NOTE

THE DANGER OF WINNING:
CONTRACT LAW RAMIFICATIONS
OF SUCCESSFUL BAILEY CHALLENGES
FOR PLEA-CONVICTED DEFENDANTS

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INTRODUCTION

In the spring of 1989, Madeline Rodriguez was working as a bagger in a heroin mill run out of a New York City apartment.\(^1\) On the day she was arrested, she was aware that there were weapons in the apartment, although the prosecution produced no evidence that she actively employed the weapons in any way.\(^2\) The federal government charged her with one count of conspiracy to violate federal narcotics laws, one count of possession with intent to distribute heroin, and one count of use of a firearm during and in relation to a drug trafficking crime.\(^3\) She subsequently entered into a plea agreement with the government, pleading guilty to both the firearm charge and a lesser included offense stemming from the conspiracy charge.\(^4\) In exchange, the government agreed to dismiss all other charges pending against her.\(^5\) The trial court sentenced Rodriguez to serve, consecutively, sixty months in prison on the firearm count and sixty-three months on the conspiracy count.\(^6\)

After Rodriguez had already served more than half of her ten-year, three-month sentence,\(^7\) the Supreme Court, in Bailey v. United

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2 See id.
3 The firearm charge was brought under 18 U.S.C. § 924(c)(1) (1988), amended by 18 U.S.C. § 924(c)(1) (1994) ("Whoever, during and in relation to any crime of violence or drug trafficking crime... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime... be sentenced to imprisonment for five years... .").
4 See Rodriguez, 933 F. Supp. at 280.
5 See id.
6 See id.
7 See id. at 282.
States, ruled unanimously that in order to convict a defendant of "use" of a firearm during the commission of a drug trafficking offense pursuant to 18 U.S.C. § 924(c)(1), the government must show that the defendant "actively employed" the firearm, not merely that the firearm was an "inert presence" at the scene of the offense. Rodriguez immediately filed a habeas corpus petition claiming that the evidence against her did not support a section 924(c) conviction under Bailey. The district court agreed (and the government conceded) that the conviction should be vacated.

The government, however, moved to reindict Rodriguez on the charges it previously had agreed to dismiss, claiming that Rodriguez's successful collateral attack on her conviction amounted to a "tacit repudiation" of her plea agreement. The district court, refusing to hold that Rodriguez's filing of a habeas petition under these circumstances was indeed a breach of her contract with the government, denied the motion and ordered Rodriguez released from custody.

Madeline Rodriguez is lucky. Having served her time on the conspiracy count, she has been released from prison, and the government is bound by its plea agreement not to charge her with any crimes relating to her involvement with the heroin mill. Several other district courts confronted with post-Bailey habeas petitions, however, have provided defendants with Pyrrhic victories: these courts have granted the habeas petition but then deemed this collateral success a mate-

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9 Id. at 505.
10 Id. at 508.
12 See Rodriguez, 933 F. Supp. at 280.
13 Id. at 281. The statute of limitations apparently had not run on the dismissed charges. If it had, the government would have had to argue that Rodriguez's failure to perform her obligations under the agreement estopped her from claiming that the statute of limitations barred the government from reindicting. The court accepted this argument in United States v. Viera, 931 F. Supp. 1224, 1231 (M.D. Pa. 1996). See infra note 18.
14 For an explanation of the Rodriguez court's reasoning, see infra note 104.
15 See Rodriguez, 933 F. Supp. at 285.
16 The Rodriguez court also rejected the government's claim that, in light of the successful habeas petition, the court should resentence the defendant on the conspiracy charge. See id. at 283. The post-Bailey issue of resentencing has been litigated even more than the contractual problem that concerns this Note. It appears that a majority of courts indeed have resented the defendants. Compare Reyes v. United States, 944 F. Supp. 260, 261 (S.D.N.Y. 1996) (granting government's request to resentence defendant), with Warner v. United States, 926 F. Supp. 1387, 1395, 1396, 1398 (E.D. Ark. 1996) (holding that resentencing would violate Double Jeopardy Clause and defendant's due process rights, and is not authorized by habeas petition statute).
17 District courts have uniformly allowed the retroactive application of Bailey and reversed section 924(c) convictions where the evidence did not establish the defendant's "ac-
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rivial breach of the plea agreement and allowed the government to reindict the defendant on the charges it had dismissed previously. Similarly, at least one other court has held that the plea agreement should be rescinded because Bailey represented a supervening circumstance that rendered the defendant's performance impracticable. Thus, by exercising their constitutional rights to take advantage of a favorable Supreme Court decision, these defendants have exposed themselves to charges and sentences potentially greater than those to which they acquiesced in their original plea agreements.

Does a successful collateral attack amount to a material breach of one's plea agreement with the government or necessitate rescission of the plea agreement due to impracticability? The district courts have little precedent to guide them in evaluating these post-Bailey cases. The court in Rodriguez, for example, rejected the government's contractual theory of relief, but it did so without much discussion, thus


While the traditional remedy for a breach of contract is the award of expectation damages, damages do not constitute an adequate remedy in the plea bargaining context, and thus courts have looked to rescission as the appropriate remedy for defendant breach. See, e.g., Viera, 931 F. Supp. at 1228, 1231 (holding that defendant's successful habeas petition was breach and allowing government to reindict defendant); United States v. Barron, 940 F. Supp. 1489, 1494 (D. Alaska 1996) (holding that "fundamental fairness" dictates that government be allowed to reindict defendant subsequent to successful post-Bailey habeas petition). In Barron, the statute of limitations apparently had not run on the dismissed charges. In Viera, the court allowed the government to reindict despite the fact that the statute of limitations had run on the dismissed charges. The court reasoned that because Viera breached the contract, he should not be able to invoke the statute of limitations as a bar to reindictment. See Viera, 931 F. Supp. at 1229-31. For further discussion of the Viera and Barron cases, see infra Part I.A.


At least one court faced with this type of dilemma has directed that any sentence on remand not exceed the sentence originally imposed. See People v. Collins, 577 P.2d 1026, 1030-31 (Cal. 1978) (holding that when legislature, prior to sentencing, deems defendant's offense noncriminal, charge ought to be dismissed and state allowed to reindict on previously dismissed charges, provided that any new sentence imposed does not exceed original sentence). Post-Bailey claims that reindictment is the product of prosecutorial or judicial vindictiveness are not likely to succeed, since the government is not charging the defendants with new, more serious offenses than it originally filed, but rather is attempting to reinstate the original charges. For a discussion of judicial vindictiveness, see Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.8 (2d ed. 1992). For a discussion of prosecutorial vindictiveness, see Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 1334-37 (5th ed. 1996).

Throughout this Note, I use the phrase "post-Bailey cases" in reference only to those cases which examine the contractual problem at issue here, as opposed to any post-Bailey cases that are concerned with resentencing, see supra note 16, or retroactivity, see supra note 17.
shedding little light on the complex problem.\textsuperscript{22} The Supreme Court has never discussed the issue, and very few circuit courts have confronted even analogous situations.\textsuperscript{23} While the question may arise infrequently because the number of cases in which district courts actually grant habeas relief continues to dwindle,\textsuperscript{24} Bailey itself has spawned a large influx of habeas petitions.\textsuperscript{25} Even after the post-Bailey claims have died down, the issue is likely to surface again as the courts interpret other aspects of section 924(c).\textsuperscript{26} The disparity of opinions among the handful of district courts that have considered post-Bailey petitions—as well as the issues raised by the rarely convergent fields of criminal and contract law—calls for a detailed analysis of the problem.

\textsuperscript{23} See, e.g., United States v. Shaw, 655 F.2d 168, 171-72 (9th Cir. 1981) (holding that defendant does not violate terms of plea agreement by successfully challenging jurisdictional basis of conviction); Moore v. Foti, 546 F.2d 67, 68 (5th Cir. 1977) (holding that defendant “tacitly repudiates” plea bargain by moving to vacate judgment on one count of conviction); Harrington v. United States, 444 F.2d 1190, 1194 (5th Cir. 1971) (same); United States v. Liguori, 430 F.2d 842, 851-52 (2d Cir. 1970) (Lumbard, C.J., concurring) (reasoning that as long as statute of limitations has not run, government may reindict defendant on dismissed charges after successful attack on plea conviction). The only one of these courts to engage in a prolonged discussion of the issue at hand was Liguori. See infra note 104.

\textsuperscript{24} See James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 22.1 (2d ed. 1994) (outlining myriad procedural defenses to habeas corpus relief and explaining that “[i]n the past two decades, the Supreme Court has erected elaborate procedural obstacles to federal habeas corpus review”); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 26 U.S.C.) (imposing variety of new procedural and substantive restrictions on habeas petitioners). The precise question posed by the post-Bailey cases has been litigated infrequently, most likely because statutes and common law have imposed extremely strict requirements for allowing Supreme Court opinions to apply retroactively on collateral attack. See Liebman & Hertz, supra, § 25.1-25.8 (discussing nonretroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989), wherein Court denied habeas petitioner retroactive application of peremptory challenge rule announced in Batson v. Kentucky, 476 U.S. 79 (1986)). Thus, cases like Bailey, which have broad retroactive effect, are extremely rare.


\textsuperscript{26} For example, now that Bailey has defined “use” of a firearm for the purpose of section 924(c), the definition of “carry[ing]” a firearm has become the subject of much litigation. See, e.g., Rosser v. United States, 946 F. Supp. 399, 400 (W.D. Pa. 1996) (discussing various circuit court interpretations of “carry”). Defendants convicted of section 924(c) violations under a broad interpretation of “carry” may find themselves in positions similar to those of the post-Bailey defendants should the Supreme Court eventually define “carry” more narrowly. Of course, this issue is not limited to section 924(c) convictions—any time an appellate court issues an opinion with broad retroactive effect, plea-convicted defendants potentially face reindictment on previously dismissed charges.
This Note argues that a successful collateral attack is neither a breach of a defendant's plea agreement with the government nor an act which requires rescission of the agreement due to impracticability. Rather, the successful collateral attack may have created a situation in which the purpose of the contract has been substantially frustrated for the government. The Note evaluates a government claim premised upon this notion, but concludes that the government is still not entitled to relief.

Part I examines the reasoning of three district courts that have allowed, or would allow, reindictment subsequent to successful collateral attack. While the specific grounds for relief differed among the courts—two found that the defendant breached the plea agreement and one rescinded the contract due to impracticability—this Part concludes that the reasoning of all three courts rests on the unarticulated and dubious premise that a criminal defendant convicted subsequent to a plea bargain has an implicit contractual obligation to serve out his or her entire sentence.

Adopting the widely accepted notion that a plea agreement is a unilateral contract, Part II attempts to ascertain the defendant's obligations under a typical plea agreement. This Part argues that a defendant fulfills all contractual obligations under the plea agreement at the moment of entering the plea in open court; in other words, the defendant's only obligation under the contract is to plead guilty. In reaching this conclusion, Part II calls into question the assumption made by several post-Bailey courts that the defendant has a contractual obligation under the plea agreement to serve the entire sentence.

Keeping in mind the defendant's limited obligations under the plea agreement, Part III then suggests that the government's best argument for reindictment in the post-Bailey cases might be the seldom used contract law doctrine of "frustration of purpose." Although none of the district courts has explicitly advanced the doctrine of "frustration of purpose" thus far, this Part maintains that the reasoning of the district court opinions that have allowed reindictment more strongly supports a frustration claim than a breach or impracticability claim. Despite acknowledging that the government has a colorable frustration argument in the post-Bailey context, however, Part III then contends that the doctrine fails to provide relief and that there is,

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27 One of these courts, in United States v. Gaither, 926 F. Supp. 50, 52 (M.D. Pa. 1996), held that because the statute of limitations had run on the dismissed charges, and because the defendant was not at fault for the impracticability, the government could not in fact reindict. This statute of limitations issue has arisen several times in the post-Bailey context; the courts have resolved it differently depending upon the government's theory of relief. See supra note 18.
in fact, no valid basis in contract law for allowing the government to reindict. The Note concludes, therefore, that courts should not permit the government to reindict post-Bailey defendants.

