficking charges.¹⁹⁴

In October of 1986, Robison entered into a plea bargain in North Carolina and agreed to plead guilty to two counts of possession of marijuana with the intent to distribute. In exchange for his plea, the prosecutor promised that “[t]he Government agrees . . . that the defendant will not be further prosecuted for any activities which arose in the Western District of Louisiana.”¹⁹⁵ In November of that same year, Robison pleaded guilty in Michigan to charges nearly identical to those which were the subject of his plea agreement in North Carolina.¹⁹⁶ The Michigan court sentenced Robison to seven years in prison, a sentence which was to run concurrently with his earlier North Carolina sentence of five years plus probation and a fine.¹⁹⁷ On June 15, 1989, almost two and one-half years after his sentencing, Robison filed a *pro se* motion with the Eastern District of Michigan seeking to vacate and set aside his sentence there, arguing that the North Carolina plea agreement had given him “blanket immunity” from prosecution in the Eastern District of Michigan for the “Bull Dog” activities.¹⁹⁸ The Michigan district court denied the motion, and Robison appealed.¹⁹⁹ The Sixth Circuit panel which heard the appeal interpreted the North Carolina prosecutor’s promise as never having been intended to bind the Michigan prosecutor.²⁰⁰ Based on this interpretation, the appeals court held that the U.S. Attorney for the Eastern District of Michigan did not breach

191. *Id.*

192. *Id.*

193. *Id.* at 612-13.

194. *Id.*

195. *Id.* at 613.

196. *Id.* The defendant pleaded guilty to the charge of attempting to possess with intent to distribute the same 300,000 pounds of marijuana brought in on the “Bull Dog,” which was the subject of the North Carolina charges. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 612.

200. *Id.* at 614.

that promise by prosecuting Robison on further charges.²⁰¹

B. *The Sixth Circuit Panel's Opinion*

A panel of the Sixth Circuit Court of Appeals affirmed the district court's denial of Robison's motion to vacate his sentence; no concurring or dissenting opinions were filed.²⁰² The court first generally reviewed the law regarding plea bargains, noting the Supreme Court's view that the practice presumes that the accused and the prosecutor exercised fairness in securing their agreement.²⁰³ The court cited *Staten v. Neal*²⁰⁴ for the principle that "fairness means that the courts will enforce promises made during the plea bargaining process that induce a criminal defendant to waive his constitutional rights and plead guilty."²⁰⁵ The opinion further explained that, once a defendant pleads guilty, the prosecutor must fulfill any promises made in exchange.²⁰⁶ The court then stated that a plea agreement existed, that the appellant had fully performed by pleading guilty, and that the job for the court was to determine the content of the North Carolina prosecutor's promise and whether or not that promise had been fulfilled.²⁰⁷

The court ruled that it was required to determine the content of the agreement using "traditional principles of contract law" because plea bargains are contractual in nature.²⁰⁸ In moving to interpret the agreement itself, the court noted the issue specifically raised by the appellant — whether a United States Attorney in one judicial district may bind another in a plea agreement — but stated that the issue need not be addressed.²⁰⁹ Instead, the court applied contract-

201. *Id.*

202. *Id.* at 612.

203. *Id.* at 613 (discussing *Santobello v. New York*, 404 U.S. 257, 261 (1971)).

204. 880 F.2d 962 (7th Cir. 1989); see *supra* notes 115-27 and accompanying text (discussing the *Staten* opinion).

205. *Robison*, 924 F.2d at 613 (quoting *Staten*, 880 F.2d at 963).

206. *Id.* (citing *Santobello*, 404 U.S. at 262).

207. *Id.* at 613-14.

208. *Id.* at 613. But see *supra* notes 98-113 and accompanying text (indicating that using contract law alone may not be appropriate where, as in the plea bargain setting, a waiver of constitutional rights is implicated).

209. *Robison*, 924 F.2d at 613. Before stating that it did not need to consider the issue of whether plea bargains are binding, the court set forth the conflicting presumptions among the circuits: the Fourth Circuit's rule presuming that plea agreements bind prosecutors in different districts absent an express indication to the contrary, and the Second Circuit's presumption that plea agreements do not bind other prosecutors unless that intent affirmatively appears from the record. The panel's subsequent analysis showed signs that the court had adopted the Second Cir-

law principles to decide whether the district court had correctly interpreted the North Carolina plea agreement. The court reviewed this issue as a question of fact under a "clearly erroneous" standard.²¹⁰

The court's contract-based analysis of the plea agreement focused on the intent of the parties to that agreement. The court stated that "[p]lea agreements are contractual in nature. . . . There can be no contract without a 'meeting of the minds.' Whether or not there was a 'meeting of the minds' depends, of course, on what the parties to the plea agreement intended."²¹¹ Examining retrospectively the actions of both the appellant and the North Carolina prosecutor, the court decided neither party had intended the plea agreement to bind other prosecutors in general, or the U.S. Attorney for the Eastern District of Michigan in particular.²¹² For example, in its analysis of the parties' intent, the court stated that the North Carolina plea agreement failed to mention the Michigan charges, despite the fact that Robison had been indicted in Michigan before entering his plea in North Carolina.²¹³ The court interpreted these facts as demonstrating a lack of intent to bind the Michigan prosecutor.²¹⁴ The court next noted that the appellant had not mentioned his plea agreement to the Michigan court when he entered his subsequent guilty plea there, but had only done so two and one-half years later.²¹⁵ Again, the court considered this omission to be an indication that Robison did not intend the bargain to be binding outside the Eastern District of North Carolina.²¹⁶

In examining the intent of the U.S. Attorney for the Eastern District of North Carolina, the Sixth Circuit's opinion pointed out that the investigations in both states, which led to separate prosecutions, were conducted separately.²¹⁷ The court also found that the North

cuit reasoning, stating that "it was intended by neither the United States Attorney for the Eastern District of North Carolina nor Robison that the North Carolina plea agreement have any effect on the prosecution in the Eastern District of Michigan." *Id.* at 614.

210. *Id.*

211. *Id.* at 613-14 (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c (1979)).

212. *Id.* at 614.

