

CONFESSIONS INDUCED BY BROKEN GOVERNMENT PROMISES

WELSH S. WHITE†

[T]hose who acknowledge their complicity in a killing must be baited by detectives with something more tempting than penitence. They must be made to believe . . . that they will, with the help of the detective, be judged less evil than they truly are.¹

INTRODUCTION

Withrow v. Williams,² one of the U.S. Supreme Court's 1993 habeas corpus decisions,³ provides a striking example of a confession induced by an apparently broken government promise. In that case, two police officers, Sergeant Early and Sergeant Ondejko, took Robert Allen Williams, Jr. to the police station for questioning about a fatal shooting. The officers questioned Williams for about forty minutes without giving him *Miranda* warnings. During this questioning, the officers assured Williams that their only concern was to learn the identity of the shooter.⁴ Al-

† Professor of Law, University of Pittsburgh. I would like to thank Albert Alschuler, Yale Kamisar, James Tomkovicz, and Rhonda Wasserman for helpful comments they made on earlier drafts of this Article and David Paul and Anne Salzman for their excellent research assistance.

1. DAVID SIMON, HOMICIDE 198 (1991).

2. 113 S. Ct. 1745 (1993).

3. In *Williams*, the Court held that "[*Stone v. Powell's*, 428 U.S. 465 (1976),] restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda v. Arizona*], 384 U.S. 436 (1966)]." *Id.* at 1748.

4. *Id.*; *Williams v. Withrow*, 944 F.2d 284, 286 (6th Cir. 1991), *aff'd in part, rev'd in part*, 113 S. Ct. 1745 (1993).

though he at first denied any involvement, Williams soon made several incriminating admissions, including that he had supplied the murder weapon to the killer.⁵ The officers then warned Williams of his *Miranda* rights and Williams waived them.⁶

After receiving the *Miranda* warnings, Williams asked the officers if he could walk out if he told everything. Sergeant Early responded with an explicit promise: "I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk."⁷ Williams then made a statement identifying the killer and explaining his own role in the crime.⁸ After hearing this statement, Sergeant Early reiterated that Williams would not be charged if the polygraph test showed he was telling the truth.⁹

Despite Sergeant Early's promise, Williams was subsequently charged with first degree murder.¹⁰ Both the statements he made prior to receiving the *Miranda* warnings and the statement he made after waiving his rights and receiving the commitment from Early were admitted into evidence,¹¹ and Williams was convicted of first degree murder. The Michigan state courts affirmed his conviction.¹²

The federal district court granted Williams's application for a writ of habeas corpus, ruling that the statements obtained prior to the warnings were inadmissible under *Miranda* and that the statement given after Sergeant Early's promise was involuntary.¹³ The U.S. Court of Appeals for the Sixth Circuit affirmed both

5. *Williams*, 113 S. Ct. at 1749.

6. *Id.*

7. *Williams*, 944 F.2d at 286.

8. Williams explained that he drove the killer to the murder scene; that, in compliance with the killer's request, he turned the car around; that he heard shots; and that he drove the killer away from the murder scene and helped him dispose of clothing and the murder weapon. *Id.*

9. Before taking a formal statement from Williams, Early said to him, "After you're done with this, we still gonna put you on a polygraph and you're gonna have to show us you're telling the truth. So that's the deal. You're telling the truth and you're not being charged." *Id.* at 287.

10. No reason was given for the government's failure to honor the commitment made to Williams. It was not stated whether the officers failed to allow Williams to "walk" because they never intended to adhere to the commitment, because their superiors refused to honor it, or because Williams flunked the lie detector test, thus failing to fulfill his end of the bargain.

11. *Withrow v. Williams*, 113 S. Ct. 1745, 1749 (1993).

12. *See People v. Williams*, 429 N.W.2d 649 (Mich. Ct. App. 1988).

13. *Williams*, 944 F.2d at 287-88.

holdings. As to the statement given after Sergeant Early's promise, the Sixth Circuit did not refer to the government's apparent failure to honor the commitment Early made to induce the confession. Instead, the Sixth Circuit essentially accepted the lower court's conclusion that "the statement that [Williams] would 'walk' if he told the truth constituted a promise of leniency sufficient to overcome [Williams's] will and render his admissions involuntary."¹⁴ The U.S. Supreme Court affirmed the Sixth Circuit's ruling excluding Williams's statements made prior to the *Miranda* warnings¹⁵ but declined to consider the admissibility of Williams's later statement on the merits,¹⁶ thus failing to clarify the circumstances under which a confession induced by a police promise will be barred by the Due Process Clause.¹⁷

To those unfamiliar with confession cases decided under the Due Process Clause of the Fourteenth Amendment,¹⁸ the Sixth

14. *Id.* at 288. The Sixth Circuit stated that, based on its evaluation of "the entire course of police conduct," including the promise that Williams would be released if he talked, Williams's statements were not voluntary. *Id.* at 289 (quoting *Oregon v. Elstad*, 470 U.S. 298, 318 (1985)).

15. *See Williams*, 113 S. Ct. at 1750-55. The Court rejected the argument that a federal habeas court should not be permitted to review a state court's determination that a defendant's statement was taken in violation of *Miranda*. The Court reasoned that state prisoners could simply convert such barred *Miranda* claims into due process claims. *Id.* at 1754-55.

16. The Court held that the district court should not have considered whether Williams's statement was voluntary because that question had not been raised in his federal habeas petition. *Id.* at 1755-56.