I

ASSUMING THE NOT-SO-OBSERVABLE:

HOW THREE DISTRICT COURTS HAVE APPLIED THE PRINCIPLES OF CONTRACT LAW TO POST-BAILEY CASES

Despite the undisputed prevalence of plea bargaining, surprisingly few courts have addressed the issue of whether successful collateral attack of a conviction entered pursuant to a plea agreement constitutes defendant breach. Far more common have been cases

28 The vast majority of criminal cases in this country are resolved by guilty pleas. According to the Department of Justice, approximately 92% of all state court felony convictions are the result of guilty pleas. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1995, at 498 tbl.5.47 (Kathleen Maguire & Ann L. Pastore eds., 23d ed. 1996). The statistics are similarly high in federal court. See U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 65-83 (1991) (documenting guilty plea rates in federal prosecutions); see also Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 Clinical L. Rev. 73, 73 n.5 (1995) ("Most scholars and practitioners agree . . . that plea bargaining is the only viable mechanism for resolving the crush of cases that must be processed by underfunded criminal justice systems.").

Either the prosecutor or defense counsel may initiate plea bargaining. In exchange for the defendant's guilty plea and, perhaps, cooperation in the form of testimony at another trial or information about other criminal activity, the prosecutor generally will make one or more of the following offers: dismiss some of the other charges pending against the defendant, recommend that the trial judge impose a favorable sentence, or agree not to oppose the defendant's request for a favorable sentence. In many cases, the agreement is written out in the form of a contract and signed by the defendant, defense counsel, and the prosecutor prior to the entry of the guilty plea. In federal court, the judge must decide whether to accept the plea agreement and is not bound by the prosecutor's recommended sentence. In other words, in most cases the judge may impose a greater or lesser sentence than that recommended, as long as it is within the Federal Sentencing Guidelines. See Fed. R. Crim. P. 11(e) (describing general plea bargain procedure in federal courts); see also William L. Gardner & David S. Rifkind, A Basic Guide to Plea Bargaining Under the Federal Sentencing Guidelines, Crim. Just., Summer 1992, at 14 (same). For a comprehensive primer on the proper role of defense counsel at each stage of the plea bargaining process, see 1 Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases 339-67 (1988).

29 Throughout this Note, I refer to "collateral attack" of a conviction in the context of the post-Bailey cases. A collateral attack is a post-conviction petition for relief, usually in the form of a habeas corpus petition, made after a prisoner's direct appeals have expired or been exhausted. The analysis in this Note would be no different if a defendant sought to take advantage of a decision like Bailey on direct appeal. I use the term "collateral attack" instead of "direct appeal" for two reasons. First, the vast majority, if not all, of the post-Bailey cases involve collateral attacks. Second, this issue is far more likely to arise in the context of a collateral attack than a direct appeal because of the strict time limits (usually
involving prosecutorial breach\(^3\) or defendant breach by other means.\(^{31}\) Similarly, commentators have focused primarily on these and other forms of plea agreement breaches,\(^3\) the desirability of plea bargaining,\(^3\) and the potential remedies for prosecutorial breach.\(^3\)

\(^{30}\) See, e.g., Santobello v. New York, 404 U.S. 257, 262-63 (1971) (holding that prosecutor breached plea agreement by not abstaining from recommending particular sentence); United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974) (holding that "prosecutor's half-heartedness in presenting the recommendation" constituted breach of plea agreement); State v. Kuchenreuther, 218 N.W.2d 621, 623-24 (Iowa 1974) (holding that prosecutor breached plea agreement by charging defendant with larceny after agreeing to charge defendant only with disturbing peace); Miller v. State, 322 A.2d 527, 528-29 (Md. 1974) (holding that state breached plea agreement by making sentencing recommendation to court after promising not to do so).

\(^{31}\) See, e.g., United States v. Donahey, 529 F.2d 831, 832 (5th Cir. 1976) (refusing to order specific performance of plea agreement where defendant had agreed, but failed, to cooperate with government); In re James, 640 P.2d 18, 20 (Wash. 1982) (holding that defendant does not automatically breach plea agreement by getting arrested on another charge subsequent to entry of plea); State v. Hall, 645 P.2d 1143, 1145 (Wash. Ct. App. 1982) (agreeing that prosecutor was justified in rescinding plea agreement induced by defendant's use of false name).

\(^{32}\) See, e.g., William M. Eijzak, Note, Plea Bargains and Nonprosecution Agreements: What Interests Should Be Protected When Prosecutors Reneged?, 1991 U. Ill. L. Rev. 107, 135-36 (arguing that defendants should be entitled to relief when prosecutors rescind plea offers prior to entry of plea in court); Julie A. Lumpkin, Note, The Standard of Proof Necessary to Establish that a Defendant Has Materially Breached a Plea Agreement, 55 Fordham L. Rev. 1059, 1051-62 (1987) (discussing appropriate standard of proof at predeprivation hearing to determine whether defendant has breached agreement).

\(^{33}\) For criticisms of plea bargaining, see, e.g., Alan M. Dershowitz, The Best Defense at xvi (1982) ("I believe that plea bargaining is one of the most destructive and least justifiable institutions in the American criminal justice system."); Albert V. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 932 (1983) ("Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings."); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 1979 (1992) (arguing that "abolition of plea bargaining would serve both justice and efficiency").

For defenses of plea bargaining, see, e.g., Thomas W. Church, Jr., In Defense of "Bargain Justice," 13 L. & Soc'y Rev. 509, 510-11 (1979) (examining empirical evidence and defending viability of plea bargaining); Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1972 (1992) (arguing that plea bargaining is "at least as effective as trial at separating the guilty from the innocent"); B.J. George, Jr., Book Review, 65 Mich. L. Rev. 815, 817 (1967) ("It is futile to talk of abolishing [plea bargaining] unless we prefer the alternative of complete breakdown of the system.").

One aspect of the post-Bailey cases that courts and commentators have discussed at length is the contractual nature of plea agreements. Since the Supreme Court's landmark decision in Santobello v. New York, holding for the first time that plea bargains are judicially enforceable, both courts and commentators have consistently recognized an analogy between the principles of contract law and the interpretation of plea agreements. The extent of that analogy, however, has been the subject of some dispute. The dispute stems from an acknowledgment that, although contract law principles are perfectly appropriate for determining the parties' obligations under the plea agreement itself, the enforcement of such obligations may raise constitutional concerns that are not present in most commercial contractual situations. After Santobello, there is no doubt that a plea agreement is in fact a contract. However, because one party to a plea agreement is a criminal defendant protected by the Due Process Clause and the Fifth and Sixth Amendments, a strict construction of the defendant's contractual obligations may sometimes lead to an unconstitutional result. Thus, defendants occasionally attempt to frame their plea agreements as "constitutional contracts," thereby raising a constitutional claim in order to mitigate the potentially harsh effects of rigid contractual interpretation.


37 See id. at 262 ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

38 See, e.g., United States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995) ("Plea agreements are construed according to contract law principles."); United States v. Peglera, 33 F.3d 412, 414 (4th Cir. 1994) ("Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated."); United States v. Gerace, 997 F.2d 1293, 1294 (9th Cir. 1993) ("It is axiomatic that plea bargains are contractual in nature . . ."); United States v. Pollard, 959 F.2d 1011, 1022 (D.C. Cir. 1992) ("A plea agreement is a form of contract . . ."). See generally Scott & Stuntz, supra note 35, at 1911-35 (evaluating plea bargains as contracts).

39 See U.S. Const. amend. XIV, § 1.

40 Justice Brennan has explained this term in the following manner: [P]lea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

Ricketts v. Adamson, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting); see also Westen & Westin, supra note 34, at 538-39 (arguing that Santobello mandates constitutional approach to plea agreement interpretation).
For example, under the principles of contract law discussed in Part II of this Note, a prosecutor may revoke all promises made to the defendant at any time prior to the defendant’s actual entry of the plea in court.\textsuperscript{41} The Fourth Circuit, in \textit{Cooper v. United States},\textsuperscript{42} while acknowledging that contract law afforded defendants no relief in this situation, determined that contract law precepts were insufficient to address constitutional notions of fairness.\textsuperscript{43} The court thus held that both substantive due process guarantees and the Sixth Amendment right to effective assistance of counsel bind the prosecutor to promises made prior to the actual plea entry.\textsuperscript{44}

Notwithstanding the \textit{Cooper} decision, which has been widely criticized,\textsuperscript{45} courts rarely look beyond the written contract when evaluating the claims of defendants convicted pursuant to plea agreements. For instance, the Supreme Court has not hesitated to apply strict contract analogies in the evaluation of plea bargains, holding defendants to harsh principles of contract law despite the more favorable treatment they might receive from an equitable perspective. In \textit{Ricketts v. Adamson},\textsuperscript{46} the Court, deferring to the determination of the Arizona Supreme Court,\textsuperscript{47} held that the defendant, Adamson, had breached his plea agreement—pursuant to which he agreed to testify against any and all codefendants in exchange for a lesser prison sentence—by initially refusing to testify at the retrial of two codefendants several years later.\textsuperscript{48} Adamson had already testified truthfully once against his codefendants, had already begun serving his sentence for second-degree murder, and eventually was in fact willing to testify at the retrial.\textsuperscript{49} Nevertheless, the Arizona Supreme Court held that, because Adamson had agreed in the written plea agreement to “testify fully

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\textsuperscript{41} See infra note 92 and accompanying text.

\textsuperscript{42} 594 F.2d 12 (4th Cir. 1979).

\textsuperscript{43} See id. at 16-17 (“[W]e agree that within classical contract doctrine the defendant here could probably claim no right . . . , [but] we find the constitutional right to ‘fairness’ to be wider in scope than that defined by the law of contract.”).

\textsuperscript{44} See id. at 18.

\textsuperscript{45} In fact, the Supreme Court rejected \textit{Cooper} in \textit{Mabry v. Johnson}, 467 U.S. 504, 507-08 (1984) (holding that Constitution does not mandate application of \textit{Cooper} rule). Whether \textit{Cooper} is still good law in the Fourth Circuit is not clear; what is certain is that several federal and state courts have soundly rejected the decision. See, e.g., Virgin Islands v. Scotland, 614 F.2d 360, 362 (3d Cir. 1980) (specifically rejecting \textit{Cooper} and allowing prosecutor to revoke promises made to defendant, as long as plea had not been entered); People v. Williams, 756 P.2d 221, 244 (Cal. 1988) (same); State v. Edwards, 279 N.W.2d 9, 12 (Iowa 1979) (same); State v. Collins, 265 S.E.2d 172, 176 (N.C. 1980) (same).

\textsuperscript{46} 483 U.S. 1 (1987).

\textsuperscript{47} See \textit{Adamson v. Superior Court}, 611 P.2d 932, 936 (Ariz. 1980) (holding that defendant violated terms of plea agreement).

\textsuperscript{48} See \textit{Ricketts}, 483 U.S. at 3-4, 11.

\textsuperscript{49} See id. at 3-7.
and completely," he was obligated to testify at as many trials as the state desired. In affirming, the Court held that Adamson had breached his contract, and thus the State was permitted to reinstate the original first-degree murder charge; Adamson was eventually sentenced to death.

The Arizona court's refusal to look beyond the "four corners" of the contract between the defendant and the state—and the Supreme Court's approval of this approach—is indicative of a widespread acceptance of the plea-bargains-as-contracts analogy and a general reluctance to grant the defendant any more protection than that afforded by the principles of contract law and the contract itself. The district courts that have examined the post-Bailey issue—even those that have not found defendant breach—generally have followed this trend, shying away from a constitutional analysis of the plea agreements and utilizing instead a contract law approach. Justice Brennan and other proponents of the "constitutional contract" model suggest that if a strict contract law approach favors the prosecution, the court must evaluate the defendant's constitutional rights in order to determine the appropriateness of holding the defendant to the letter of the contract. In the event that the contract approach favors the defendant, the analysis need go no further, as any constitutional considerations will only aid the defendant.