213. *Id.*

214. *Id.* Judge R. Allan Edgar pointed out that the Michigan indictment made "specific reference to the events surrounding the 'Bull Dog' marijuana," but that this indictment was not mentioned in the words of the plea agreement. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (citing *United States v. DiNapoli*, 817 F.2d 978, 979 (2d Cir. 1987), which held that a denial of a motion to dismiss a subsequent indictment, which the defendant asserted violated a

Carolina prosecutor had not indicated an intention to affect the Michigan prosecution.²¹⁸ Finally, the court indicated that since the plea agreement made no mention of Robison's Michigan indictment, the North Carolina prosecutor had never considered doing anything which might have affected the U.S. Attorney from Michigan.²¹⁹ Seeing no affirmative indications that either of the parties to that bargain intended to bind other districts to the North Carolina plea agreement, the court held that the agreement contained no such promise to bind.²²⁰ Consequently, the court ruled that the Michigan prosecutor was not bound to his North Carolina counterpart's bargain, and thus was not in breach of the plea agreement.²²¹

Absent from the court's contract-law interpretation of the content of the plea agreement was any analysis of the actual language of the agreement.²²² Its review of Jack Robison's Fourth Circuit plea agreement, based as it was on conduct which crossed federal jurisdictional lines, raises issues of both interpretation and fairness. This Note next analyzes the *Robison* opinion in the context of these issues.

III. ANALYSIS

The Sixth Circuit's opinion in *Robison* may be interpreted both narrowly and broadly. Read narrowly, with respect to plea agreements entered into by one federal prosecutor and sought to be made binding on others, the decision proposes that courts should interpret the scope and content of these plea agreements using a retrospective contract-law intent analysis.²²³ Broadly interpreted, the opinion stands for the proposition that U.S. Attorneys in different districts are not bound by one another's plea agreements unless the intent to bind appears affirmatively on the record.²²⁴ This Note argues that

prior plea agreement, was not appealable where the investigation leading to this indictment was neither conducted nor authorized by those who conducted the investigation which led to the plea agreement). Notwithstanding this Second Circuit rule, the court heard Robison's appeal.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* The Sixth Circuit panel affirmed the district court's finding that "the parties to the North Carolina agreement never intended to limit prosecution in other districts." *Id.*

222. *Id.* at 612-14. As mentioned in the text accompanying *supra* note 195, the plea agreement stated: "The Government agrees . . . that [Robison] will not be further prosecuted for any activities which arose in the Western District of Louisiana." *Id.* at 613.

223. *Id.* at 613-14.

224. *Id.* at 614 (indicating a willingness to hold the plea agreement binding if that intent was

the court's application of contract principles is defective under a narrow interpretation and that the court's reasoning is faulty under a broad interpretation.

A. A Narrow Interpretation

1. The Sixth Circuit's Subjective Interpretation of the Plea Agreement

In applying contract-law principles to interpret the content of the plea bargain²²⁵ in *Robison*, the Sixth Circuit panel considered only the intent of the parties to that agreement, as determined through a retrospective analysis of those parties' actions.²²⁶ Courts frequently apply *objective* principles of contract interpretation to plea agreements.²²⁷ However, commentators and courts usually define objective principles as comprising a *prospective* analysis — looking at the parties' intent at the time the agreement was made — rather than a *retrospective* analysis that looks back on the agreement from some future vantage point.²²⁸ The *Robison* court's purely retrospective analysis, therefore, runs contrary to the weight of authority. For a

affirmatively shown and stating that "[t]he circumstances of this case disclose that it was intended by neither the United States Attorney for the Eastern District of North Carolina nor Robison that the North Carolina plea agreement have any effect on the prosecution in the Eastern District of Michigan").

225. See *supra* notes 50-86 and accompanying text (giving an overview of contract law analysis of plea agreements).

226. See *supra* notes 211-21 and accompanying text (noting that the court looked to the intent of the parties).

227. *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) (holding that any dispute over the terms of a plea agreement is to be resolved by objective contract-law standards); *United States v. Crusco*, 536 F.2d 21, 24-25 (3d Cir. 1976) (ruling that, where the court should judge the circumstances of the guilty plea by "objective standards," there was sufficient objective proof that the defendant misunderstood the sentence he faced); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972) ("Plea bargaining is an accepted folkway of our criminal jurisprudence [Thus, i]t must have explicit expression and . . . [must be] measured by objective, not subjective standards."); see also *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985) (holding that the inquiry as to whether a plea agreement has been violated or not "is one of objective fact, not of subjective intent").

228. 4 WILLISTON, *supra* note 60, § 607; see *United States v. Crusco*, 536 F.2d 21, 24 (3d Cir. 1976) (holding that, where the record showed that the circumstances as they existed at the time of his guilty plea justified the defendant's misunderstanding as to sentencing, there was sufficient proof to uphold the defendant's claim that the government breached its plea agreement); see also *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) (ruling that an unambiguous plea agreement may not be challenged by subsequent affidavits). *But see United States v. Harvey*, 791 F.2d 294, 302 (4th Cir. 1986) (allowing evidence of the parties' acts subsequent to the entering of a plea agreement to infer the defendant's intent or understanding with respect to the plea agreement).

situation analogous to that surrounding *Robison's* plea agreement, consider a person who pays for an extended warranty on a car, issued by a dealer in the manufacturer's name. Although the warranty on its face fails to state any limitations, problems arise when the car's engine blows up after its owner relocates to another state. When presented with the warranty, a dealer halfway across the country analogously responds by noting that the warranty does not state that it covers engines blown in states other than that in which it was issued. Not surprisingly, that dealer does not wish to be forced to fix the car for free. An analogous ruling by that dealer's manufacturer representative would be to state that, in retrospect, the warranty was never intended to cover out-of-state repairs, even though it does not explicitly say so. Such a decision would render the buyer's warranty useless, and illustrates the inherent weaknesses of a retrospective contract analysis.²²⁹

Besides shunning prospective analysis by considering the Michigan prosecutor's views on the plea agreement, the *Robison* court failed to apply another hallmark of objective contract-law interpretation: that is, the search for a common meaning ascribed by the parties to the *words* of the plea agreement.²³⁰ In the plea bargain context, most courts first attempt to divine the parties' intent from the meaning a reasonable person would give to the words of the agreement, not from an inquiry into the parties' subjective interpretation.²³¹ In *Robison*, however, the Sixth Circuit did not even consider the words of the appellant's plea agreement in its analysis.²³² It is reasonable that a person in *Robison's* position could have inter-

229. See *supra* notes 60-63 and accompanying text (explaining prospective versus retrospective contract analysis).

230. See *supra* notes 56-63 and accompanying text (describing this modern view of objective analysis, in contrast to the old "strict objectivism," under which the intent of the parties or the meaning they ascribed was completely irrelevant to the legal meaning of their words).