17. The Court had granted *certiorari* in *Williams* to decide whether the lower court's ruling that Williams's confession was involuntary constituted a new ruling within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). *See Williams*, 113 S. Ct. at 1756 n.8. In *Teague*, a plurality of the Court concluded that, unless one of two narrowly drawn exceptions is present, new constitutional rules of criminal procedure will not be applicable on habeas corpus to cases that were finally decided before the new rule was announced. *See Teague*, 489 U.S. at 307-10 (opinion of O'Connor, J.). Under *Teague* and its progeny, a criminal procedure decision is new if it was not "dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (opinion of O'Connor, J.); *see Butler v. McKellar*, 494 U.S. 407, 412-15 (1990). Thus, to resolve the *Teague* issue presented in *Williams*, the Court would have had to determine whether the Sixth Circuit's conclusion that Williams's confession was involuntary was "dictated by [the] precedent" in existence at the time Williams's state court conviction became final. *See generally* John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1991).

18. *See, e.g., Culombe v. Connecticut*, 367 U.S. 568 (1961) (plurality opinion) (finding that the admission of an involuntary confession violated due process); *Spano v. New York*, 360 U.S. 315 (1959) (same); *Brown v. Mississippi*, 297 U.S. 278 (1936) (finding that the admission of a confession obtained by whipping the defendant until he confessed

Circuit's conclusion that Williams's will was overborne at the time he made an incriminating statement in response to Sergeant Early's promise may seem counterintuitive. Although Early's promise undoubtedly provided an inducement to confess, Williams was not forced to do so in the sense that he was unable to make a rational choice.¹⁹ To the contrary, Williams chose to confess in order to receive the benefits Early promised.

Based on the Supreme Court's confession cases, however, the statement that a defendant's will was overborne is essentially a legal conclusion, rather than simply an empirical judgment.²⁰ In the course of deciding a long line of state confession cases, the Court has established the principle that the admission of an involuntary confession violates due process.²¹ More recently, the Court has indicated that the admission of an involuntary confession also will violate the defendant's Fifth Amendment privilege against self-incrimination.²² To decide whether a confession is involuntary, the Court has evaluated the "totality of the circumstances,"²³ consid-

violated due process). See generally Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963), reprinted in YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 1 (1980) [hereinafter KAMISAR, *ESSAYS*].

19. See generally Kamisar, *supra* note 18, at 14-15 (describing the amorphous nature of the term "voluntariness").

20. As Kamisar has pointed out, every defendant who confesses in some sense makes a choice to confess; on the other hand, in litigated cases, few if any defendants have made spontaneous or unconstrained choices to admit their guilt. See *id.* Thus, the meaning of an "overborne will" depends on the normative question of how much mental freedom should be afforded the defendant who is confessing, as well as an empirical assessment of how much freedom he had at the time he made the incriminating statement. See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 885-86 (1979).

21. See, e.g., *Culombe*, 367 U.S. at 602; *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961). See generally Kamisar, *supra* note 18, at 11-25 (discussing the due process voluntariness test).

22. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that the Fifth Amendment privilege applies to individuals subjected to custodial interrogation by the police. In the course of holding that safeguards are necessary to protect against violations of the Fifth Amendment privilege even when "the defendants' statements [might not be found] to have been involuntary in traditional terms," *id.* at 457, the Court clearly indicated that statements that are involuntary under the due process test also are compelled within the meaning of the Fifth Amendment privilege. *Id.* at 457-58. In later cases, the Court has narrowed the scope of *Miranda's* Fifth Amendment holding by equating Fifth Amendment compulsion with due process coercion. See *infra* note 93. These decisions, of course, implicitly reaffirm the conclusion that the admission of an involuntary confession violates both the Due Process Clause and the Fifth Amendment privilege.

23. See, e.g., *Fikes v. Alabama*, 352 U.S. 191, 197 (1957).

ering factors that relate both to the nature of the police practices and to the individual characteristics of the defendant.²⁴

The totality-of-the-circumstances test ostensibly focuses on whether the defendant's "will was overborne"²⁵ or whether the confession was a "product of [the defendant's] own free choice"²⁶ at the time he confessed. Nevertheless, the Court's application of the totality test²⁷ indicates that it is less concerned with whether the confession is a product of the defendant's free choice in an empirical or metaphysical sense than it is with the source²⁸ and the nature of the pressure²⁹ exerted on the defendant at the time he confessed. In *Miller v. Fenton*,³⁰ for example, the Court stated that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."³¹ Thus, as Justice Harlan stated in his *Miranda* dissent,

The concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice.³²

24. In *Spano v. New York*, 360 U.S. 315 (1959), for example, the Court considered the defendant's level of education, his experience with law enforcement, the defendant's mental state, the number of police present during questioning, the nature of the questioning (including the deceptive tactics employed), and the duration of the interrogation. *Id.* at 321-22.

25. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991).

26. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 583 (1961) (opinion of Frankfurter, J.).

27. See, e.g., *Lynum v. Illinois*, 372 U.S. 528, 534 (1963); *Culombe*, 367 U.S. at 602.

28. In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167.

29. In *Spano v. New York*, 360 U.S. 315 (1959), for example, the Court considered a case in which a police officer, who was the defendant's childhood friend, falsely told the defendant that he (the officer) would be likely to lose his job if the defendant did not confess. *Id.* at 323. Although the pressure to confess exerted on the defendant would be the same regardless of whether his friend's story was true, the Court put considerable emphasis on the fact that the defendant's sympathy was "falsely aroused." *Id.*

30. 474 U.S. 104 (1985).