50 See Adamson, 611 P.2d at 935-36.
51 See Ricketts, 483 U.S. at 7-8. In dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that by refusing to evaluate the defendant's claim that he did not in fact breach his agreement with the state—a claim that the dissenters would have upheld—the Court "flout[ed] the law of contract, due process, and double jeopardy." Id. at 26.
52 See supra note 45 (discussing overwhelmingly negative reaction to Fourth Circuit's decision in Cooper).
53 For example, in Rodriguez v. United States, 933 F. Supp. 279, 281 (S.D.N.Y. 1996), the court notes at the outset that "because a plea agreement implicates a defendant's constitutional rights, . . . contract principles will not always dictate the outcome of the analysis." Id. The court then goes on to analyze the issue using strict contract analogies, see id. at 281-83, and never again mentions how the defendant's constitutional rights alter the effectiveness of those analogies.
54 See generally Ricketts, 483 U.S. at 12-26 (Brennan, J., dissenting) (explaining that courts must evaluate constitutional considerations if contract law does not protect defendant).
55 The potential remedies for a prosecutorial breach of a typical plea agreement are discussed most cogently in Westen & Westin, supra note 34, at 512-28. If the defendant were to prevail in the post-Bailey contract dispute, there would be, of course, no remedy beyond the status quo after granting the habeas petition, because the prosecutor is the party claiming breach of contract (or asking for rescission). Rather, the court would not permit the government to reindict the defendant on previously dismissed charges.
56 For example, in Rodriguez, the court did not need to address the defendant's constitutional claims because the defendant had already prevailed under a contractual analysis. See infra note 104 and accompanying text.
Thus, the first step in an evaluation of the plea agreements in the post-
*Bailey* cases is to examine the nature of the parties' respective
interests and obligations, using standard principles of contract law.
Only if this step yields the conclusion that the defendants have
breached their contracts, or that the contracts should be rescinded for
some other reason, will a constitutional analysis be necessary. 7
This Part discusses the contract law approach of three recent post-
*Bailey* decisions.

### A. Defendant Breach: The VierafBarron Approach

The courts in *United States v. Viera*58 and *United States v. Barron*59 both held that a defendant's primary obligation under a plea
agreement is to serve the sentence imposed by the court. Although
neither case involved an express provision to that effect in the respec-
tive plea agreements, both courts found that "an implicit part of the
agreement[s], indeed [their] very heart[s], was that the defendant[s]
would remain convicted and serve the sentence[s] imposed."60 By
seeking collateral relief, the defendants violated this implicit provision
and breached their contracts with the government.61 Accordingly, the
courts relieved the government of its obligations under the agree-
ments62 and allowed reindictment of the defendants on the previously
dismissed charges.

The courts' insistence that "the absence of [an express] provision
does not mean that the defendant is not obligated to perform a basic
and essential obligation under the plea agreement"63 is surely accu-
rate.64 Furthermore, defendants can, and sometimes do, breach their

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57 Because this Note concludes that the defendants prevail on contract theories alone, I
do not in fact reach a constitutional analysis.
60 *Viera*, 931 F. Supp. at 1228 (emphasis added); accord *Barron*, 940 F. Supp. at 1493
(stating that basis for bargain included amount of time defendant was to serve and that full
performance required serving that time).
61 The *Barron* court never used the word "breach," although it implicitly employed a
breach analysis.
62 The *Barron* court defined the government's obligations as follows:
[i]o refrain from seeking further prosecution arising from facts underlying the
indictment, to agree that [the defendant] was entitled to a two-point reduction
in sentencing for acknowledging that he has accepted responsibility for his acts,
to refrain from seeking an enhanced penalty pursuant to 18 U.S.C. § 924(e),
and to acknowledge that [the defendant] had reserved his right to appeal the
ruling on the motion to suppress.
*Barron*, 940 F. Supp. at 1493 n.7.
63 *Viera*, 931 F. Supp. at 1228.
64 See *Arden v. Freydberg*, 174 N.E.2d 495, 496 (N.Y. 1961) ("[A] promise need not be
express [in order to be binding]."); Restatement (Second) of Contracts § 204 (1981) (pro-
plea agreements with the government, thereby warranting rescission of the contract. However, the courts’ conclusion in Viera and Barron—that one of these “basic and essential” obligations is that the defendant serve out the entire imposed sentence—demands closer examination. In fact, neither court articulated a justification for this claim.

The Viera court asserted in a conclusory manner that because the government reasonably believed at the time of the plea entry that the defendant would not challenge his conviction, the defendant’s action was a violation of a basic and reasonable assumption upon which the plea agreement was predicated. Meanwhile, the Barron court concluded that

the basis for the bargain between the government and [the defendant] was not [the defendant] appearing in court on a particular day and engaging in a ritualistic dialogue [but rather] was an agreement regarding the charges to which [the defendant] would plead and the amount of time [he] would be required to serve.

These courts reasoned that because the government’s expectations under the agreements were not satisfied entirely, the defendants must have breached their contracts. However, when a contractual party is disappointed—even if a primary expectation of the party remains unfulfilled—the disappointment is not necessarily due to the other party’s material breach.

viding that court may supply terms not explicitly agreed to by parties to contract if “essential to a determination of their rights and duties”). At least one appellate court, however, has demonstrated an unwillingness to hold defendants to provisions in plea agreements which are not made explicit. In United States v. Shaw, 655 F.2d 168, 170 (9th Cir. 1981), the government charged the defendant with bribery, mail fraud, and conspiracy offenses. The defendant previously had submitted to the prosecutor an extensive legal memorandum arguing that subject matter jurisdiction did not exist for the two bribery charges; nevertheless, the prosecutor filed charges for all the alleged offenses. See id. The prosecutor then allowed the defendant, at the defendant’s discretion, to plead guilty to one of the offenses; not surprisingly, he pleaded to one over which he believed the court did not have subject matter jurisdiction. See id. When he successfully appealed his conviction on the question of subject matter jurisdiction, the court barred the prosecution from reindicting him on any of the dismissed charges, despite arguments that he had violated an implicit provision not to challenge his plea conviction. See id. at 170-72.

65 See supra note 31.
66 Viera, 931 F. Supp. at 1228; accord Barron, 940 F. Supp. at 1493.
67 See Viera, 931 F. Supp. at 1228.
68 Barron, 940 F. Supp. at 1493.
69 A material breach of a contract may be defined as a failure to perform a condition, as opposed to a mere expectation, of the contract. One commentator has explained: [O]ne who contracts to furnish things or services to another does not, even though he knows of the other’s expectations when the contract is made, promise that they will be fulfilled. The theatrical producer hopes that his play will entertain his audience and knows that ticket-buyers expect to be entertained,
The leap of logic from the government’s disappointment to a finding of defendant breach passes over the crucial determination of the defendant’s obligations under the contract. In order to breach a contract, one party must fail to perform a particular duty required by the contract. The Viera and Barron courts’ use of a breach analysis necessarily assumes that the defendants have failed to perform a particular duty. The validity of the defendant breach argument, therefore, rests upon a premise left unexplained by the two courts: that the defendants had obligations under their contracts with the government to serve specific sentences. There are two possible ways, neither of which was advanced by the Viera and Barron courts, to arrive at the conclusion that a defendant’s plea entry involves more than what the Barron court calls “ritualistic dialogue.” Ultimately, however, neither is tenable.

The first, and less compelling, of these arguments is that the defendant’s obligation to serve the entire sentence resulting from the plea originates in his or her agreement with the prosecutor. If this assertion is true, the defendant does indeed breach the plea agreement by refusing to remain convicted. However, basing the obligation to serve the entire sentence in the plea agreement usurps one of the principal powers of the trial judge and places it in the hands of the prosecutor. The trial judge, not the prosecutor, is the person who chooses and imposes the sentence. While a term of a plea agreement indeed may involve a request or recommendation for a certain sentence, the trial judge is the ultimate arbiter of the propriety of that term, and the defendant’s obligation to serve that sentence comes from the order of the trial court. Both parties assume the risk that the judge will not impose the sentence recommended by the prosecu-

\textsuperscript{70} See Restatement (Second) of Contracts § 235(2) (1981) ("When performance of a duty under a contract is due any non-performance is a breach.").

\textsuperscript{71} See supra text accompanying note 68.

\textsuperscript{72} At first glance, the Barron court initially seems to support this contention by stating that "the basis for the bargain was an agreement regarding . . . the amount of time [the defendant] would be required to serve." Barron, 940 F. Supp. at 1493.

\textsuperscript{73} See supra note 28 (discussing possible terms of plea agreement and noting that judge is not bound by prosecutor’s recommended sentence).
tor. To suggest otherwise would be to advocate a breakdown of the adversarial process in which prosecutors assume the role properly reserved for trial judges. Therefore, because literal application of the court’s statement leads to a contravention of the constitutional goal of separation of powers—reflected in the roles of the prosecutor and judge—the Barron court almost certainly meant something else.

The second possible argument is significantly more compelling: while the obligation to serve the sentence stems from an action of the trial judge, an obligation to accept whatever sentence the court hands down originates in the plea agreement. By this reasoning, the defendant breaches the contract by refusing to accept the sentence that the trial court hands down. This argument seems more plausible, but

74 “Once the defendant agrees to a plea, he or she is bound by it. The defendant has no right to withdraw the plea if the court rejects the [prosecutor’s] recommendation and imposes a heavier sentence.” Gardner & Rifkind, supra note 28, at 16; see Fed. R. Crim. P. 11(e)(1)(B) (providing that any recommendation of, or agreement not to oppose defendant’s request for, particular sentence by prosecutor is not binding on court); U.S. Sentencing Guidelines Manual § 6B1.1(b) (1995) (same). Occasionally, the prosecutor will agree to a “specific sentence agreement”—if the court rejects such an agreement, the defendant may withdraw the plea. See Fed. R. Crim. P. 11(e)(4); U.S. Sentencing Guidelines Manual § 6B1.3 (1995). This form of plea agreement is less common than a “recommendation agreement” which binds the defendant to whatever sentence the judge imposes. See Gardner & Rifkind, supra note 28, at 15-16 (discussing specific sentence agreements and recommendation agreements and noting that former “are generally harder to obtain”).

75 A variation on this argument, which the government has yet to advance, is that the defendant, by collaterally attacking the plea conviction, breaches an implicit contract with the court itself. The theory is that by pleading guilty, a defendant is actually entering into a contract with the court, exchanging an admission of guilt for the imposition of a lenient sentence. By attacking the conviction, the defendant breaches an implicit provision that binds him or her to the trial court’s original sentence. Beneath its ostensible plausibility, this reasoning has three serious flaws.

First, no court has recognized such an implicit contract, and for good reason. Bargaining—the central feature of any contract—is almost entirely absent from the relationship between a defendant and a court. The defendant is completely at the mercy of the court; the court may refuse to accept a plea agreement, and it usually may refuse to follow the government’s sentencing recommendation. See supra note 28. It is difficult to imagine a “contractual” situation with a greater disparity in bargaining power.

Second, even if the judge-defendant relationship could be considered contractual, the defendant does not necessarily breach his or her agreement with the court under the post-Bailey scenario. If such a contract exists, it is presumably with the judicial branch as a whole, not merely with the individual trial court that imposes the sentence. Because the defendant has agreed to comply with the judicial branch’s punishment, and the primary agent of the judicial branch, the Supreme Court, has dictated that the defendant be released on the section 924(c) charge, the defendant performs his or her obligation under the contract by taking advantage of the Supreme Court’s ruling. Thus, an argument that the defendant, by making a claim grounded in Supreme Court precedent, breaches his or her contract with the trial court is untenable.