231. See, e.g., *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989) ("[W]e make no decision as to what the appellant's or his attorney's *actual* expectations were, [so] the words in the plea agreement before us must be interpreted as a reasonable person would interpret the written words."); *United States v. Harvey*, 791 F.2d 294, 303 (4th Cir. 1986) ("We need not believe that [the defendant] and his counsel actually read this disputed plea agreement with this settled circuit law [as to binding] in mind. It suffices that they were entitled so to read it and may reasonably have done so."); *United States v. Crusco*, 536 F.2d 21, 24 (3d Cir. 1976) (finding that, according to objective standards, the defendant was *reasonably justified* in his mistaken impression as to statements by the judge and by the government); *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985) (holding that in interpreting a plea agreement, "[t]he court's inquiry is one of objective fact, not of subjective intent").

232. *United States v. Robinson*, 924 F.2d 612, 613-14 (6th Cir. 1991).

preted the promise that "[t]he Government agrees . . . [t]hat the defendant will not be further prosecuted for any activities which arose in . . . Louisiana"²³³ to mean that the United States government, and all the attorneys it employs, was barred by its promise from further prosecuting the defendant for his "Bull Dog" activities.

Moreover, in assessing the parties' actions after they entered the agreement, the court further departed from accepted principles of objective interpretation by seeking to ascertain the parties' subjective intent.²³⁴ The court did not consider any alternate interpretations of those acts which may have been reasonable when considered along with the North Carolina prosecutor's words.²³⁵ For example, the court interpreted the fact that the North Carolina plea agreement failed to mention the Michigan indictment as proof that the U.S. Attorney in North Carolina did not intend to bind the Michigan prosecutor to his promise.²³⁶ Such an interpretation may well be consistent with the Second Circuit's presumption cited by the court.²³⁷ But the defect in the court's failure to consider any other interpretation of these actions lies in the fact that the plea agreement was entered in a federal judicial district within the Fourth Circuit which, as the *Robison* court well knew, follows an opposite presumption.²³⁸ If a U.S. Attorney in that circuit, who knows that

233. *Id.* at 613. A defendant facing subsequent prosecution in another state for virtually the same acts might likely be very eager to enter an agreement which removes that imminent threat. Likewise, it seems very reasonable that such a defendant would read "Government" to mean the entire bureaucratic entity and all the departments it controls. Whatever their reasonable meaning, however, it is difficult to see how this court could neglect to even consider the plain words of the North Carolina prosecutor's promise within its review.

234. *Id.* at 613-14; see *supra* note 231 (citing authorities supporting an analysis based on a reasonable, and not a subjective, intent as to the meaning of the agreement).

235. *Robison*, 924 F.2d at 613-14.

236. *Id.* at 614.

237. *Id.* at 613 (citing *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985), which stated the Second Circuit's rule that U.S. Attorneys are not bound by one another's plea agreements unless the intent to bind "affirmatively appears" from the record); see *supra* notes 151-57 and accompanying text (explaining the Second Circuit's approach).

238. *Robison*, 924 F.2d at 613 (citing *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), for the rule that U.S. Attorneys in different districts are presumed to be bound by one another's plea agreements unless the agreement expressly provides otherwise). The court in *Carter* explained its reasoning, stating:

If we hypothesize a single defendant charged with the interstate transportation of a stolen motor vehicle through several states, we would not question that the efficient administration of justice would support the authority of the prosecutor in one of those states to obtain an indictment and bargain for a guilty plea, agreeing that all offenses in the other jurisdictions would be disposed of in the single case. . . . A contrary result would constitute a strong deterrent to the willingness of defendants accused of multistate crimes to cooperate in speedy disposition of their cases

his promise is presumed to be binding (as would defendant's counsel in that state), fails to use words to negate the presumption, a binding plea agreement is the probable result of a prospective inquiry into the reasonable intent of the parties.²³⁹

In another example of faulty reasoning, the court stated that "the investigation leading to the North Carolina indictment was unconnected to . . . the one resulting in the Michigan prosecution."²⁴⁰ Yet only two sentences before, the opinion noted that both prosecutions were based on the appellant's "Bull Dog" activities,²⁴¹ an obvious connection. Besides the flaws in the Sixth Circuit's contract-law interpretation in its own right, the court's approach to Robison's plea agreement also raises concerns about the effect of that analysis on the government's promises to Jack Robison.

2. *The Court's Analysis as an End-Run*

The First Circuit has ruled that, in interpreting plea agreements, a court may not do what amounts to an "end-run" around the government's promises.²⁴² In both *United States v. Voccola*²⁴³ and *United States v. Mata-Grullon*,²⁴⁴ the court went to great lengths to avoid finding "end-runs" under facts that are, however, clearly distinguishable from *Robison*. In *Voccola*, the plea agreement stated that the government would not make a recommendation concerning what, if any, sentence should be imposed by the court.²⁴⁵ The court found no end-run where the prosecutor technically made no recommendations, but rather informed the court of the harm the defend-

Carter, 454 F.2d at 428; see *supra* notes 158-85 and accompanying text (explaining the applications of the Fourth Circuit's rule); see also *infra* notes 262-75, 282-85 and accompanying text (discussing the relative merits of the Second and Fourth Circuit views in the due process context).

239. See *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986) (holding a plea agreement binding on other districts where it contained no words to negate the presumption of binding, and where the prosecutor could easily have included such words if the agreement had not been intended to bind).

240. *Robison*, 924 F.2d at 614.

241. *Id.*

242. *United States v. Mata-Grullon*, 887 F.2d 23, 24 (1st Cir. 1989); *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985); see *supra* note 66 and accompanying text (explaining that an overly literal reading of plea bargain language may result in a promise which actually promises nothing). In the context of the agreement in *Robison*, however, one could argue that an overly broad reading of the plea bargain language would lead to a similar result: the court could say that, where the agreement said one thing, it actually meant something else.

243. 600 F. Supp. 1534 (D.R.I. 1985).

244. 887 F.2d 23 (1st Cir. 1989).