31. *Id.* at 109.

32. *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (quoting Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to*

The Supreme Court's attitude towards confessions induced by promises has changed significantly over the past century. In *Bram v. United States*,³³ decided in 1897, the Court delineated the principle that the admission of a confession induced by even the slightest promise violates the Fifth Amendment privilege against self-incrimination.³⁴ *Bram's* prohibition apparently stemmed from the common law view that confessions induced by promises were of questionable reliability.³⁵ As a constitutional decision, *Bram's* influence fluctuated,³⁶ reaching its peak in the mid-1960s, when *Haynes v. Washington*³⁷ seemingly applied *Bram's* prohibition³⁸ and *Malloy v. Hogan*³⁹ and *Miranda v. Arizona*⁴⁰ relied on *Bram* to extend the Fifth Amendment privilege to the states⁴¹

Counsel, 66 COLUM. L. REV. 62, 73 (1966)).

33. 168 U.S. 532 (1897).

34. See *id.* at 542-43 ("But a confession, in order to be admissible . . . , must not be . . . obtained by any direct or implied promises, however slight.") (quoting 3 RUSSELL ON CRIMES 478 (Horace Smith & A.P.P. Keep eds., 6th ed. 1896)). Although *Russell* was apparently stating the common law rule, *Bram* indicated that the Fifth Amendment privilege incorporated the principle *Russell* stated. *Id.* at 543. *Bram's* conclusion foreshadowed *Miranda's* later holding that the Fifth Amendment privilege is applicable to custodial interrogation. See *Miranda*, 384 U.S. at 444.

35. In 1783, for example, an English court excluded a confession on the ground that "a confession forced from the mind by the flattery of hope . . . comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." *The King v. Warickshall*, 1 Leach 263-64 (K.B. 1783). See generally 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 827-35 (James H. Chadbourne rev. 3d ed. 1970) (providing a historical background of the treatment of confessions induced by promises).

36. During the first half of the twentieth century, *Bram* was rarely cited or applied by the Supreme Court, but this failure could partially be attributed to the fact that the Fifth Amendment privilege did not then apply to the states; moreover, during this period, the Court considered few federal cases involving the privilege's application. By the early 1950s, however, *Bram's* influence had clearly ebbed. In *Stein v. New York*, 346 U.S. 156 (1953), the Court upheld the admissibility of a confession given after the police promised the defendant that his father, who also had been arrested, would be released if the defendant confessed. *Id.* at 167. In its reasoning, the Court went out of its way to discredit *Bram*, characterizing the decision as "not a rock upon which to build constitutional doctrine." *Id.* at 191 n.35.

37. 373 U.S. 503 (1963).

38. In *Haynes*, the Court relied on *Bram* and similar cases for the proposition that the test for admissibility under the Due Process Clause is whether the confession was made "without compulsion or inducement of any sort." *Id.* at 513 (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)). The Court held that the defendant's confession was involuntary, relying in part on the police promise that the defendant would be permitted to call his wife after he confessed. *Id.* at 514.

39. 378 U.S. 1 (1964).

40. 384 U.S. 436 (1966).

41. In *Malloy*, the Court held that the Due Process Clause of the Fourteenth

and the police station.⁴² Indeed, *Malloy v. Hogan*'s holding that the Due Process Clause incorporates the Fifth Amendment privilege seemed to set the stage for applying *Bram*'s specific prohibition of confessions induced by government promises to the states.⁴³

Soon afterward, however, *Bram*'s influence waned.⁴⁴ By the mid-1980s, the Burger-Rehnquist Court's restrictive view of the Fifth Amendment privilege,⁴⁵ as well as increasing acceptance of the view that the criminal justice system is a marketplace in which bargaining between the government and criminal defendants should be freely allowed,⁴⁶ reduced *Bram* to a "derelict"⁴⁷ on the constitutional landscape. By 1988, Judge Frank Easterbrook was able to state without contradiction that "*Bram* ha[d] not excluded a confession in decades,"⁴⁸ in *Arizona v. Fulminante*,⁴⁹ decided three years later, the Court expressly repudiated *Bram*, stating that *Bram*'s language prohibiting confessions induced by government promises "does not state the standard for determining the voluntariness of a confession."⁵⁰

Amendment incorporates the Fifth Amendment privilege and therefore that the Fifth Amendment privilege applies to the states. See *Malloy*, 378 U.S. at 6.

42. *Miranda* held that the Fifth Amendment privilege applies to custodial interrogation. See *Miranda*, 384 U.S. at 444.

43. In *Malloy*, the Court stated that the "admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897," when *Bram* was decided. *Malloy*, 378 U.S. at 7.

44. Between 1966 and 1991, *Bram* was cited by the Court only once. In *Brady v. United States*, 397 U.S. 742 (1970), the Court quoted *Bram*'s prohibition on confessions induced by government promises but stated that the prohibition would not apply to a situation in which the government induced a guilty plea through the promise of a reduced sentence. See *id.* at 753-55 (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)). The Court distinguished *Bram* on the ground that a defendant negotiating a guilty plea is represented by counsel and therefore is in a better position to assess the value of the benefits offered by the government. See *id.* at 754.