Third, and finally, even if there were an implicit contract between the defendant and the trial court, and the defendant breached that contract, permitting the government to reindict would not be an appropriate remedy. If anything, the court may hold the defen-
nevertheless leads to some unsettling conclusions.

Many plea agreements may indeed include a defendant's promise to serve whatever sentence the trial court imposes upon entry of the plea. Such a provision may be interpreted in several ways, however, and not every interpretation leads to the conclusion that a defendant's successful collateral attack constitutes a breach of contract. One interpretation of such a provision may obligate the defendant to accept the trial court's sentence as imposed on the day of the plea entry. Another possibility is that the provision may obligate the defendant to accept more generally the joint determination by the judiciary and legislature of the appropriate punishment for given behavior, even if it should change with time. In a vast majority of cases, the two approaches would lead to results with no practical differences. For example, a trial judge's imposition of a life sentence for first-degree murder is usually an exact reflection of the legislature's determination of the proper punishment for first-degree murder and an implicit reflection of a judicial determination of constitutionality. In the post-Bailey cases, however, the sentence imposed by the trial court is no longer an accurate reflection of the judiciary's or legislature's position on the proper punishment for the admitted behavior. The United States Supreme Court, as the foremost agent of the judiciary, has informed American citizens that the behavior Barron and Viera admitted warrants no punishment at all.76

A contract interpretation that binds the defendant to the concededly invalid sentence imposed by the trial court makes no sense when compared to one that "binds" the defendant to the "sentence" deemed appropriate by the Supreme Court. The Barron and Viera courts would apparently favor the former interpretation, such that any subsequent attempt by the defendant to avoid serving the imposed sentence would constitute a breach. This interpretation, however, if not unconstitutional,77 is certainly problematic. More sensitive to the

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76 I am referring only to the section 924(c) charge here.
77 For example, the Constitution requires that a plea entry be entered knowingly, intelligently, and voluntarily. See Henderson v. Morgan, 426 U.S. 637, 646 (1976) (declaring guilty plea invalid unless defendant knows nature of offense to which he or she pleads); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that trial judge's failure to create record demonstrating defendant's knowing, voluntary, and intelligent waiver of right to trial is automatic grounds for reversal); McCarthy v. United States, 394 U.S. 459, 463-66 (1969) (holding that failure of trial judge to evaluate voluntariness of plea is automatic grounds for reversal). Defendants have an absolute right to challenge the circumstances under which a plea was entered. A claim that the appeal of a conviction on such grounds constitutes a breach of the plea agreement would be untenable, as prosecutors surely assume the risk that such an event will occur. See infra text accompanying note 170.
realities of our democratic government is an interpretation of the plea agreement that imposes upon the defendant an obligation to serve whatever sentence the judicial branch of the government hands down. In most cases, this is the trial court’s sentence. In some rare cases, it may be the retroactive determination of a higher court or act of the legislature.

Does this interpretation reduce the guilty plea to “ritualistic dialogue”? Perhaps it does. Indeed, the government’s protest that it bargained for the defendant’s incarceration in Barron and Viera exhibits at least intuitive merit and will be examined further in Part III. Nevertheless, the justification for relief proposed by these courts—defendant breach—simply fails to withstand analysis. Regardless of how disappointed the government may be by its failure to keep the post-Bailey defendants incarcerated, the principles of contract law dictate that a party must fail to perform a particular duty before he or she is deemed to have breached the contract. Defendants released subsequent to successful collateral attacks do not breach their contracts because they never had a contractual obligation to remain convicted and incarcerated. If there is a legal doctrine that allows reindictment, it is not breach of contract. The court in United States v. Gaither recognizes that a breach analysis is not proper under the post-Bailey fact pattern, but nevertheless exposes the defendant to potential reindictment under a different contractual theory.

B. Defendant Impracticability: The Gaither Approach

The Gaither court explicitly concluded that the defendant did not breach his plea agreement with the government: “Because Defendant’s continued incarceration in the wake of Bailey would result in a ‘complete miscarriage of justice,’ his decision to seek release is entirely proper, and is not a breach of the plea agreement.” Rather, the Gaither court held that Bailey constituted a supervening circumstance rendering the defendant’s performance impracticable and the plea agreement void. As a result of Bailey, the defendant was no

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79 Id. at 52 (citation omitted).
80 See Restatement (Second) of Contracts § 261 (1981):
Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

For classic examples of impracticability, see Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts, 817 F.2d 1094, 1102 (4th Cir. 1987) (finding sufficient evidence for defense of impracticability where defendant canceled plaintiff opera company’s perform-
longer obligated to perform, and the contract was unenforceable.81

The Gaither court is certainly correct in concluding that if a contract is voided due to impracticability, the parties ought to be returned to the positions they occupied prior to the entry of the plea.82 The problem with the court’s analysis lies not in its contemplated remedy for an impracticable contract, but rather in its characterization of the contract as impracticable in the first place.

According to the Restatement (Second) of Contracts (Restatement), a contract is impracticable only when “a party’s performance is made impracticable.”83 It is certainly impracticable for a defendant to remain incarcerated after the Supreme Court has said that he or she should be released. The Gaither court reasoned that because of this impracticability, the defendant was unable “to perform his obligations under the plea agreement.”84 But this statement begs the question: what were the defendant’s obligations under the plea agreement? If the defendant never had an obligation under the contract to remain incarcerated, his performance could not have been deemed impracticable.85 The defendant’s incarceration may have become impracticable, but the contract arguably has not. If the defendant’s only obligation under the contract was to plead guilty, then Bailey did not in any way hamper his ability to perform.

By embracing the notion that the defendant was no longer able to “perform” his end of the contract, the Gaither court implicitly defined the defendant’s obligations under the contract as the combination of pleading guilty and staying incarcerated. The court failed, however, to provide any support for this definition. Thus, the problem with Gaither is identical to the problem with Viera and Barron: the court’s analysis rests on the questionable, and unproved, premise that the defendant was obligated under the plea agreement to serve out his entire sentence.

A claim of impracticability requires proof that a supervening circumstance rendered one party’s performance impracticable. A claim of material breach requires proof that one party did not render per-

81 See Gaither, 926 F. Supp. at 52.
82 See Restatement (Second) of Contracts, ch. 11 Introductory Note, at 311-12 (1981) (describing remedies for impracticable contracts).
83 Restatement (Second) of Contracts §261 (1981) (emphasis added).
84 Gaither, 926 F. Supp. at 52.
85 For a detailed discussion of whether the defendant in fact had an obligation under the plea agreement to remain incarcerated, see infra Part II.
formance. Ascertaining the exact definition of the party's performance, then, is critical in evaluating the legitimacy of either of these claims. The Viera, Barron, and Gaither courts failed to establish that a defendant's contractual obligations under a plea agreement include both pleading guilty and serving the entire imposed sentence. If the assumption of these courts is inaccurate, and a defendant is not obligated under a plea agreement to serve out the entire sentence, both the Viera/Barron defendant breach theory and the Gaither impracticability theory must fail. The next step, then, is to determine precisely a defendant's obligations under a plea agreement. Part II undertakes this analysis.

II

PLEA AGREEMENTS AS UNILATERAL CONTRACTS:
DEFINING THE DEFENDANT'S OBLIGATIONS

Plea agreements are unilateral contracts. Thus, "the consideration given for the prosecutor's promise is not the defendant's promise to plead guilty, but the defendant's actual performance in so pleading." In a typical classical unilateral contract, the offeror (here, the prosecutor) is free to revoke her promise at any time prior to complete performance by the offeree (defendant). For example, in Professor Wormser's famous Brooklyn Bridge hypothetical—in which A promises B $100 if B walks across the Brooklyn Bridge—A is not obli-

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86 Virtually every mention in the case law of plea agreements as unilateral contracts arises in the context of a court rejecting the analysis of Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), see supra notes 42-45 and accompanying text, and holding that a prosecutor may revoke her promises to the defendant at any time prior to the plea entry, see, e.g., State v. Wheeler, 631 P.2d 376, 379 (Wash. 1981) (stating that most courts have rejected Cooper and that "[t]hat result has been reached by strictly applying contract principles and characterizing the plea bargain as a unilateral contract"); State v. Collins, 265 S.E.2d 172, 176 (N.C. 1980) ("When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts."). It is important to note, however, that even Cooper assumed that plea agreements are unilateral contracts; the court went further, though, and asserted that the defendant's constitutional rights trumped the doctrines of contract law. See Cooper, 594 F.2d at 16-17; see also Westen & Westin, supra note 34, at 525 n.189 ("[M]ost plea agreements arise in the form of 'unilateral' contracts . . . ."); Eileen T. McGough, Recent Decision, Enforcing Plea Bargains: A Step Beyond Contract Law, 40 Md. L. Rev. 90, 96 (1981) ("When using a contract analogy, most courts view the plea agreement as a form of unilateral contract."). See generally John D. Calamari & Joseph M. Perillo, The Law of Contracts § 4-15 (2d ed. 1977) (discussing unilateral contract as exception to requirement of mutuality of obligation between contracting parties).

87 Westen & Westin, supra note 34, at 525 n.189 (emphasis added).

88 The distinction between the classical and modern theories regarding unilateral contracts is discussed below. See infra text accompanying note 98.
gated to pay B until B has walked across the entire bridge.\textsuperscript{89} Although A is free to revoke at any point until B reaches the other side, once B reaches the other side, A is bound by her promise.\textsuperscript{90}

Defining an agreement as a unilateral or bilateral\textsuperscript{91} contract, then, provides a means for determining at what point a party is free to withdraw, or revoke, an offer. For example, the fact that a plea agreement is a unilateral contract usually favors the prosecutor because, in most cases, she can revoke her plea offer at any time prior to the defendant's actual plea entry.\textsuperscript{92} Aside from determining when an offer is revocable, evaluating a plea agreement as a unilateral contract also assists in determining the point at which the defendant has rendered full performance under the agreement.

Once the offeree has performed his obligations under a unilateral contract, the offeror is bound by her promise.\textsuperscript{93} Conversely, if we know at what point the offeror is bound by her promise, we can deter-


\textsuperscript{90} For the sake of clarity, I have assigned genders to A (female) and B (male), which correspond to the genders I use for the prosecutor/offor (female) and defendant/offeree (male) throughout the discussion in Part II.

\textsuperscript{91} In a bilateral contract, each party is both an offeror and an offeree; the contract is an exchange of promises. For example, A promises to paint B's house in exchange for the promise of a certain agreed upon payment. In that situation, once the parties form the contract and one party tenders the consideration (often in the form of a down payment, but possibly just in the form of an exchange of promises), neither party is free to revoke. In a unilateral contract, the parties exchange a promise (A's promise to pay B) for an act (B walking across the bridge). A can revoke at any time prior to B's performance. A common example of a unilateral contract is an offer of a reward for finding a lost dog. The dog owner has promised to pay the reward only if someone completes the act of finding the dog. Until someone has found the dog, the offeror is free to withdraw her reward offer.

\textsuperscript{92} See McGough, supra note 86, at 97 ("[T]he prosecutor does not breach a contract if [s]he rescinds [her] offer before the defendant performs because the contract does not exist until the defendant takes the promised action."). While principles of contract law do not prohibit the practice, some ethical guidelines expressly forbid prosecutors from reneging on promises made to a defendant. See ABA Standards for Criminal Justice Standard 3-4.2(c) (1993) ("A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present."); id. Standard 3-4.1(c) ("A prosecutor should not knowingly make false statements or representations . . . in the course of plea discussions with defense counsel or the accused."). For discussion of an interesting recent case in which the prosecutor arguably crossed these ethical lines, see David Stout, Girl's Killer Evades Trial Under Death Penalty Law, N.Y. Times, Nov. 21, 1996, at B3.