245. *Voccola*, 600 F. Supp. at 1535.

ant's acts had caused.²⁴⁶ Similarly, in *Mata-Grullon*, the court found that the government's comments regarding the seriousness of the defendant's offense pertained to the court's determination of the appropriate sentencing range, and did not technically violate a promise to recommend the lowest sentence within that appropriate range.²⁴⁷ Yet, even the excruciatingly literal reading of the plea agreements in *Voccola* and *Mata-Grullon* would likely yield an opposite result on the facts in *Robison*. The "end-run" rule seems intended to prevent a strained interpretation of a promise from rendering that promise utterly without meaning.

In both *Voccola* and *Mata-Grullon*, the plea agreements — read literally — did not specifically prohibit the government's act in question; they did, however, prohibit other actions and thus were not meaningless. In *Robison*, however, the agreement — read literally — prohibited the "Government" from further prosecuting the defendant for activities arising "in the Western District of Louisiana," where the court admitted the defendant's "Bull Dog" activities arose.²⁴⁸ Such a strained interpretation of the words "the government" does, in fact, render the government's promise to Robison meaningless with respect to further charges based on activities arising in Louisiana. The court's finding of an intent contrary to the literal words of the plea agreement smacks of an attempt to do an end-run around the effect of the promise duly made by the North Carolina prosecutor and accepted by the North Carolina district judge.²⁴⁹ Equally as troubling as the effect of the Sixth Circuit's strained interpretation, however, was the court's failure to consider the potential ambiguity of the words its reading so stretched to construe.

3. *The Omitted Contract Law Ambiguity Analysis*

In admitting extrinsic evidence to show the intent of the parties to the North Carolina plea agreement with respect to binding other districts,²⁵⁰ the Sixth Circuit panel put the cart before the horse.

246. *Id.* at 1537-39.

247. *Mata-Grullon*, 887 F.2d at 24-25.

248. *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991).

249. *See supra* note 15 (detailing the plea bargaining procedures under FED. R. CRIM. P. 11(e)).

250. *Robison*, 924 F.2d at 613-14. Under the favored "liberal" view of contract interpretation, a court may use extrinsic evidence to help interpret the agreement once the court has raised an issue as to the agreement's ambiguity. FARNSWORTH, *supra* note 56, at 503-04 (citation omitted);

The court in *Robison* never determined that the words of the plea agreement were unclear, nor did it address a specific issue as to the agreement's ambiguity; the court, in fact, never analyzed the language of the promise at all.²⁵¹ Thus, under "traditional principles of contract law," the North Carolina prosecutor's promise should have been interpreted according to the plain meaning of the words.²⁵² Furthermore, if the court had found the North Carolina plea agreement to be ambiguous, under an accepted maxim of contract interpretation doctrine, the defendant would have been entitled to the benefit of that ambiguity.²⁵³

The court did not inquire whether the term "the Government" referred to the U.S. government as an entity, or whether it referred only to the North Carolina U.S. Attorney's office that issued the promise.²⁵⁴ Thus, the court was premature in even attempting to determine, by extrinsic evidence, the scope of that term. However, for

see also *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) ("To allow defendant to attempt to prove by affidavit that the agreement is otherwise than it appears, unambiguously, on a thorough record would violate established contract-law standards."). Under the older, disfavored "restrictive" view, the court could not have even admitted such extrinsic evidence until it had determined the agreement to be ambiguous or unclear as a matter of law. FARNSWORTH, *supra* note 56, at 502 (citing 1 SAMUEL WILLISTON, CONTRACTS § 95 (3d ed. 1957)).

251. *Robison*, 924 F.2d at 613-14.

252. *Id.* at 613; see *United States v. Harvey*, 791 F.2d 294, 296 n.1 (4th Cir. 1986) (holding ambiguous as a matter of law a plea agreement which provided that: "The Eastern District of Virginia further agrees not to prosecute [the defendant] for any other possible violations of criminal law arising from the offenses set out in the indictment" and that "the Government will move to dismiss"). The court in *Harvey* pointed out that, had the government wished to restrict the scope of the agreement to the Eastern District of Virginia, it could have easily done so by wording the agreement to state that "the Government further agrees that defendant will not be prosecuted in the Eastern District of Virginia . . ." *Id.* at 301. The Sixth Circuit, in *United States v. Ykema*, similarly stated: "If this [different provision] is what appellant wished to have in his plea agreement, this is what he should have bargained for." *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989). In *Robison*, if the North Carolina prosecutor had intended to restrict the geographic scope of his promise, he could easily have drafted the agreement to accomplish this goal.

253. See *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986) (construing the ambiguity concerning the terms "government" and "Eastern District of Virginia" against the government, and to the benefit of the defendant); *United States v. Vergara*, 791 F. Supp. 1095, 1099-1100 (N.D.W.Va. 1992) ("[T]he government must bear the disadvantage of ambiguity or omission."). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

254. Compare *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) ("The United States government is the United States government throughout all of the states and districts.") with *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) ("[A] plea agreement whereby a federal prosecutor agrees that 'the Government' will dismiss counts of an indictment . . . might be thought to bar the United States from re-prosecuting the dismissed charges in any judicial district. . . . However, the law [in the Second Circuit] has evolved to the contrary.").

an issue it said it did not have to address, the panel in *Robison* seemed to dedicate a great deal of its opinion to deciding whether the plea agreement entered by the U.S. Attorney for the Eastern District of North Carolina bound the U.S. Attorney for the Eastern District of Michigan to its terms.²⁵⁵

Notwithstanding the argument that the result the court achieved may not have been completely undesirable given the specific facts in *Robison*, the means employed to reach that result were seriously flawed. And it is those flaws which bode ill for potential defendants whose offenses span more than one federal jurisdiction. By applying subjective and retrospective modes of analysis rather than accepted *objective* doctrines and principles to the plea agreement before it, the Sixth Circuit panel in *Robison* construed that agreement in a way the parties probably never intended. Equally important, in view of the accepted law in the North Carolina district in which the agreement was originally reviewed and accepted by the federal judiciary, the Sixth Circuit's review rendered meaningless many of the protections the accused could have reasonably expected the agreement to provide.

B. A Broad Interpretation

Though the Sixth Circuit stated that it did not have to decide whether a U.S. Attorney in one judicial district may bind another in a plea agreement, the court clearly *did* decide this issue.²⁵⁶ By holding that neither the United States Attorney for the Eastern District of North Carolina nor *Robison* intended that the North Carolina plea agreement have any effect on the Michigan prosecution, the court implied that one prosecutor can bind another under the proper circumstances.²⁵⁷ Further, by adopting the Second Circuit's rule, the court determined that the circumstance for a binding plea agreement is the expressed intent of the prosecutor, which must affirmatively appear from the record.²⁵⁸ The opinion held that the requisite intent to bind did not appear from the record in *Robison*,²⁵⁹ and the

255. *Robison*, 924 F.2d at 613-14.