45. See *infra* note 71 and accompanying text.

46. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

47. *United States v. Long*, 852 F.2d 975, 980 (7th Cir. 1988) (Easterbrook, J., concurring).

48. *Id.*

49. 499 U.S. 279 (1991).

50. *Id.* at 285. In that case, the defendant, Fulminante, an inmate at a federal prison, was suspected of murdering his stepdaughter. Sarivola, another inmate at the prison, was a confidential informer for the FBI who "masqueraded as an organized crime figure." *Id.* at 283. According to Sarivola, Fulminante was experiencing "tough treatment" from other inmates because of their distaste for his alleged crime. Sarivola promised to provide

The removal of *Bram* from the constitutional landscape does not clarify the circumstances under which confessions induced by government promises are constitutionally admissible. Based on the Court's due process decisions,⁵¹ a confession induced by a promise will be inadmissible whenever the government's use of the promise "unfairly impairs [the suspect's] capacity to make a rational choice,"⁵² a situation that might occur either because the promise exerts excessive pressure on the suspect⁵³ or because it violates accepted standards of fairness.⁵⁴

Arguably, inducing a confession through a promise of leniency during custodial interrogation violates accepted standards of fairness. As Professor Philip Johnson has suggested, a promise of leniency exerts such great pressure on a suspect that in some cases it is likely to induce an unreliable confession.⁵⁵ Moreover, when the police offer a promise of leniency to induce a confession, they are essentially engaging in plea bargaining with an unrepresented defendant. Since a defendant who enters a guilty plea is entitled to be represented by counsel, the police arguably should be prohibited from engaging in negotiations at an earlier stage of the proceedings to induce what is tantamount to a guilty plea from an unrepresented suspect.⁵⁶

Fulminante with protection if he would tell the truth about the killing of his stepdaughter. Fulminante then admitted to the killing. *Id.* The Arizona Supreme Court relied on *Bram* in holding that Fulminante's confession was involuntary. *See State v. Fulminante*, 778 P.2d 602, 609 (Ariz. 1988), *aff'd*, 499 U.S. 279 (1991). In a 5-4 decision, the U.S. Supreme Court affirmed, concluding that, under the totality-of-the-circumstances test, Fulminante's confession to Sarivola could properly be deemed coerced, especially because the confession was induced by a promise of protection from a "credible threat of physical violence." *Fulminante*, 499 U.S. at 288.

51. *See supra* text accompanying notes 18-32.

52. *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (quoting Bator & Vorenberg, *supra* note 32, at 73).

53. *See, e.g., Fulminante*, 499 U.S. at 288.

54. *See Haynes v. Washington*, 373 U.S. 503, 514 (1963) (finding that a promise to the defendant that he would be allowed to call his wife as soon as he made a statement to the police, in conjunction with other circumstances, violated due process).

55. *See Phillip E. Johnson, A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 310-11 (1987).

56. Kamisar supports this position:

Suspects there are who feel in a "pleading guilty" mood, for some of the many reasons most defendants do plead guilty. Suspects there are who would intentionally relinquish their rights for some hoped-for favor from the state. I do not deny this. I do deny that such suspects do not need a lawyer.

Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 11 (A. Howard ed., 1965), *reprinted in*

Nevertheless, in view of *Fulminante's* repudiation of *Bram*, it is unlikely that the Court will hold that the admission of every confession induced by a police promise of leniency violates due process. On the other hand, *Fulminante's* holding indicates that admitting confessions induced by certain types of promises—in that case, the promise of protection from an unlawful “threat of physical violence”⁵⁷—will violate due process. In this Article, I explore the question whether admission of a confession induced by a broken or illusory government promise violates either the Fifth Amendment privilege or due process.

Consideration of this question seems timely not only because of the doctrinal confusion created by cases such as *Fulminante* but also because of the frequency with which the police employ this tactic. Anecdotal and empirical evidence, as well as reported cases, indicate that the police frequently use promises to induce confessions. In some instances, the promises are as explicit as the one in *Williams*.⁵⁸ The more common police practice, however, is to suggest to the suspect, without making an explicit commitment, that he will be rewarded for his statement.⁵⁹ Moreover, a suspect who confesses in response to an explicit or implicit police promise is often disappointed; he frequently finds that the benefit he expected to obtain by confessing is either not forthcoming or is of much less value than he believed it to be when he confessed.

In considering whether confessions induced by broken or illusory government promises should be constitutionally inadmissible,⁶⁰ Part I examines whether either *Miranda v. Arizona* and its

KAMISAR, ESSAYS, *supra* note 18, at 27, 39.

57. *Fulminante*, 499 U.S. at 288.

58. In *People v. Manning*, 672 P.2d 499 (Colo. 1983), for example, the officer repeatedly assured the suspect that she would be treated as a witness, rather than being prosecuted, if she disclosed information relating to the disappearance of her son. The officer told her, “I am going to interview you as a witness in this thing. . . . [T]hey cannot prosecute you for this.” *Id.* at 503. Subsequently, the suspect identified her son’s killer and explained her own role in the boy’s death. Ten days later, the district attorney filed six felony charges against her. *Id.*

59. For example, in *United States v. Rutledge*, 900 F.2d 1127 (7th Cir.), *cert. denied*, 498 U.S. 875 (1990), when the defendant asked what the effect of his statement would be, the interrogating officers said that “his cooperation would be helpful” and that “all cooperation is helpful.” *Id.* at 1128; *see also* *Womack v. State*, 205 So. 2d 579, 585 (Ala. 1967) (concerning a homicide investigation wherein the interrogating officer told the defendant, “Gene, you are into it now. If you will go ahead and tell the truth, it will go lighter on you all.”).