\textsuperscript{93} A nineteenth-century case from Massachusetts illustrates this proposition. In Bishop v. Eaton, 37 N.E. 665, 666 (Mass. 1894), defendant Eaton had promised plaintiff Bishop that if Bishop lent money to Eaton's brother, Eaton would pay Bishop back. Bishop did lend the money to Eaton's brother and attempted to notify Eaton of this fact by mail. The letter, however, never reached Eaton. The court, holding that a unilateral contract had been formed and that Eaton was obligated to pay, noted that in this type of contract, "the promise is in consideration of an act to be done [and] becomes binding upon the doing of the act." Id. at 667.
mine at what point the offeree has completed his performance. Because the offeror’s obligations are not triggered until the offeree has fully performed, the point at which the offeror may no longer revoke the offer serves as a precise indicator of the point at which the offeree has fully performed.

For example, in the Brooklyn Bridge scenario, A is obligated to pay B as soon as B reaches the other side of the bridge. B’s act of crossing the bridge, and no more, constitutes his performance. If B’s performance were to require something more, A would not be obligated to pay B until B completed that “something more.” Suppose, for example, A wishes that B stay in Brooklyn for one month after crossing the bridge. Unless the contract is amended to reflect this desire, A is still obligated to pay B as soon as B crosses the bridge, even if B turns around and walks right back to Manhattan. If B’s continued stay in Brooklyn were an enforceable obligation under the contract, contemplated by both parties and reflected in the contract itself, A would not be obligated to pay B until B remained in Brooklyn for the specified period of time.\(^{94}\)

The application of this test to the plea bargaining situation allows one to ascertain the precise limits of the defendant’s obligations under a plea agreement. Until the defendant enters the guilty plea in court, the prosecutor is free to revoke her various offers (such as offers to dismiss other charges or to ask for a reduced sentence).\(^{95}\) As soon as the defendant pleads guilty, however, the prosecutor is bound to her promises.\(^{96}\) Thus, the defendant performs completely by pleading guilty in open court, and no more.

The government’s argument to the contrary, in several of the post-Bailey cases, implies that the defendant’s required performance is a combination of pleading guilty and serving the sentence imposed by the court. This argument does not withstand analysis, however, because the government is not free to revoke its offer once the defendant has pleaded guilty. If the government’s argument were to prevail here, a prosecutor would be free to revoke her offer (and reindict on dismissed charges) at any moment until the defendant had completely served his sentence. We know from Santobello that the prosecutor may not do so.\(^{97}\)

Although the classical unilateral contract model works well for analyzing plea agreements, the modern unilateral contract model has

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\(^{94}\) Any implied analogy between Brooklyn and prison is unintended.

\(^{95}\) See supra note 92 and accompanying text.


\(^{97}\) See id.
altered the analysis. Modern contract law has relaxed the harshness of the rules of unilateral contracts as advocated by Wormser, so that in many cases an offeree's partial performance will serve as consideration, binding the offeror to her promise conditional upon the offeree's full performance within a reasonable time. This rule was adopted in section 45 of the first Restatement. The second Restatement builds upon the principles of the first by providing that an option contract is formed "when the offeree tenders or begins the invited performance or tenders a beginning of it." Thus, if Wormser's example is modified to reflect this shift in theory, A is bound to pay B as soon as B starts walking across the bridge, conditional upon B's complete walk across the bridge.

The advent of section 45, then, turned the tables on the offeror in a typical unilateral contract. Whereas Wormser's rule was extremely harsh towards the offeree (because the offeror could revoke her offer after the offeree had already performed 99% of his obligation), the modern rule binds the offeror at the desire of the offeree. Under section 45, "the offeror may be bound once the offeree's performance has begun . . ., but the offeree is not: If the offeree should elect not to complete the performance called for by the offer, no liability on the offeree's part will follow." Again, using the Brooklyn Bridge hypothetical, once B starts walking across the bridge, A is bound to pay B if B finishes the walk, but B is not bound to A at all and can decide to stop walking at any point, for any reason.

The widespread adoption of section 45, then, casts doubt upon the propriety of analyzing plea bargains as classical unilateral contracts. In fact, under a section 45 analysis, the unilateral contract test may even support the government's contention that full performance requires the defendant both to plead guilty and to serve out the entire sentence. The government could argue that the defendant's plea in open court is simply consideration, binding the government to its promises conditional upon the defendant completing performance by serving a specific sentence.

However, the unique characteristics of our criminal justice system preclude this reasoning. If it were true that the defendant's plea in
open court is only consideration, the defendant would not be bound until the entire sentence had been served. Under a section 45 analysis, the defendant would remain free to withdraw his plea at any time prior to the completion of his sentence—for any reason or even no reason—just as B is free to stop walking across the bridge even though A is bound to pay him if he reaches Brooklyn. However, the Federal Rules of Criminal Procedure mandate that once a defendant has entered his plea in open court and has been sentenced, he generally may not withdraw it, \(^{101}\) and certainly may not withdraw it on a whim, as the section 45 analysis would otherwise allow.

Given that the defendant is bound upon entering the plea, it is disingenuous for the government to argue that the defendant's plea is merely consideration for the unilateral contract and that the government is bound only if the defendant serves the entire sentence imposed by the court. If the plea itself were only consideration under section 45, and full performance were to require serving the entire sentence, then serving the sentence would have to be optional. Serving the sentence, however, clearly is not optional for the defendant. He is obligated to remain incarcerated once sentenced, an obligation that stems from the court's sentence, not from the defendant's plea agreement with the government. \(^{102}\) The defendant goes to prison because the judge issues an order to that effect; later, if the defendant is informed of a favorable Supreme Court decision, a bed shortage caused by prison overcrowding, \(^ {103}\) a regularly scheduled parole hearing, or any other means that might lead to release from prison earlier than anticipated, he is free to take advantage of that circumstance because he has long since fulfilled his obligations to the prosecutor. It follows, then, that the plea itself is not only binding consideration, but also complete performance of the plea agreement. \(^ {104}\) This conclusion

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\(^{101}\) See Fed. R. Crim. P. 32(e):
If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255. (emphasis added).

\(^{102}\) See supra text accompanying note 73.

\(^{103}\) For a discussion of prison overcrowding and early parole, see infra notes 134-46 and accompanying text.

\(^{104}\) The Rodriguez court reached the same conclusion, but the court found dispositive the fact that Rodriguez's plea agreement—like the plea agreements of the other post-Bailey defendants—contained no express provision prohibiting the defendant from collaterally attacking her conviction. See Rodriguez v. United States, 933 F. Supp. 279, 281 (S.D.N.Y. 1996). The court thus held that Rodriguez's only obligation under the agreement was to plead guilty, an obligation that she fulfilled. See id. In rejecting the government's argument that her habeas petition was a tacit repudiation of the contract, the court emphasized that attacking her conviction did not necessitate her recanting any of the facts
firmly precludes the reasoning of the Viera, Barron, and Gaither courts, which depended upon the notion that the defendant has an obligation under the plea agreement to serve out the entire sentence. When, as in the typical plea bargaining situation, one party's basic assumption is not identical to the other party's obligation, such that the obligation can be met but the assumption thwarted, rescission of the contract is simply not warranted on the grounds of material breach or impracticability.

Given that the government's arguments of material breach and impracticability are untenable and that the post-Bailey defendants have fully performed their obligations under the plea agreements, the government has only one potential argument remaining. The government may argue that one of its primary reasons for entering into the plea agreement—to incarcerate the defendant for a particular period of time—has been disappointed. The seldom used doctrine of "frustration of purpose" was developed to address precisely the dilemma at issue in the post-Bailey cases: performance on both sides is possible, but the contract has lost value to one of the parties as a result of an unforeseen intervening circumstance. Although not employed by any of the post-Bailey courts thus far, the doctrine of frustration may present the government's best case for relief.

III
EVALUATING THE GOVERNMENT'S DISAPPOINTMENT: THE CASE FOR FRUSTRATION OF PURPOSE

The famous English case of Krell v. Henry\(^ {105} \) presents a paradigm...
matic application of the doctrine of frustration. The plaintiff Krell advertised rooms for rent overlooking the parade celebrating the coronation of King Edward VII. Henry agreed to pay Krell an inflated price because of the momentous nature of the event and the shortage of viewing space. When the King fell ill and the parade was canceled, the room became useless to the defendant, who refused to pay for it.106 Recognizing that the room had lost all value to the defendant, the court exercised the doctrine now known as “frustration of purpose,” or simply “frustration,”107 to excuse the defendant from his duties under the contract.108

American courts have applied the doctrine of frustration infrequently,109 which might explain the lack of attention it has received in the post-Bailey cases. Nevertheless, if there is any contract doctrine designed to provide relief for a contractor in the government’s situation, it is this one.110

106 See id. at 741.
107 See Restatement (Second) of Contracts § 265 (1981):
Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
108 See Krell, 2 K.B. at 754.
109 Compare Arthur Anderson, Frustration of Contract—A Rejected Doctrine, 3 DePaul L. Rev. 1, 1 (1953) (asserting that doctrine had not yet been adopted into American law), and Nicholas R. Weiskopf, Frustration of Contractual Purpose—Doctrine or Myth?, 70 St. John’s L. Rev. 239, 242 (1996) (describing current state of law as extremely reluctant to rescind contracts because of frustration), with Patterson, supra note 69, at 951 (“The [frustration doctrine] is too well established . . . in the United States[ ] to be rejected as a temporary aberration.”), and T. Ward Chapman, Comment, Contracts—Frustration of Purpose, 59 Mich. L. Rev. 98, 122 (1960) (explaining that, while not many American courts are inclined to apply doctrine, it has indeed been adopted into American law).
110 A related doctrine is the doctrine of mutual mistake, which allows for relief if the parties contracted with each other under a belief which later proved to be erroneous. See Restatement (Second) of Contracts § 153 (1981). While the government might be tempted to argue that the Supreme Court’s decision in Bailey demonstrates that both parties were mistaken as to the ultimately correct interpretation of section 924(c), in reality they were correct about current interpretation of the statute and simply did not anticipate the Supreme Court’s subsequent reinterpretation. The case law is clear that for a claim of mistake to succeed, the parties must have had erroneous beliefs about facts or law existing at the time of the contract. See, e.g., Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 207 (Mich. 1982) (stating that for valid claim of mistake, “[t]he erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed”). Thus, neither party was actually mistaken about the definition of firearm “use” under section 924(c) at the time of the contracting. But see United States v. Lewis, 964 F. Supp. 1513, 1521 (D. Kan. 1997) (holding that parties were mutually mistaken as to interpretation of section 924(c) and therefore defendant has option of withdrawing plea and facing reindictment or remaining incarcerated).

Even if a court finds mutual mistake, it ought to find that the government had assumed the risk of such a “mistake.” Part III.C infra discusses the assumption of risk ques-
While the reasoning of the Viera and Barron courts does not support an argument for defendant breach or impracticability, it does provide a basis for the government to argue under the doctrine of frustration. The courts referred to the defendants' incarceration respectively as the "very heart"\(^{111}\) of the plea agreements and as a "key component"\(^{112}\) of the government's expectations under the contracts. Each court then concluded that the defendant's freedom from incarceration reflected his failure to satisfy a basic obligation under the contract.\(^{113}\) Although that particular conclusion is logically and legally unsound, the facts in the typical post-Bailey scenario do indicate a possibility of frustration of the government's contractual purpose. The Restatement notes that when the purpose of a contract is frustrated substantially, "[a]lthough there has been no true failure of performance in the sense required for the application of the rule [regarding breach of contract], the impact on the party adversely affected will be similar."\(^{114}\) The government might argue that the effect of Bailey on the government's expectations is similar to the effect of a defendant's outright breach of the contract.