256. *Id.*

257. *Id.* at 614.

258. *Id.* at 613 (citing *United States v. Annabi*, 771 F.2d 670 (2d Cir. 1985)).

259. *Id.* at 614. *But see supra* notes 225-55 (analyzing and criticizing the court's interpretation of the intent of the parties to the plea agreement in question, and examining the standards of interpretation a defendant is subject to in the Sixth Circuit before a plea agreement becomes binding on that jurisdiction).

court's implicit analysis employing this adopted rule was faulty since its presumption was inconsistent with fundamental fairness and due process concerns attendant to the plea bargaining process.²⁶⁰

1. *The Sixth Circuit's Presumption*

The court in *Robison* implicitly presumed that U.S. Attorneys are not bound by one another's plea agreements unless such an agreement "affirmatively appears" from the record.²⁶¹ In the Second Circuit, a prosecutor must explicitly mention the issue of binding for courts to find that it affirmatively appears.²⁶² The Sixth Circuit took this same tack, apparently giving great weight to the fact that the U.S. Attorney for the Eastern District of North Carolina, who wrote *Robison's* plea agreement, never discussed that agreement with the U.S. Attorney for the Eastern District of Michigan.²⁶³ The fault in this reasoning, however, is that it is inconsistent with the requirements of due process in the plea bargain context set forth in the Supreme Court's opinions in *Santobello*²⁶⁴ and, more particularly, *Mabry*.²⁶⁵

For a guilty plea or a plea agreement to meet *Mabry's* standards, the defendant must enter it voluntarily and intelligently.²⁶⁶ For a defendant's plea to be considered voluntary and intelligent, the defendant must be aware both of the direct consequences of his plea

260. See *supra* notes 24-31, 98-113 and accompanying text (discussing fairness and due process concerns regarding plea bargains).

261. See *supra* notes 257-58 and accompanying text (noting that this presumption was imported from the Second Circuit); see, e.g., *United States v. Annabi*, 771 F.2d 670 (2d Cir. 1985) (finding that a plea agreement under which the U.S. Attorney for the Eastern District of New York dismissed certain charges did not preclude prosecution in the Southern District of New York on similar and possibly related charges, where the prosecutors never conferred about making the plea bargain binding).

262. See *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976) (refusing to bind a prosecutor where the prosecuting attorney had not consulted other districts); *United States v. Boulier*, 359 F. Supp. 165 (E.D.N.Y. 1972) (holding a plea agreement not binding where the U.S. Attorney had spoken to the prosecutor in another district but did not expressly tell the prosecutor that the plea agreement could affect him), *aff'd sub nom. United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied sub nom. Brown v. United States*, 414 U.S. 823 (1973).

263. *Robison*, 924 F.2d at 614.

264. *Santobello v. New York*, 404 U.S. 257 (1971).

265. *Mabry v. Johnson*, 467 U.S. 504 (1984); see *supra* notes 32-49 and accompanying text (discussing the decisions in *Santobello* and *Mabry* and the due process concerns inherent in plea bargaining procedures).

266. *Mabry*, 467 U.S. at 508; see also *supra* notes 24-25 and accompanying text (noting the requirement that a defendant's plea must satisfy fairness concerns).

and of the value of any promises the court, the prosecutor, or the defendant's own lawyer made to him.²⁶⁷ Given this definition of a voluntary plea, it is difficult to see how a U.S. Attorney's *failure* to discuss the issue of binding with his prosecutorial counterparts makes a defendant fully aware of the consequences of his plea. What one prosecutor fails to discuss with *another prosecutor* concerning the consequences of a plea agreement is, by the very act of that omission, unknown to the defendant. Such an omission cannot reasonably be considered to have informed, in any meaningful way, the defendant's understanding of the direct consequences of that prosecutor's commitment to him.²⁶⁸ Yet the Second and, apparently, the Sixth Circuits both hold that complete *omission* of any mention of binding raises a presumption against it.²⁶⁹ *Santobello* held that the essence of promises which induce a guilty plea must in some way be made known.²⁷⁰ To presume that a party to an agreement is informed that it will not bind other districts because both the agreement and the prosecutor are silent on that issue is inconsistent with, if not contrary to, Supreme Court precedent.

267. See *supra* notes 24-31 and accompanying text (discussing the importance of a defendant's knowledge of what promises have been made in exchange for the relinquishing of his constitutional rights).

268. In the circumstances of *Robison*, where the appellant was a party to a plea agreement stating that "[t]he Government agrees . . . [t]hat the [appellant] will not be further prosecuted," nothing said between the North Carolina and Michigan prosecutors could have been said to affect Robison's understanding as to the consequences of pleading guilty under that agreement. *United States v. Robison*, 924 F.2d 612, 613-14 (6th Cir. 1991). More to the point, the court's presumption that plea agreements do not bind unless they are expressly made binding allows the government's silence on the binding issue to be sufficient to make the appellant fully aware as to this issue.

269. See *supra* notes 150, 156 and accompanying text (noting the language the Second Circuit Court used to articulate this principle). *But cf.* *United States v. Harvey*, 791 F.2d 294, 298 (4th Cir. 1986) (stating that although the prosecutor "never made any specific representation that she was authorized to bind other districts than her own . . . , neither did she specifically caution that she had no such authority," and holding the agreement binding where it was silent as to this issue). "[T]he Government . . . [has the] primary responsibility for insuring precision in the agreement." *Id.* at 301; see also *United States v. Vergara*, 791 F. Supp. 1095, 1099-1100 (N.D.W.Va. 1992) (upholding the government's unwritten promise not to pursue drug charges against the defendant in exchange for her cooperation, and ruling that "in the absence of an agreement, 'clearly understood by all of the parties, carefully memorialized, and fully disclosed to the Court,' the government must bear the disadvantage of ambiguity or omission") (citation omitted).

270. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971); see *supra* note 27 and accompanying text (quoting the *Santobello* decision); see also *supra* note 15 (setting out FED. R. CRIM. P. 11(e)(2), which states in part that "the court shall . . . require the disclosure of the agreement").