60. Although my approach is descriptive (in the sense that I am seeking to apply

progeny or the due process confession cases require this conclusion when the suspect's confession is induced by an explicit government promise that is later broken. Finding these cases inconclusive, Part II considers the possible application of *Santobello v. New York's*⁶¹ prohibition against guilty pleas induced by broken government promises to the confession context. It concludes that, taken in conjunction with the Court's confession cases, *Santobello* mandates a conclusion that a confession induced by a broken government promise is constitutionally inadmissible. Part III then considers how this principle should be applied to situations in which the suspect's confession is induced by an implicit or illusory government promise. Using actual cases as illustrations, this Part explores some of the specific issues that are likely to arise. Finally, Part IV summarizes the Article's most important conclusions.

I. THE COURT'S CONFESSION CASES

*Williams v. Withrow*⁶² presents a paradigmatic example of a confession induced by a broken government promise. To resolve a possible ambiguity in the case as it was presented to the courts, I will assume that, after making his incriminating statement, Williams passed a lie detector test, thus meeting all the conditions that Sergeant Early said he had to meet to "walk."⁶³ Since Wil-

existing Supreme Court precedent) as well as normative, I will not consider whether a holding that confessions induced by broken or illusory government promises are constitutionally inadmissible should be viewed as establishing a new constitutional rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. *See supra* note 17.

61. 404 U.S. 257 (1971).

62. For a discussion of *Williams*, see *supra* text accompanying notes 1-17.

63. In the event that Williams did not pass the lie detector test, the circumstances of the test would determine whether he would have a good claim that his confession was induced by an illusory government promise. *See infra* text accompanying notes 189-202. In making the promise to Williams, Sergeant Early stated the condition to be met as "I confirm [the truth of the statement] on a polygraph." *Williams v. Withrow*, 944 F.2d 284, 286 (6th Cir. 1991), *aff'd in part, rev'd in part*, 113 S. Ct. 1745 (1993). If this condition suggests that Sergeant Early was to be the sole judge of whether Williams passed the lie detector test, then the government promise was illusory under contract law because Early had absolute discretion as to whether the condition imposed was met. *See infra* note 193 and accompanying text. Moreover, even if the lie detector test was conducted by someone other than Early, the government promise might still have been illusory under the definition used in this Article. If the polygraph test were of dubious reliability, *see generally* Peter J. Garofalo, *Polygraph Test Results in Arbitration: A Question of Privacy and Scientific Validity*, 13 LAW & PSYCHOL. REV. 59, 63-65 (1989) (discussing the validity of polygraph tests), or focused on matters that were peripheral to Williams's central admission, then the promise would be illusory in the sense that a reasonable person in

liams was later prosecuted for first degree murder, the explicit government promise that induced his confession was broken. Under the Court's confession cases, two arguments could be made in support of excluding Williams's confession: first, Williams did not validly waive his Fifth Amendment privilege; and second, Williams's confession was involuntary.

A. *Waiver of the Fifth Amendment Privilege*

Although the Fifth Amendment privilege ostensibly protects only against compulsion to testify against oneself,⁶⁴ *Miranda v. Arizona*⁶⁵ held that a suspect subjected to custodial interrogation (which in the absence of safeguards was presumed to lead to compulsion) must intelligently waive his Fifth Amendment privilege for his confession to be admissible.⁶⁶ Moreover, *Miranda* stated in dicta that "any evidence that the accused was . . . tricked . . . into a waiver"⁶⁷ would vitiate the waiver. Based on *Miranda*, a suspect could argue that the government's inducement of a confession through a false promise of leniency violated his Fifth Amendment privilege because the trickery negated the possibility of obtaining an intelligent waiver of the privilege.

Post-*Miranda* cases have construed the intelligent waiver requirement quite narrowly, however. In *United States v. Washington*,⁶⁸ the Court held that a grand jury witness who is given *Miranda* warnings need not be warned that he is a potential defendant rather than a mere witness. Emphasizing that the guarantee of the privilege "is only that the witness be not *compelled* to give self-incriminating testimony,"⁶⁹ the Court concluded that,

Williams's position would have believed that Early's promise was significantly more valuable than it was in fact. See *infra* text accompanying notes 189-202.

64. The Fifth Amendment privilege states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

65. 384 U.S. 436 (1966).

66. *Miranda* states that a confession obtained during custodial interrogation may not be admitted unless the suspect first validly waives his Fifth Amendment privilege. See *Miranda*, 384 U.S. at 475. Despite *Miranda*, however, it may be argued that, because the Fifth Amendment privilege only protects against compulsion, a waiver—in the sense of an "intentional relinquishment . . . of a known [constitutional] right," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)—should not be required in this context. See *infra* text accompanying notes 68-71.

67. *Miranda*, 384 U.S. at 476.

68. 431 U.S. 181 (1977).