The Viera and Barron courts emphasized that the government's principal purpose in making the deals was to secure the defendants' incarceration.\(^{115}\) The government undoubtedly would not have entered into the plea agreement had it known that the defendants would be released prior to completing their sentences. Under this reasoning, the unanticipated, intervening Supreme Court decision releasing defendants convicted under section 924(c) is precisely the type of frustrating event contemplated by the drafters of the Restatement. Under the doctrine, then, the government could argue that its remaining contractual duties ought to be discharged, and that it should be free to reindict the defendants on the dismissed charges.

On a superficial level, the government's frustration claim appears to be sound. However, although courts indeed have incorporated the doctrine of frustration into American law, they have applied it only


\(^{113}\) See id.; Viera, 931 F. Supp. at 1228.

\(^{114}\) Restatement (Second) of Contracts § 265 cmt. a (1981).

\(^{115}\) See Barron, 940 F. Supp. at 1493; Viera, 931 F. Supp. at 1228.
under the most extreme circumstances. Their reluctance to use the doctrine probably stems from a belief that the doctrine "results in an unwarranted judicial remaking of the contract." As one commentator stated, the doctrine "should be, and generally is, a safety valve which is moved only by the pressure of war and other catastrophic events." Aside from their general reluctance to use the doctrine to excuse a contract in which both parties are able to perform or have performed, courts apply the doctrine of frustration only when satisfied that certain rigorous criteria have been met. Specifically, they require that, first, the purpose frustrated be the principal purpose of the contract; second, the frustration be substantial; third, the nonoccurrence of the frustrating event be a basic assumption at the time of contract formation; and last, the frustrating event not be the fault of the party invoking the doctrine. Assuming that a post-Bailey defendant does not have a colorable claim that the holding in Bailey was the fault of the government, the following analysis focuses on the first three elements of a frustration claim.

A. The Principal Purpose

Any frustration analysis must begin by ascertaining the principal purpose of the contract for the party seeking relief. The government has several purposes in entering into a plea agreement with a defendant, purposes that fall roughly into two categories. One category consists primarily of what I will call "procedural" purposes, including the efficient allocation of valuable time and resources (which is accomplished by offering plea bargains to a very high percentage of criminal defendants), the minimization of risk (that the defendant will be acquitted if the case goes to trial), and, most importantly,

116 "[A] careful look at a fairly broad representative sampling reinforces the notion that a party showing nothing more than unilateral frustration-in-fact is highly unlikely to be even partially excused from contractual performance." Weiskopf, supra note 109, at 261.
117 Chapman, supra note 109, at 109.
118 Patterson, supra note 69, at 954.
119 Although there is no explicit requirement in the Restatement or in most of the frustration case law that the contract be executory in order for the doctrine to be applicable, at least one commentator has suggested that such a requirement indeed exists. See Chapman, supra note 109, at 100. Despite the fact that the defendants in the post-Bailey cases have performed their duties under the contract, the government's obligation—not to press any further charges in relation to the underlying facts of the crime to which the defendant has pleaded guilty—is continuous. Thus, the plea agreements in the post-Bailey cases are executory.
120 See Restatement (Second) of Contracts § 265 cmt. a (1981).
121 See Scott & Stuntz, supra note 35, at 1914.
122 See id. at 1935.
the establishment of the defendant's legal culpability. The second category consists of what I will call "substantive" purposes, including the penological objectives which underlie most criminal prosecutions: retribution, rehabilitation, incapacitation, general deterrence, and specific deterrence. The procedural purposes of a plea agreement are satisfied as soon as the defendant pleads guilty in court; satisfaction of the substantive purposes, for the most part, depends upon the defendant's incarceration. Most plea bargains, as far as the government is concerned, include a combination of procedural and substantive purposes.

The frustration doctrine, however, insists that the principal purpose of the contract be frustrated, and the case law and Restatement are clear that courts shall construe "principal" narrowly. In determining the principal purpose of the contract, the Restatement notes, "It is not enough that [the frustrated party] had in mind some specific object without which he would not have made the contract." In other words, the fact that the government almost certainly would not have entered into the contract with the post-Bailey defendants had it foreseen the Bailey decision does not mean that the defendants' incarceration was the principal purpose of the contract. In fact, the argument that the government's substantive purposes constitute the principal purpose of the contract—such that the defendants' release from prison frustrates the contract's entire purpose for the government—proves to be an argument with far reaching and un-

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123 Establishment of legal culpability is the resolution of the factual questions involved in the case. A trial is a fact-finding enterprise; the plea entry removes the factual questions from the case.


125 See Restatement (Second) of Contracts § 265 cmt. a (1981).

126 See, e.g., Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 205 F.2d 103, 105 (2d Cir. 1953) (denying frustration claim where buyer was still able to purchase printing presses but, due to unanticipated government regulations, could no longer export them to Russia, as originally intended); Popper v. Centre Brass Works, Inc., 43 N.Y.S.2d 107, 108 (N.Y. City Ct. 1943) (denying glass coal buyer's frustration claim despite war regulations that thwarted purpose of purchase); Sechrest v. Forest Furniture Co., 141 S.E.2d 292, 294 (N.C. 1965) (denying frustration claim where defendant buyer no longer needed drawers for factory that had burned down unexpectedly); Restatement (Second) of Contracts § 265 cmt. a (1981) (stating that purpose "must be so completely the basis of the contract that . . . without it the transaction would make little sense").

127 Restatement (Second) of Contracts § 265 cmt. a (1981).
acceptable implications. An example from a commercial contracts case illustrates this point.

In *Karl Wendt Farm Equipment Co. v. International Harvester Co.*, International Harvester ("Harvester") entered into a franchise agreement with Karl Wendt Farm Equipment ("Wendt"), pursuant to which Wendt distributed Harvester equipment. A "dramatic downturn in the market for farm equipment" forced Harvester to sell its assets to another company which decided not to continue the franchise agreement with Wendt. When Wendt sued Harvester for breach of contract, Harvester defended by arguing that it should be excused from its contractual obligations because the recession had rendered its entire business unprofitable, thereby substantially frustrating the purpose of its contract with Wendt. Harvester claimed that the principal purpose of the contract was "mutual profitability," a purpose arguably analogous to the "substantive" purposes of a plea bargain in that it relates to an ultimate goal of the contract, rather than to a procedural means of achieving that goal. The court disagreed, explaining that the principal purpose of the contract—at least in a frustration analysis—was procedural: to establish the terms of the franchise arrangement and the terms of interaction between the respective parties. "If [Harvester's] argument were to be accepted," the court reasoned, "the 'primary purpose' analysis under the Restatement would essentially be meaningless as 'mutual profitability' would be implied as the primary purpose of every contract."

The government's argument that its principal purpose in entering into a plea agreement with a defendant is to fulfill the penological objectives inherent in any criminal prosecution fails for the same reason that Harvester's argument failed in *Karl Wendt*: calling substantive penological objectives the "primary purpose" of any given plea agreement would render the analysis meaningless because such objectives are common to every plea agreement. If the government's argument were accepted, every time a plea-convicted defendant is released from prison earlier than contemplated by the government, the government could claim frustration and reindict on previously dismissed charges. Several examples illustrate why this proposition is unacceptable.

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128 931 F.2d 1112 (6th Cir. 1991).
129 Id. at 1114.
130 See id. at 1119-20.
131 Id. at 1119.
132 See id.
133 Id. at 1120.
As a primary example, defendants who have yet to serve their entire sentences are released on parole every day. No one seriously would suggest that the government could reindict these parolees on previously dismissed charges on the theory that they have violated their plea bargains.\textsuperscript{134} Even if the government contemplates the prospect of parole during the plea negotiations and factors that possibility into the offer eventually extended to the defendant, many cases demonstrate the regularity with which sudden and unanticipated prison overcrowding leads to parole for inmates far earlier than expected by either party at the time of the plea.\textsuperscript{135} Presumably, the government would never claim that these parolees have breached their plea agreements. On the contrary, the inmates have simply received a lucky break.

One might argue, however, that while parolees are no longer incarcerated, they remain within the control of the criminal justice system and they remain convicted, as opposed to post-Bailey defendants such as Madeline Rodriguez,\textsuperscript{136} who have had their convictions reversed and have been released outright. This formal distinction pales in comparison to the distinction between outright release, as occurred in Rodriguez, and reindictment on several serious charges carrying potentially large sentences, as occurred in Viera and Barron. Parolees, particularly those who never violate the law again, can live lives

\textsuperscript{134} The U.S. Sentencing Commission abandoned parole for federal criminal defendants when it enacted the Sentencing Guidelines in 1984. Nevertheless, virtually every state has retained some form of parole. See, e.g., Cal. Penal Code § 3040 (West 1997) (permitting parole at discretion of parole board); Mass. Gen. Laws Ann. ch. 127, § 133 (West 1997) (same); N.Y. Penal Law § 70.40 (McKinney 1997) (same). In addition, defendants convicted in federal court prior to 1984 are eligible for regular parole, and such cases routinely arise. Nevertheless, the post-Bailey issue that concerns this Note arises in the context of federal courts only because the statute which the Supreme Court reinterpreted in Bailey happened to be a federal statute. This issue is just as likely to arise when a defendant convicted in state court collaterally attacks his or her conviction in federal district court.

\textsuperscript{135} See, e.g., Young v. Harper, 117 S. Ct. 1148, 1150 (1997) (describing Oklahoma's "Preparole Conditional Supervision Program," which allows for early release of prisoners whenever "population of the prison system exceed[s] 95% of its capacity"); Dugger v. Grant, 610 So. 2d 428, 429 (Fla. 1992) (explaining and citing portions of Florida statute that provide for accelerated parole for certain inmates "[w]henver the inmate population of the correctional system reaches 97.5 percent of lawful capacity"); see also Linda Greenhouse, Inmate on Release Program Deserves Due Process, High Court Says, N.Y. Times, Mar. 19, 1997, at A19 (reporting that more than 12 states have programs that are "governed by a formula requiring the release of a certain number of prisoners as the prison system approaches capacity"). The phenomenon of prison overcrowding leading to early parole is often referred to as "bed pressure." See Editorial, What Do We Do When Our 12-Year-Olds Start Showing Up in Court for Murder?, Buffalo News, Nov. 18, 1996, at B2, available in 1996 WL 5880820 (explaining that "bed pressures" often lead to early release for juveniles incarcerated in state detention facilities).

\textsuperscript{136} See supra text accompanying notes 1-17.
substantially similar to the lives led by people who have been released outright.\textsuperscript{137} Persons who have been reindicted, convicted, and sentenced for charges previously dismissed obviously cannot. A variation on this argument is that the defendants in the prison overcrowding cases have only partially, and not materially (or totally),\textsuperscript{138} breached their contracts, which would not necessarily require granting relief to the government.\textsuperscript{139} Contract law's distinction between material and partial breaches, however, rests at least in part on the effect of the breach on the party seeking relief.\textsuperscript{140} In both the prison overcrowding cases and the post-\textit{Bailey} cases, the effect on the government is substantially similar.\textsuperscript{141} Thus, if the post-\textit{Bailey} defendants are breaching their contracts materially, so must be the early parolees.

Another potential challenge to the prison overcrowding analogy is the fact that the post-\textit{Bailey} defendants must take the affirmative step of initiating habeas corpus review, whereas the parolees are practically thrown out of prison to make room for new inmates. Unlike the parolees, the argument goes, the post-\textit{Bailey} defendants are "responsible" for the fact that they are in a situation that neither party contemplated at the time of the plea. This reasoning has two flaws. First, even those inmates paroled during a bed shortage crisis must apply for parole. They are not simply handed the keys to their cells one day.\textsuperscript{142} The fact that the parole hearing is simply a formality is no response: the summary grant of habeas relief for post-\textit{Bailey} defendants, of course, are restricted in some ways that nonparolees are not. For example, parolees often have to report to probation officials on a periodic basis and must refrain from associating with people with criminal records. Most release conditions for parolees, however, involve restrictions on criminal activity. See Gray Cavender, Parole: A Critical Analysis 49-55 (1982) (describing parole conditions in various jurisdictions).