2. *Due Process Concerns*

It is the nature of the defendant's understanding of the content of a plea agreement which determines what performance he is due, not that of the prosecutors nor even the defendant's counsel.²⁷¹ Thus, in *Robison*, the court's concern with whether the prosecutors believed the defendant's agreement was binding is irrelevant. Likewise, it is irrelevant whether the court would have considered a promise to bind the Michigan prosecutor to be an unfulfillable or illegal promise.²⁷² This is so because a defendant waives a number of important constitutional rights and guarantees by pleading guilty,²⁷³ and the Supreme Court has held that this waiver is no longer voluntary if the government fails to deliver on *any* promise it has made.²⁷⁴ The fact that these concerns are premised on fundamental fairness and due process concerns, on giving the defendant what he is *reasonably* due in the circumstances,²⁷⁵ suggests that the time for a strict and literal interpretation of plea bargains is *before* they are accepted by the court.

a. Court Approval of the Plea Agreement

Before a defendant enters his guilty plea and waives his rights pursuant to a plea agreement, a court must first accept that agreement.²⁷⁶ At this point, the court has an opportunity to actively investigate and question the terms of the agreement. If the agreement is ambiguous as to the issue of binding, or fails to mention it altogether, the judge has an opportunity, with the parties to the agreement standing before him, to clarify the matter.²⁷⁷ If the court

271. See *supra* notes 29-30 and accompanying text (noting that when a prosecutor's promise induces a defendant's guilty plea, the defendant should receive what he reasonably expected he would receive).

272. See *supra* notes 29-31 and accompanying text (explaining that even unfulfillable or improper promises which induce a guilty plea must be performed).

273. See *supra* notes 24-28 and accompanying text (discussing a defendant's waiver of his constitutional rights).

274. See *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) ("[W]hen the prosecution breaches its promise with respect to an executed plea agreement . . . [the defendant's] conviction cannot stand."); see also *supra* notes 30-31 (providing examples of this rule in practice).

275. See *supra* note 29 and accompanying text (noting the Court's holding that it is important to ensure that the defendant receives what he reasonably expected in exchange for his waiver).

276. FED. R. CRIM. P. 11(e)(3)-(4) (specifying that a court may either accept or reject a plea agreement).

277. See, e.g., *United States v. Ingram*, 979 F.2d 1179, 1182 n.3 (7th Cir. 1992) (quoting the district court's dialogue with the parties as to their understanding of the plea agreement and noting that the inquiry took place at the hearing at which the defendant entered his guilty plea).

places its imprimatur on a defective agreement, a defendant who has clearly performed his part of the bargain by pleading guilty should not be disadvantaged by the court's abdication of its duty to perform a meaningful review.

b. Giving Meaning to Court Approval

Applying this analysis to the facts of *United States v. Robison*, it is important to note that the North Carolina district court was not required to accept this plea agreement. Presumably, that court had a full opportunity to inquire into the nature of the bargain, and if the court had any qualms about the potential breadth of the promise by "the Government" that the defendant would not be further prosecuted for any activities which arose in the Western District of Louisiana, it could have asked that the bargain be made clearer, or simply have refused to accept it.²⁷⁸ At the very least, a defendant should be entitled to rely on a reasonable interpretation of the words of his agreement.²⁷⁹ Since the plea bargaining process is premised on fairness in securing an agreement between an accused and the government,²⁸⁰ allowing the government an opportunity to modify the effect of its promises by subjectively reinterpreting them in hindsight, and by implying presumptions based on the absence of key terms, in essence gives the government a second bite at its own apple.²⁸¹

3. A Better Approach

An approach to plea agreements which is far more cognizant of the due process concerns which such agreements raise is that of the Fourth Circuit.²⁸² Courts in the Fourth Circuit apply a presumption

and the court approved the plea bargain).

278. *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991) (noting that the plea was accepted by the North Carolina district court and that Robison was sentenced accordingly).

279. See *supra* notes 56-69 and accompanying text (discussing traditional contract principles of objective interpretation).

280. *Santobello v. New York*, 404 U.S. 257, 261 (1971).

281. *United States v. Lieber*, 473 F. Supp. 884, 893-94 (E.D.N.Y. 1979) (noting that where the defendants had begun to perform under a cooperation/plea agreement, but where the government was not realizing as much benefit as it hoped, the fact that "the Government struck a bad bargain should not weigh against the defendants" and that "[w]hile the terms may not have been as advantageous to the Government as those obtained in other cases, as in other cases, an agreement was nonetheless reached").

282. See *supra* notes 158-85 and accompanying text (describing the Fourth Circuit's rule for interpreting plea agreements and subsequent cases which have used or interpreted this rule).

opposite that of the Second and Sixth Circuits: "United States Attorneys in different districts are bound by one another's plea agreements unless the agreement expressly provides otherwise."²⁸³ This rule creates a presumption *in favor* of binding judicial districts to each other's plea agreements.

By requiring a prosecutor seeking to restrict the geographic scope of a plea agreement to expressly mention its intended scope in the agreement itself, a defendant has notice of any such restrictions before he responds to the offer.²⁸⁴ This approach thus satisfies the intelligence and voluntariness requirements for guilty pleas much more effectively and consistently than the approach of the Sixth Circuit *Robison* court and the Second Circuit, both of which equate noncommunication with actual notice.

The presumption favoring binding is also very simple to comply with: a few words clearly express the prosecutor's intent in this respect.²⁸⁵ In addition, the burden placed on the government to comply with this approach is far lighter than the burden placed on the defendant under the Second Circuit's approach, under which the defendant must shoulder the burden of being held to have voluntarily and intelligently agreed to restrictions which may not be mentioned in the plea agreement.

IV. IMPACT

After the Sixth Circuit's decision in *United States v. Robison*,²⁸⁶ a defendant who is open to multistate federal charges and who seeks to plea bargain with the government must consider how courts will interpret those bargains in each circuit his conduct touches.²⁸⁷ For

283. *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991) (citing *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)). Note here that the Sixth Circuit court had before it both the Fourth Circuit's presumption and the Second Circuit's presumption. *See supra* note 209 (noting that the court set forth the conflicting presumptions). Yet the court did not explicitly choose one over the other. Instead, the court implicitly applied the presumption of the Second Circuit to the facts of the case. *Robison*, 924 F.2d at 613-14.