69. *Id.* at 188.

once the witness is informed of his *Miranda* rights, the sole remaining question "is whether, considering the totality of the circumstances, the free will of the witness was overborne."⁷⁰ As Professor Geoffrey Stone has stated, this analysis "seems simply to have ignored *Miranda's* requirement of a 'knowing and intelligent' waiver."⁷¹

In two more recent cases, *Moran v. Burbine*⁷² and *Colorado v. Spring*,⁷³ the Court reiterated that, in most instances, a suspect's waiver of his Fifth Amendment privilege will be valid as long as he is informed of the privilege's basic elements, including "the right to remain silent and that anything he [says may] be used as evidence against him."⁷⁴ *Spring* provided one significant caveat, however. In response to the defendant's argument that the police tricked him into waiving his Fifth Amendment privilege by failing to provide him with information material to the waiver decision,⁷⁵ the Court drew a distinction between a failure to supply relevant information and an affirmative misrepresentation. Citing cases in which confessions were held to be involuntary under the Due Process Clause, the Court stated that in some instances it "has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege."⁷⁶ Noting that no such misrepresentation took place in *Spring*,⁷⁷ the Court declined to express an opinion on the circumstances under which misrepresentation of information relevant to the defendant's waiver of the Fifth Amendment privilege would vitiate the waiver.⁷⁸

If the Court were to pursue this issue, it could take a variety of approaches. In an article published fifteen years ago, I argued

70. *Id.*

71. Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 167.

72. 475 U.S. 412 (1986).

73. 479 U.S. 564 (1987).

74. *Id.* at 574.

75. In *Spring*, agents of the Bureau of Alcohol, Tobacco, and Firearms arrested the defendant incident to an undercover firearms purchase. When the agents began to interrogate him about the firearms transactions, they neglected to inform him that he also would be questioned about an unsolved murder. *Id.* at 566-69.

76. *Id.* at 576 n.8.

77. *Id.*

78. The Court specifically declined to decide whether "an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation" would vitiate the defendant's waiver of his Fifth Amendment privilege. *Id.*

that any police statement that "significantly distorts the meaning and effect of the *Miranda* warnings" should vitiate a suspect's waiver of his *Miranda* rights.⁷⁹ Under this approach, either a misrepresentation or an honest statement that leads the suspect to believe that he will receive some benefit from confessing negates the effect of the *Miranda* warnings because the suspect will believe that, "although he may have some technical right to remain silent, the right is not a meaningful one [because] in reality it is in his best interest to talk."⁸⁰

In view of its confession decisions over the past decade, however, the Court seems unlikely to adopt this approach. First, *Fulminante's* dicta repudiating *Bram*⁸¹ indicates that at least some promises of leniency will not be held to vitiate *Miranda* waivers. Moreover, when considered in conjunction with *Washington, Burbine*, and *Spring*,⁸² the Court's decision in *Frazier v. Cupp*⁸³ suggests that even police misrepresentation that distorts the effect of the *Miranda* warnings will not always vitiate a *Miranda* waiver. In *Frazier*, the defendant made incriminating statements after the interrogating officer falsely told him his accomplice had confessed and sympathetically suggested that the victim had provoked the defendant to attack him by making homosexual advances.⁸⁴ In holding that the defendant's confession was voluntary, the Court stated that the police misrepresentation relating to his accomplice's statement was "insufficient . . . to make [an] otherwise voluntary confession inadmissible."⁸⁵

Frazier does not directly address whether police misrepresentation will vitiate a *Miranda* waiver because the case was decided under the Due Process Clause rather than the Fifth Amendment privilege.⁸⁶ On the other hand, since *Spring* cited cases in which confessions were held to be involuntary under the due process test

79. Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 590 (1979).

80. *Id.* at 609.

81. See *supra* text accompanying note 50.

82. See *supra* text accompanying notes 68-78.

83. 394 U.S. 731 (1969).

84. *Id.* at 737-38.

85. *Id.* at 739.

86. Although *Frazier* was a post-*Miranda* decision, the case was decided under the due process test, rather than *Miranda*, because the defendant's trial took place prior to the *Miranda* decision and, under *Johnson v. New Jersey*, 384 U.S. 719 (1966), *Miranda* was applicable only to cases tried after the date of the *Miranda* decision. *Id.* at 738.

as instances in which police misrepresentations were held sufficient to invalidate a Fifth Amendment waiver,⁸⁷ *Frazier's* due process holding suggests that the type of government misrepresentation involved in that case will not be sufficient to invalidate a Fifth Amendment waiver.⁸⁸

Arguably, the misrepresentation in *Frazier* could be distinguished from that in the *Williams* hypothetical because the latter misrepresentation distorts a central aspect of the Fifth Amendment privilege, rather than misrepresenting information that is relevant only to whether the suspect should exercise the privilege. Unlike the misrepresentation in *Frazier*, the misrepresentation involved in cases like *Williams* will generally distort a suspect's awareness of both his right to remain silent and the warning that anything he says can be used against him. When *Williams* heard Sergeant Early's promise that he would "walk" if he told the truth about the homicide, his awareness of these two protections was distorted because he mistakenly believed it would not be in his interest to remain silent and that the statement he made would not in fact be used against him.

It seems tenuous, however, to distinguish between trickery that distorts the suspect's awareness that anything he says can be used against him and trickery that distorts the suspect's understanding of the consequences of waiving his rights.⁸⁹ In both situations, the suspect may argue that the police trickery undermined the protection of the *Miranda* warnings.⁹⁰ The government, on the other hand, may argue that in both situations the defendant has been given the *Miranda* warnings, and therefore under the

87. See *supra* text accompanying note 76.

88. Daniel Sasaki has suggested that *Frazier's* due process holding could be limited because the officer's misrepresentation relating to his accomplice's confession did not "seem to have induced [the defendant's] confession." Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1607-08 (1988). The Court did not refer to this possibility in its opinion, however, and as Sasaki acknowledges, "[l]ater courts have . . . interpreted [*Frazier*] as definitively ruling that police trickery is a mere factor to be included in a court's assessment of a confession's voluntariness under a totality of the circumstances analysis." *Id.* at 1608 (citing cases).