The terms "total" and "material" breach are often used interchangeably. More precisely, however, "[a] breach is total if the breach is material and the breaching party either cannot correct or fails to correct or 'cure' the breach within a reasonable period of time." Knapp & Crystal, supra note 100, at 854. For the purposes of a post-\textit{Bailey} analysis, there is no practical difference between a material and a total breach.

A partial breach does not generally discharge the nonbreaching party's obligations under the contract. See id. Thus, a defendant's partial breach would not necessarily discharge the government from its obligation to refrain from reindicting. A material, or total, breach, on the other hand, immediately discharges the nonbreaching party from its contractual obligations. See id.

See Restatement (Second) of Contracts § 241 (1981) (describing circumstances to take into account in order to determine materiality of breach).

The Supreme Court recently rejected, in a different context, another potential argument that parole due to prison overcrowding is somehow different from normal parole. Justice Thomas, writing for a unanimous court in Young v. Harper, 117 S. Ct. 1148, 1152-53 (1997), called such differences "phantom" and "non-existent."

See, e.g., Dugger v. Grant, 610 So. 2d 428, 429-30 (Fla. 1992) (describing procedure by which inmates can take advantage of prison overcrowding by applying for parole earlier than previously allowed).
dants whose behavior clearly does not fall within the ambit of section 924(c) is similarly perfunctory. Second, and perhaps more important, the argument that the post-Bailey defendants are somehow culpable for their collateral success is simply not compelling. When the Supreme Court decided Bailey, it did not intend for inmates wrongly convicted under section 924(c) to remain incarcerated, whether they had pleaded guilty or not. As the Supreme Court proclaimed in Blackledge v. Allison, "[A] prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ [of habeas corpus] in challenging the constitutionality of his custody." The fact that the post-Bailey defendants had to file habeas petitions to gain release ought not be held against them. In the words of the Gaither court, "the fact that the plea must be vacated under the present circumstances is the responsibility of neither the government nor Defendant, but rather has been dictated by the Supreme Court."

Besides early parole, several other scenarios involve defendants released from prison earlier than the government anticipated at the time of the plea entry. For instance, as discussed earlier, the trial judge will occasionally impose upon the defendant a sentence more lenient than that requested and expected by the government. To hold that a defendant who has received a more lenient sentence from the trial judge has breached his or her plea agreement with the government—even though an implicit assumption of the agreement was that the defendant would receive the harsher recommended sentence—would be a blatant violation of due process.

Another example is the granting of clemency to a particular defendant. During the last two decades, over one hundred battered women who killed or seriously injured their batterers have been

145 Id. at 72.
146 Gaither, 926 F. Supp. at 53.
147 See supra note 74 and accompanying text (noting that trial judge is not bound by government's sentence recommendation).
148 See Schulhofer, supra note 33, at 1994 n.54 ("Judges can always impose a sentence lower than the one negotiated by the parties, unless there is an applicable mandatory minimum."); Scott & Stuntz, supra note 35, at 1953 (explaining that "[a] prosecutor can promise to recommend a given sentence (or sentencing range), but she cannot guarantee that the defendant will actually receive that sentence").
granted clemency. In these cases, an official with clemency power (usually a state governor) determines that the defendant no longer should remain incarcerated for his or her actions; as a result, that defendant is released from prison. Most often, clemency is granted long after the prosecution of the defendant has ended and, in many cases, in the face of active opposition from the prosecutor.

The principal purposes of the plea agreement, then, cannot be substantive penological objectives because such purposes are common to every plea agreement and are frustrated frequently in cases where the government would never be permitted to reindict. Thus, it follows that the "principal" purposes of the contract for the government, according to a Restatement analysis, must be the procedural ones, namely resolving the factual questions in the case. In other words, although the government encourages guilty pleas to effect a variety of penological objectives, its "principal" purpose is to have the defendant stand up in court and admit to certain behavior. This purpose is by no means frustrated when a subsequent Supreme Court decision renders a conviction invalid as a matter of statutory interpretation.

B. Substantial Frustration

Even if a court finds that the defendant's incarceration was the government's principal purpose in entering into a plea agreement, it is not clear that a successful collateral attack substantially frustrates this purpose. As with the definition of "principal," the case law and Restatement strictly define "substantial," holding the party claiming frus-

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150 See id. (reporting that Governor of New York agreed to grant clemency to Brundidge after his wife took "special interest" in case); cf. Marshall Frady, Death in Arkansas, New Yorker, Feb. 22, 1993, at 105 (reporting then-Governor Bill Clinton's refusal to grant clemency for mentally retarded Death Row inmate Rickey Ray Rector).

tration to an extremely high burden. Given this burden, the post-
Bailey defendants have two solid grounds for arguing that the govern-
ment's purpose was not substantially frustrated.

The first argument is that many of the post-Bailey defendants
have already served large portions of their sentences and therefore
have substantially satisfied the government's purpose of incarcera-
tion. The Restatement explains that in order for the frustration to be substantial, "it is not enough that the transaction has become less
profitable for the affected party or even that he will sustain a loss." In the post-Bailey cases, the contract simply has become less profit-
able for the government. Instead of receiving from the defendant a
prison term of, for example, ten years, the government receives five
years. Of course, not all defendants released subsequent to success-
ful collateral attacks have served a substantial portion of their
sentences, but under the frustration case law, it would take a severe
reduction of the defendant's sentence to qualify as "substantial" in
this context.

See infra note 157 and accompanying text.

See, e.g., Rodriguez v. United States, 933 F. Supp. 279, 282 (S.D.N.Y. 1996) (noting that defendant had served more than half of original sentence). It is difficult to determine precisely how long each post-Bailey defendant has been incarcerated, but Madeline Rodriguez is most likely a typical example.

Restatement (Second) of Contracts § 265 cmt. a (1981).

The contract also has become less profitable for the government in terms of the penological objectives of retribution, rehabilitation, and incapacitation. The other peno-
logical objectives underlying the prosecutor's desire for incarceration, however, are not
necessarily thwarted by the defendant's release pursuant to Bailey. For example, the
general deterrent effect of the now-invalid section 924(c) conviction remains intact. Foolish
would be the person who broke the law in reliance upon the possibility of a subsequent
Supreme Court opinion that might reinterpret the statute violated. Neither does a
post-Bailey release upset the goal of specific deterrence. A defendant such as Madeline
Rodriguez, who no doubt appreciates her good fortune, would be unlikely to rely on the
prospect of another favorable Supreme Court reinterpretation in deciding whether or not
to break the law again.

The Rodriguez court emphasized that the defendant had already served more than
half of her ten-year, three-month sentence on her plea conviction. See Rodriguez, 933 F.
Supp. at 282. The court stated that Rodriguez had "suffered a severe detriment that will
not be erased with the vacating of the section 924(c) count." Id. In other words, allowing
the government to reindict Rodriguez after she already had served time for an invalid
conviction would have added insult to injury. The court did not recognize explicitly, how-
ever, that while Rodriguez indeed had served "more than half" of the 123 months, see id.
at 282, 63 of those months were for the conspiracy count which was left unaffected by the
Bailey decision. Although it is unclear whether the Rodriguez court would have allowed
the government to reindict had Rodriguez not already begun serving her sentence, the
heart of the opinion appears to be the court's firm belief that Rodriguez did not breach her
agreement with the government in any way.

See, e.g., Pete Smith Co. v. City of El Dorado, 529 S.W.2d 147, 148-49 (Ark. 1975) (rejecting frustration claim of company that had contracted to construct golf course and had to spend significantly more money than anticipated due to substantial erosion caused
The second reason that the government might have a difficult time persuading a court that its frustration was substantial arises from the practice of prosecutorial "overcharging." Professors Westen and Westin explain the process of overcharging as follows: "[T]he prosecutor charges a defendant with an offense that—though supported by evidence and regularly charged against other defendants similarly situated—is more serious than the prosecutor believes is justified by the nature of the defendant's conduct."158 The prosecutor uses these "overcharged" offenses as leverage to induce the defendant to plead guilty. Westen and Westin decry this common159 practice because "the state, speaking through a representative possessing final authority to so announce, admits that it has no interest in charging the defendant with a particular offense except to penalize him for asserting his

158 Westen & Westin, supra note 34, at 486 n.65. Overcharging in capital cases is widely recognized and often criticized. For discussion of a particularly poignant example of overcharging in the capital context, see Janet McConnaughey, Innocent Man Leaves Prison Life of 30 Years, S.F. Examiner, May 16, 1997, at A15 (reporting release of innocent man, Hayes Williams, who spent 30 years in prison after pleading guilty to second-degree murder in order to avoid death penalty threatened by prosecutors); see also E. Michael McCann, Opposing Capital Punishment: A Prosecutor's Perspective, 79 Marq. L. Rev. 649, 669-75 (1996) (criticizing, from perspective of career prosecutor, overcharging in capital cases).

159 See George E. Dix, Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions, 1975 Wash. U. L.Q. 275, 353 & n.247 (noting "general recognition that the danger of . . . overcharging exists"). Professor Dix adds that the ethical guidelines for prosecutors have "carefully steer[ed] clear of prohibiting charges or threats of charges that are not statistically unusual but are frequently employed to 'encourage' pleas of guilty, and [have] not prohibit[ed] representations to a specific defendant that his sentence will be less severe if he pleads guilty than if he stands trial." Id. at 354 n.247; see also Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 864-65 (1995) (describing how ethical guidelines make room for practice of overcharging). For a more strident critique of overcharging, see Abraham S. Goldstein, Converging Criminal Justice Systems: Guilty Pleas and the Public Interest, 49 SMU L. Rev. 567, 571 (1996):

Prosecutors . . . cannot be relied on to protect the public interest because they have their own agendas, both personal and administrative. They may be "overcharging" because witnesses may have become incredible or are no longer available; they may be using a serious charge for which there is no substantial evidence in order to induce pleas to lesser charges; they may be asserting correctional considerations that might best be left to the judge as bases for reducing charges; or they may be abusing their power to cumulate offenses and potential sentences.

Id.
constitutional right [to go to trial]." The practice of overcharging, therefore, tends to weaken the government's claim that its failure to secure the defendant's incarceration on the section 924(c) charge renders the purpose of the contract substantially frustrated.

Overlooking the practice of overcharging, the Viera and Barron courts based their opinions upon the unwritten assumption that, in the common situation where a defendant pleads guilty to charge A in exchange for the dismissal of related charges B and C, the government has as strong an interest in punishing the defendant for crimes B and C as it does for crime A. In other words, the courts assumed that the charge to which the prosecutor insists the defendant plead guilty—charge A—is chosen essentially at random from among the several available charges. This assumption is necessary to reach the conclusion that when the Supreme Court declares a defendant ineligible for prosecution under charge A, the purpose of the plea agreement has been frustrated and the government should be permitted to reindict the defendant on charges B and C.

However, the burden of limited resources makes it impossible (and undesirable) for the government to try every defendant on every possible charge. Thus, while the defendant's conduct technically may fall within the scope of charges A, B, and C, the government often does not have a practical interest (though it may have a legitimate interest) in trying the defendant on any of these charges, let alone on all three. Recognizing the role of overcharging leads one to the conclusion that, in most cases, the charge to which a defendant pleads guilty is either the only crime actually committed or the only charge that the government—given both the underlying facts of the crime and the prosecutorial resources available—believes is worth pursuing. The government uses charges B and C solely to induce the defendant to plead guilty to charge A.