284. *United States v. Harvey*, 791 F.2d 294, 303 (4th Cir. 1986); *see* *United States v. Ingram*, 979 F.2d 1179, 1185 (7th Cir. 1992) (noting that, based on the Colorado prosecutor's unambiguous limitation of the plea bargain's geographic scope, the defendant and his attorneys knew full well the effect of the agreement).

285. *See supra* notes 162-64 and accompanying text (presenting the language of the binding plea agreement in *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), and the changes the court suggested could be made if the prosecutor intended that it not be binding).

286. 924 F.2d 612 (6th Cir. 1991).

287. The *Robison* court summarized two conflicting circuits' approaches vis-à-vis binding plea agreements, then said it did not have to address that issue. *Id.* at 613. Ironically, the court devoted

instance, before an accused bargains for a promise that the government will not further prosecute him for the conduct underlying his charges, he must explore the geographic scope each court might ascribe to that promise.²⁸⁸ The defendant must determine how each different court will define words like "government,"²⁸⁹ and he must consider whether each court will review his plea bargain as of the time it was made or will scrutinize it using hindsight.²⁹⁰ Finally, the defendant must endeavor to ascertain each circuit's definition of "fairness."²⁹¹ Consequently, the deviation among the circuits' approaches to interpreting plea agreements greatly impairs the certainty which a defendant has reason to expect from his bargain, and which is fundamental to the accepted system of plea bargaining.²⁹²

A. *The Scope of a Bargain*

The *Robison* decision clearly demonstrates the contrasting presumptions some circuits make regarding the geographic scope of plea bargains. While courts in the Sixth and Second Circuits presume that plea agreements — absent express language to the contrary — affect prosecutors only in the district in which they were made,²⁹³ courts in the Fourth and Eighth Circuits presume an

much of its opinion to implicitly applying one of those approaches in analyzing the plea agreement at bar. *Id.* at 613-14; see also *supra* notes 208-10, 230-41, 256-60 and accompanying text (analyzing the court's reasoning in *Robison*).

288. See *supra* notes 151-86 and accompanying text (explaining the views of the conflicting circuits and their contrasting presumptions regarding the scope of plea agreements).

289. This question implicates two areas of inquiry. The first concerns the contract law doctrines courts commonly use to interpret the words of plea agreements. See *supra* notes 56-69 and accompanying text (discussing the courts' differing applications of objective contract analysis in the plea bargain setting). The second area concerned is agency, and the varied ways courts apply the agency concept to determine who can act in the name of the federal government. See *supra* notes 136-50 and accompanying text (discussing the courts' confused reaction to the "government as an entity" statement by the Supreme Court in *Giglio v. United States*, 405 U.S. 150 (1972)).

290. See *supra* notes 60-63 and accompanying text (explaining that objective doctrines of interpretation call for prospective analysis of plea bargain language, but that some courts apply a retrospective approach).

291. The Supreme Court first voiced its concern with "fairness in securing agreement between an accused and a prosecutor" in *Santobello v. New York*, 404 U.S. 257, 261 (1971). Since then, the Supreme Court and numerous lower courts have further defined the meaning of fairness in the context of plea agreements. See *supra* notes 23-31, 98-113 and accompanying text (discussing "fundamental fairness" and due process requirements).

292. See *supra* note 31 (pointing out that defendants are entitled to relief when the government breaches a plea bargain, whether or not the breach was occasioned by bad faith).

293. See *United States v. Robison*, 924 F.2d 612, 613-14 (6th Cir. 1991) ("There is no indication . . . that the United States Attorney in the Eastern District of North Carolina had any thought of doing anything which would affect the separate prosecution of another United States

agreement binds U.S. Attorneys in all districts absent express limiting language.²⁹⁴ Thus, given the same agreement with no limiting language, it is very possible that one court would hold all prosecutors bound by the terms of the bargain, but another court would hold the promise binding only on the U.S. Attorney who made it. A defendant whose conduct exposes him to charges in both of the above jurisdictions would have to satisfy the requirements of both presumptions in a plea bargain negotiated with the first U.S. Attorney he faced, or risk further prosecution for the same conduct. In addition, the consequence of bargaining first within one of these circuits is not the same as that of bargaining first within the other circuit.

As an example of this dilemma, assume that a plea agreement exists in each of two circuits having potential jurisdiction over the defendant's offense. Each agreement comprises the defendant's guilty plea in exchange for a reduced sentence and the U.S. Attorney's promise that the government will not prosecute any further charges based on the same conduct.²⁹⁵ Now consider, for example, that the defendant bargains first with a prosecutor in a district within the Sixth Circuit, then faces the same charges in the Fourth Circuit. If the plea agreement contains no language to broaden its scope, the promise will have the same effect in the Fourth Circuit as it had where it was made. The defendant would be treated just as he reasonably expected to be treated under the bargain because his plea would bar the further charges.

But compare the result if the defendant bargains first with a U.S. Attorney in a Fourth Circuit district, then faces the same charges in the Sixth Circuit. If, again, the agreement contains no language to broaden its scope, the plea bargain will have no effect in the latter

Attorney"); *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (holding that a "plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction").

294. See *supra* notes 158-70 and accompanying text (describing cases from the Fourth and Eighth Circuits employing this approach). It is also fair to note that two cases from the Sixth Circuit have at least appeared to apply the Fourth Circuit's reasoning. See *supra* notes 167-70 and accompanying text (discussing *United States v. Turner*, 936 F.2d 221 (6th Cir. 1991), and *United States v. Ykema*, 887 F.2d 697 (6th Cir. 1989)). However, the court's application of the Second Circuit rule in *Robison* indicates a lack of consistency.

295. This hypothetical plea agreement is quite similar to the agreement in *Robison*. See *supra* note 195 and accompanying text (quoting the language of the plea agreement at issue in *Robison*).

district. The defendant will be forced to choose between a trial and a possible sentence for the same conduct, or even a second guilty plea for, presumably, a second reduced sentence.

This was essentially the defendant's situation in *Robison*, yet the court held that Jack Robison neither intended, nor reasonably expected, that his initial plea bargain would affect his subsequent prosecution.²⁹⁶ Such a decision seems to defy reality and scorn the concept of fundamental fairness for plea bargaining set forth in *Santobello*.²⁹⁷ As a result of this decision, defendants charged with multistate federal offenses must hold out for promises that are explicit in geographic scope in exchange for their guilty pleas or risk unexpected prosecution in other federal districts.²⁹⁸ Courts should not allow this degree of uncertainty to prevail, especially given the fact that consistent application of the Fourth Circuit's approach²⁹⁹ is a simple and sufficient solution.