89. For discussions of police trickery in inducing confessions, see Sasaki, *supra* note 88; White, *supra* note 79.

90. In the first case, the police negate the protection afforded by the right to remain silent by leading the suspect to believe that it is really in his interest to make a statement. In the second case, the police deception accomplishes essentially the same result by leading the suspect to believe that exercising his right to remain silent will be of no benefit because the police already have a solid case against him.

Washington case, the sole remaining question should be whether "the free will of the [suspect] was overborne."⁹¹ In any event, the Court's Fifth Amendment cases will not be determinative. In *Spring*, the Court left open the questions whether and under what circumstances police misrepresentation will vitiate a suspect's Fifth Amendment waiver. In view of the cases cited in *Spring*,⁹² however, it appears that this question can only be resolved by determining whether the police misrepresentation would render the suspect's confession involuntary within the meaning of the Court's due process confession cases.

B. *The Due Process Confession Cases*

In its post-*Miranda* decisions, the Court has essentially equated compulsion within the meaning of the Fifth Amendment privilege with the coercion required to render a confession involuntary under the Due Process Clause.⁹³ In theory, of course, a broken promise exerts no greater coercive pressure on a suspect than one that is kept. Yet as the Court indicated in *Spring*,⁹⁴ the Due Process Clause cases have recognized that government misrepresentation is a factor to be considered in deciding whether the defendant's confession was involuntary.⁹⁵ Considering this factor,

91. *United States v. Washington*, 431 U.S. 181, 188 (1977). In *Washington*, the free will of a grand jury witness was at issue.

92. See *supra* text accompanying notes 76-78.

93. In *New York v. Quarles*, 467 U.S. 649 (1984), for example, the Court stated that to establish that his incriminating statement was compelled within the meaning of the Fifth Amendment privilege, the defendant would have to show that his statement was "coerced under traditional due process standards." *Id.* at 655 n.5. In thus equating compulsion and coercion, the Court necessarily interpreted the *Miranda* decision as imposing prophylactic requirements that exclude confessions that were not compelled within the meaning of the Fifth Amendment privilege. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."); *Quarles*, 467 U.S. at 654 (making a similar point). For an incisive criticism of these cases, see Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440-46 (1987).

94. See *Colorado v. Spring*, 479 U.S. 564 (1987); *supra* text accompanying note 76.

95. *Spring*, 479 U.S. at 576 n.8 (citing *Lynum v. Illinois*, 372 U.S. 528 (1963) (applying the totality-of-the-circumstances test and holding that, when police officers falsely informed a suspect that she would be granted leniency if she confessed and would be deprived of state financial aid for her children if she failed to confess, her confession was involuntary); *Spano v. New York*, 360 U.S. 315 (1959) (applying the totality-of-the-circumstances test and holding that, when a police officer who was a childhood friend of the suspect falsely stated that he would lose his job if the suspect failed to cooperate, the confession induced by the police misrepresentation was involuntary)).

moreover, is consistent with *Miller v. Fenton*'s⁹⁶ condemnation of interrogation tactics that are contrary to our standards of justice.⁹⁷

Lynumn v. Illinois's⁹⁸ holding provides support for the view that admission of a confession induced by a broken government promise violates due process. In *Lynumn*, the defendant confessed to selling marijuana after the police promised her leniency if she confessed.⁹⁹ According to the defendant, the police told her she "could get 10 years and [her] children could be taken away, . . . and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again."¹⁰⁰ Although this testimony was not disputed by the police,¹⁰¹ the defendant was convicted and sentenced to ten to eleven years. In holding the defendant's confession involuntary, *Lynumn* itself did not refer to the officer's broken promise as a basis for its decision.¹⁰² *Spring*,¹⁰³ however, referred to *Lynumn* as a case in which government misrepresentation resulted in a violation of the defendant's Fifth Amendment privilege, thus suggesting that *Lynumn* can now be viewed as holding that the confession admitted in that case was involuntary because it was induced by government misrepresentation relating to the consequences of confessing.

Spring's citation of *Lynumn* need not be read so broadly, however. In its brief explanation of *Lynumn*, *Spring* did not mention that the police had deceived the suspect as to the sentence she could expect if she confessed. Instead, it characterized the government misrepresentation as relating to whether the "suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities."¹⁰⁴ This language could be read to mean that only certain types of government misrepresentation as to the consequences of confessing will render a result-

96. 474 U.S. 104 (1985).

97. See *supra* text accompanying notes 28-32.

98. 372 U.S. 528 (1963).

99. *Id.* at 533-34.

100. *Id.* at 531.

101. *Id.* at 533.

102. In holding that the defendant's confession was involuntary, the Court relied primarily on the fact that the confession was "made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'" *Id.* at 534.

103. *Colorado v. Spring*, 479 U.S. 564, 576 n.8.