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160 Westen & Westin, supra note 34, at 487 n.65.
161 See Scott & Stuntz, supra note 35, at 1935 (noting costs of criminal trials and possible savings made through reaching bargain early in process).
162 This practice is explained best in the context of capital cases. District attorneys often announce their intention to seek the death penalty—even when they do not believe that the death penalty is warranted by the facts of a particular case, and even when they do not believe that they can afford the enormous resources that a capital prosecution requires—in order to induce a defendant to plead guilty to life imprisonment. For a particularly compelling narrative account of this practice, see Pete Earley, Circumstantial Evidence: Death, Life, and Justice in a Southern Town 151-52, 294 (1995) (describing capital defendant's decision to plead guilty and testify against codefendant in exchange for life sentence).
163 The Supreme Court has all but explicitly approved the practice of overcharging. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (affirming conviction where prosecutor threatened to, and eventually did, "overcharge" defendant in order to induce guilty plea).
Overcharging certainly does not occur in every drug prosecution, and the prosecutorial motives behind the charging of the post-
Bailey defendants are not known. However, the frequency of overcharging challenges the assumption of the Barron and Viera courts that the defendants pleaded guilty to charges selected randomly from among their many offenses. It is not clear that the government had as much of an interest in prosecuting the post-
Bailey defendants on the dismissed charges as it did on the section 924(c) charge. Thus, even if a court were to hold that the principal purpose of the contract for the government was to secure the incarceration of the defendant, the government, in most cases, would be hard pressed to prove that this purpose had been substantially frustrated.

Under the second prong of the frustration analysis, then, two empirical arguments suggest that the government's frustration is not substantial. First, many post-
Bailey defendants have already served a substantial portion of their sentences. Second, and more strongly rooted in empirical observation, the specter of prosecutorial overcharging suggests that the government's inability to reindict on dismissed charges does not substantially frustrate the purpose of a plea agreement made in lieu of those charges. These arguments lead to the conclusion that the government should fail on the second prong, as well as the first prong, of a frustration claim.

C. Assumption of Risk

The third prong of a frustration claim, according to the Restatement, requires that "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." In making this determination, courts often look to the foreseeability of the frustrating event, although the Restatement notes that "the mere fact that the event was foreseeable does not compel the conclu-

One career prosecutor has criticized the practice of overcharging, particularly in drug cases:

I have always felt that Prosecutors do a great disservice to themselves by engaging in [overcharging]. I realize that is [sic] is very simple to charge the highest possible classification of a crime and then work downward, but this basically is, in my opinion, a sign of "laziness" and not wanting to thoroughly investigate and think through the case before filing.


164 Restatement (Second) of Contracts § 265 cmt. a (1981).

165 See, e.g., Waldinger Corp. v. CRS Group Eng'rs, Inc., 775 F.2d 781, 786 (7th Cir. 1985) ("[T]he promisor . . . is presumed to have agreed to bear any loss occasioned by an event that was foreseeable at the time of contracting.").
sion that its non-occurrence was not . . . a basic assumption." Nevertheless, a determination of foreseeability often informs an "assumption of risk" analysis. When one party has assumed the risk of the frustrating event, its nonoccurrence cannot be said to be a "basic assumption" of the contract.

In the post-Bailey context, the government's success on the "basic assumption" element of its frustration claim may depend upon the definition of the "frustrating event." One possible candidate for the frustrating event in the post-Bailey context is the defendant's early release from prison. However, prisoners are frequently released from prison earlier than anticipated, whether through imposition of a more lenient sentence than expected, early parole, or a grant of clemency. Given the frequency with which defendants are released from prison prior to the completion of their sentences, a post-Bailey defendant may argue that early release is foreseeable from the government's perspective. Thus, it is fair to say that the government assumed the risk that the defendant would be released from prison earlier than originally anticipated.

As a second alternative, the frustrating event may be defined as the defendant's decision to appeal the conviction by seeking collateral review. If so, the government bears the risk here, too, even when the defendant is convicted pursuant to a plea agreement. Defendants always may appeal potential defects in the plea procedure, such as the voluntary or knowing nature of the plea entry. This right to appeal necessarily puts prosecutors on notice of the possibility that the conviction will be reversed. In jurisdictions where defendants may not waive their right to collateral attack, prosecutors are, by definition, aware of the possibility. In jurisdictions where defendants may waive this right, prosecutors who have not insisted upon such a waiver cannot in good faith claim that they have not assumed the risk that the conviction will be reversed.

166 Restatement (Second) of Contracts § 265 cmt. a (1981); see also Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) ("Foreseeability . . . of a risk does not necessarily prove its allocation.").

167 See Transatlantic, 363 F.2d at 318 ("[T]hat some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs.").

168 See Restatement (Second) of Contracts, ch. 11 Introductory Note, at 311 (1981) ("Determining whether the non-occurrence of a particular event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence.").

169 See supra Part III.A.

170 See supra note 77.

171 The law in most jurisdictions is not clear on this point. See infra note 174 and accompanying text.
Finally, the frustrating event may be defined as the Supreme Court's decision in Bailey. Under this scenario, the best starting point is to determine which party is in a better position to prevent a decision like Bailey—that party bears the risk. Since neither party is in a position to prevent a Supreme Court decision, the party in a better position to minimize its consequences bears the risk. Unlike a commercial setting, neither party in a prosecutorial setting may purchase insurance and thereby assume the risk that an unanticipated event will occur. Having failed to identify the appropriate risk bearer under this approach, the principles that underlie our criminal justice system nevertheless implicitly place the risk on the shoulders of the government. This default position is mandated by the numerous and varied procedural protections our system affords criminal defendants, protections such as the government's extremely high burden of proof at trial and its inability to appeal an acquittal, which are intended to give every benefit of the doubt to the citizen accused of a crime.

Because the defendants have a strong argument that the government is the party that has assumed the risk of a successful collateral attack—regardless of what a court finds the frustrating event to be—the government necessarily fails to demonstrate that the nonoccurrence of the frustrating event was a basic assumption of the contract. The government thus has failed on the final prong of the frustration analysis. In the end, although the frustration doctrine may represent the government's best argument for reindictment, the government will not be able to carry its burden to satisfy the doctrine. In fact, the government likely will fail all three primary prongs of the frustration test in the post-Bailey context.

If courts do begin to decide post-Bailey cases against the government, whether in the manner of the Rodriguez court, or by rejecting a frustration claim, the government may try to avoid this unfavorable result by contracting around the issue. Contractual provisions in the plea agreements may operate in several ways. For example, the government might include a provision that forbids a defendant from collaterally attacking the conviction, as Madeline Rodriguez did. However, it is unsettled whether defendants can waive their right to collateral review, not to mention unsettling to imagine defendants

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173 See id. (discussing allocation of risk in context of frustrated contracts).

174 See Mabry v. Johnson, 467 U.S. 504, 508 (1984) (implying that because pleas that are not "voluntary and intelligent" are suspect and may be invalid, such pleas are always subject to collateral attack). People v. Seaberg, 541 N.E.2d 1022, 1025 (N.Y. 1989), stands for
remaining incarcerated for convictions that are concededly invalid. Another tack might be to include a provision by which the prosecutor reserves the right to reinstate dismissed charges upon the completion of a successful collateral attack. But this provision would have precisely the same chilling effect on a defendant's right to appeal.175

Regardless of the manner in which these types of provisions attempt to preserve means of recourse for the government, they should not be upheld. If the courts do in fact forbid the insertion of such provisions, the government simply will have to bear the risk that a Bailey-type situation will occur again, much the same way that the defendant bears the risk that the trial judge will impose upon him or her a sentence greater than that recommended by the government.176

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175 The Supreme Court, discussing prosecutorial vindictiveness in Blackledge v. Perry, 417 U.S. 21 (1974), explained its concern for the ways in which prosecutors might discourage defendants from appealing their convictions:

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals[,]... the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Id. at 27-28. Because the prosecutor has means at his or her disposal to ensure that indeed only the most "hardy" defendants appeal their convictions, the use of such means is likely to be considered vindictive, or perhaps even unconscionable. If the state cannot ask a defendant to waive his or her constitutional right to collateral review, see supra note 174, it is doubtful that a state can contract for the right to reindict should the defendant prevail on collateral review. For example, in United States v. Shaw, 655 F.2d 168, 171 (9th Cir. 1981), the court refused to allow the government to reindict after the plea-convicted defendant successfully attacked the jurisdictional basis of his conviction. According to the court, "[n]othing in that agreement prohibi[ed] [the defendant] from challenging the court's subject matter jurisdiction. Furthermore, such an explicit prohibition would be unenforceable." Id.

176 See Fed. R. Crim. P. 11(e)(2) (if plea agreement calls for prosecutor to recommend sentence, "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 the plea"); see also 1 Amsterdam, supra note 28, § 211(3) ("Sentencing recommendations are only recommendations. They are the riskiest form of agreements because the judge may not go along with them. Some judges invariably do; some never do; some do or do not, depending on the case." (emphasis added)).
Conclusion

The post-Bailey defendants have withstood the government's contractual attack. The justifications for reindictment explored by the district courts to date—defendant breach and impracticability—are not persuasive. Even a claim of frustration of purpose, which seems to be the government's best argument, ultimately falls short. Thus, no constitutional analysis is necessary to find for the defendants in these cases. The conclusion of this Note is that the government should not be permitted to reindict the post-Bailey defendants on previously dismissed charges.

The defendants here have indeed gotten lucky. But parties to contracts often gain beyond their expectations, and courts have been extremely reluctant to saddle this good fortune with the burden of contractual liability. Professor Weiskopf explains that

[s]uch judicial reluctance ties in neatly with the idea that courts would best leave disparities between contractual objective and contractual realization caused by unavoidable supervening circumstance as they find them, in part because forced judicial reallocation of these so-called “windfall” disparities is of little social or economic utility and could serve as a disincentive to parties who would otherwise be inclined to allocate such disparities for themselves. 177

A purchaser of land who discovers oil the day after the purchase has encountered good fortune, as has a bettor whose team wins because the opponent’s star player suffers an injury. In neither case would the “unlucky” party on the other side of the transaction be entitled to contractual relief; courts are reluctant to intervene even when one party’s expectations have been dashed.

All contracts, plea agreements certainly included, are to some extent allocations of risk and attempts to minimize risk. 178 Occasionally, a contractor will miscalculate the levels of risk involved in a particular transaction and subsequently will have to bear the consequences of an unfortunate investment. If the miscalculation was due to some particularly discernible unfairness, there are several doctrines in contract law—duress, unconscionability, impossibility, impracticability, and frustration of purpose, to name a few—that may provide relief. But in the vast majority of cases, the aggrieved party will find no solace in the harsh world of contract law.

The only discernible difference between a post-Bailey defendant and the serendipitous purchaser of land or the fortunate bettor is that

177 Weiskopf, supra note 109, at 270-71.
the former is a criminal defendant. It may be somewhat disconcerting to allow criminal defendants to experience such good fortune, especially if doing so means releasing them from prison. Fundamental rules of contract law apply to all contractual parties, however, without regard to social status. We may cheer the lottery winner who has spent her life caring for her poverty-stricken family, and we may frown upon the lottery winner who has spent her life gambling away her family's future, but in the end, both are entitled to the benefits of their good fortune. To claim that the post-Bailey defendants have breached their plea agreements—even though they have entirely performed their contractual obligations by pleading guilty in open court—is the most pernicious form of result-driven jurisprudence, because it arbitrarily removes from the protection of the law a certain class of people, namely those who have been accused of crimes.179 As the post-Bailey cases continue to flow through the courts, and as courts confront similar Bailey-type cases resulting in successful habeas petitions, these courts should follow the lead of the Rodriguez court and reject the government's contrived justifications for reindictment.

POSTSCRIPT

As this Note was going to press, the Ninth Circuit in United States v. Sandoval-Lopez180 became the first appellate court to decide this post-Bailey issue. In a unanimous decision written by Judge Reinhardt, the court held that a defendant's successful collateral attack does not amount to a breach of a plea agreement permitting the government to re-indict on the dismissed charges.181

179 And, as my overcharging analysis suggests, the "luck" of the post-Bailey defendants may not even be as random as the luck of a lottery winner. See supra text accompanying notes 158-63.

180 Nos. 96-30249, 96-30250, 1997 WL 448264 (9th Cir. Aug. 8, 1997).

181 See id. at *5.