B. Due Process and Fairness Concerns

Because a defendant's guilty plea serves to waive important constitutional rights, the plea bargaining process implicates due process and fairness issues.³⁰⁰ The *Robison* decision highlights the ways in which the approach this and other courts take creates additional uncertainty and unfairness for defendants. Courts in the Sixth and Second Circuits employ an approach to plea agreements which seems patently unfair and borders on being deceitful.

After *Robison*, defendants seeking to have their plea agreements made binding on prosecutors from other federal districts may be

296. *United States v. Robison*, 924 F.2d 612, 614 (6th Cir. 1991).

297. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971); see also *supra* notes 23-31 and accompanying text (discussing the fairness concerns enunciated by the Court in the plea bargain context).

298. The Fourth Circuit has suggested another possible result of the refusal by some courts to hold plea agreements binding on prosecutors in other districts. The court's opinion in *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), stated that a failure to hold plea agreements binding would deter defendants accused of multistate crimes from cooperating in the "speedy disposition of their cases." *Id.* at 428; see also *supra* notes 145-47 and accompanying text (discussing the *Carter* opinion).

299. The Supreme Court espoused a similar view in the context of agency, indicating that all U.S. Attorneys have the power to bind the government as an entity to the terms of a plea bargain. *Giglio v. United States*, 405 U.S. 150, 154 (1972). But see *supra* notes 136-50 and accompanying text (discussing the decision in *Giglio* and the fact that some courts have found ways to minimize or seemingly disregard this part of the Court's opinion).

300. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); see also *supra* notes 98-113 and accompanying text (discussing the implications of a defendant's waiver in the plea bargain setting).

subject to conditions never communicated to the accused. Before one prosecutor's plea agreement can be made binding on another, the U.S. Attorneys concerned must each intend that they be bound, and they must affirmatively express this intent in the plea agreement. Furthermore, the courts in these districts will deem the *absence* of an expression of the prosecutor's intent to bind to be sufficient notice to defendants that their plea bargains will *not* bind other prosecutors. The effect of this presumption surely runs afoul of the Supreme Court's holding that, where a guilty plea based on a plea bargain implicates a waiver of constitutional rights, the defendant must enter that bargain intelligently and voluntarily.³⁰¹ It seems axiomatic that a waiver based on a lack of information is not intelligently made, yet after *Robison* it is clear that many courts will find that such a waiver *was* intelligently made.

However, under the rule which courts in the Fourth Circuit apply, a lack of information regarding whether a plea agreement binds other prosecutors raises a presumption which *favours* defendants. Absent a clear expression which notifies the defendant otherwise, these courts will give a plea agreement its broadest possible binding effect. Uncertainty would be minimized if all courts took this approach, because a plea agreement of expressly limited range is much more likely to have truly been made intelligently and voluntarily.

CONCLUSION

In *United States v. Robison*,³⁰² the Sixth Circuit attempted to determine whether the federal government had breached its plea agreement with the defendant, whose offenses spanned a number of jurisdictions. The court ultimately affirmed the lower court's ruling that the government's promise, made in North Carolina and stating that the defendant would not be further prosecuted in exchange for his guilty plea, was not breached by the defendant's subsequent prosecution on identical charges in Michigan.³⁰³ In its inquiry, the court undertook to both interpret the agreement according to contract principles traditionally applied to plea bargains, and to avoid choosing between conflicting circuits' rules regarding inter-jurisdic-

301. See *supra* notes 22-31 and accompanying text (explaining the basis of both the Supreme Court's and federal statute's requirement that defendants demonstrate that they entered a plea agreement voluntarily and intelligently).

302. 924 F.2d 612 (6th Cir. 1991).

303. *Id.* at 613-14.

tional binding.³⁰⁴ This Note has endeavored to show that the court failed in both undertakings.

First, the court retrospectively applied subjective means of interpretation rather than prospectively applying accepted *objective* contract principles.³⁰⁵ Second, the court implicitly chose to invoke the Second Circuit's rule for potentially binding plea bargains, a rule which is of great disadvantage to defendants.³⁰⁶ The Second Circuit rule that the court applied presumes that plea agreements are enforceable only in the federal district in which they were made, absent words which expressly broaden their scope.³⁰⁷ This troubling rule treats the *absence* of language as actual notice to defendants that the scope of their bargains is limited. In contrast, the Fourth Circuit rule, which the court ignored, presumes that plea agreements are binding on all federal districts absent express limiting language.³⁰⁸ This rule does not rely on implied meanings but instead gives a natural interpretation to the words of the plea agreement, an interpretation more in keeping with defendants' reasonable expectations regarding the government's promises.³⁰⁹

Unfortunately, after *Robison*, both approaches exist side-by-side in the federal circuit courts. Federal defendants are left subject to the uncertainty of the Sixth and Second Circuits' presumption against binding. Further, they are subject to the added uncertainty of negotiating plea bargains which may have to face contradictory tests imposed by different circuits.³¹⁰ This Note has argued that this uncertain situation should not continue. Since the Fourth Circuit's rule stands as an easily-implemented and fundamentally fair solution to this uncertainty,³¹¹ this Note has suggested that courts should therefore apply the Fourth Circuit's rule and reject the pa-

304. *Id.*

305. See *supra* notes 225-55 and accompanying text (analyzing the *Robison* court's application of contract-law principles).

306. See *supra* notes 256-85 and accompanying text (analyzing the *Robison* court's application of the Second Circuit rule and contrasting this rule with the Fourth Circuit's approach).

307. See *supra* notes 151-57 and accompanying text (discussing the Second Circuit's view regarding binding plea agreements).

308. See *supra* notes 158-86 and accompanying text (discussing the Fourth Circuit's view regarding binding plea agreements).

309. See *supra* notes 300-01 and accompanying text (analyzing the effects of the Fourth Circuit rule on defendants).

310. See *supra* notes 286-301 and accompanying text (discussing the uncertain position of defendants potentially subject to both circuits' views on binding plea agreements).

311. See *supra* notes 282-85 and accompanying text (suggesting the Fourth Circuit's rule is a better approach to the issue of binding plea agreements).

tently unfair rule adopted by the *Robison* court and others within the Sixth and Second Circuits.

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