104. *Id.*

ing confession involuntary. Misrepresentation relating to the fate of one's dependent children—like misrepresentation as to whether a friend would lose his job if the suspect did not confess¹⁰⁵—might seem especially reprehensible in that it relates to a matter that involves the well-being of someone other than the suspect. Even if there is no government misrepresentation, such appeals to altruism are objectionable because they are likely to place great pressure on the suspect¹⁰⁶ and relate to matters that should not properly be a subject of negotiation during police interrogation.¹⁰⁷ Thus, *Spring* could be read to condemn only a very narrow category of government misrepresentation—perhaps limited to misrepresentation concerning the effect of the suspect's confession on a third party who is closely connected to the suspect.¹⁰⁸

A narrow reading of *Spring* is consistent, moreover, with the Court's approach towards deciding cases under the Due Process Clause. Although *Miller v. Fenton* stated that "certain interrogation techniques . . . must be condemned under the Due Process Clause,"¹⁰⁹ with the exception of techniques that involve prolonged interrogation¹¹⁰ or the use or threat of force,¹¹¹ the

105. See *Spano v. New York*, 360 U.S. 315 (1959), cited in *Spring*, 479 U.S. at 576 n.8.

106. Government inducements relating to a third party who is very close to the suspect are likely to exert great pressure on the suspect because the suspect, especially if he is experiencing a sense of shame, may be inclined to place the welfare of the third party above his own. Cf. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 163-64 (3d ed. 1986) (suggesting that the interrogator point out to the suspect the "harm caused to other persons . . . by the offender's conduct" and create a "challenge for the offender to display some evidence of decency and honor"). When the suspect experiences these kinds of feelings, moreover, the government's appeal to altruism has the potential to induce a false confession.

107. In *Brady v. United States*, 397 U.S. 742 (1970), the Court suggested that a plea might be invalid if it was "induced . . . by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Id.* at 755 (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958)). If a similar rule were to apply in the interrogation context, promises relating to the suspect's children or friends would clearly be prohibited.

108. Moreover, even if *Spring* were read to invalidate a broad range of confessions induced by government misrepresentation, such a rule would still not apply when the government misrepresentation that induced the confession was made in good faith. This limitation might have an important effect in cases involving confessions induced by broken government promises; even if a promise that induced a confession was later broken, it would sometimes be difficult to establish that the officer who made the promise was intending to misrepresent facts.

109. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); see also *supra* text accompanying notes 28-32.

110. See *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (holding that 36 hours of

Court has rarely held that the government's use of a particular interrogation technique is sufficient in itself to render a confession inadmissible under the Due Process Clause.¹¹² Instead, the Court has almost invariably adjudicated the admissibility of confessions challenged under the Due Process Clause on a case-by-case basis,¹¹³ thus making it difficult to determine whether the use of any particular interrogation technique is impermissible.

II. THE PLEA BARGAINING ANALOGY: SANTOBELLO'S PROHIBITION

In *Santobello v. New York*,¹¹⁴ the defendant, who was charged with two felony offenses, entered into a plea agreement under which he agreed to plead guilty to a lesser-included offense,¹¹⁵ in exchange, the prosecutor dismissed the felony charges and agreed to make no sentence recommendation.¹¹⁶ At sentencing, however, a new prosecutor, unfamiliar with the plea agreement, recommended a maximum sentence; the judge imposed that sentence, stating that he would have done so regardless of the prosecutor's recommendation.¹¹⁷ The Court concluded that the breach of the plea bargain deprived the defendant of due process.¹¹⁸ It held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, . . . such promise must be fulfilled."¹¹⁹

continuous interrogation is "inherently coercive").

111. See, e.g., *Watts v. Indiana*, 338 U.S. 49, 59-60 (1949) (Jackson, J., dissenting) (condemning confessions induced by violence or threats of violence); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding the admission of a confession obtained by torture violates due process).

112. Cf. *Miranda v. Arizona*, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting) ("Apart from direct physical coercion, . . . no single default or fixed combination of defaults guaranteed exclusion . . .").

113. See *supra* text accompanying notes 20-24.

114. 404 U.S. 257 (1971).

115. *Id.* at 258. The defendant was originally charged with promoting gambling in the first degree and possession of gambling records in the first degree. He agreed to plead guilty to possession of gambling records in the second degree, a lesser-included offense carrying a maximum penalty of one year. *Id.*

116. *Id.*

117. *Id.* at 259.

118. The Court did not use the term "due process" but stated that because of the breach the defendant's plea was not "attended by safeguards to insure the defendant what [was] reasonably due in the circumstances." *Id.* at 262.

119. *Id.* The Court left open the question of the appropriate remedy, remanding the case to the state courts to determine whether the defendant should be allowed to with-

The Court has never addressed the question of whether *Santobello's* principle should be applied outside the plea bargaining context. Lower courts have applied *Santobello* outside the prosecution context, holding that, when a police officer or other government agent enters into an agreement promising that an individual will not be criminally prosecuted, the government will be bound by the terms of the agreement.¹²⁰ They have never specifically applied *Santobello* to a situation in which the admissibility of a confession induced by a government promise was at issue.

Determining whether *Santobello* should apply to confessions induced by police promises is difficult because the source of the unequivocal prohibition¹²¹ against pleas induced by broken gov-

draw his guilty plea or merely to have specific performance of the original bargain. *Id.* at 263.

120. See, e.g., *Plaster v. United States*, 720 F.2d 340, 351 (4th Cir. 1983) (indicating in dicta that military officials' agreement to grant a detainee transactional immunity from American or West German prosecution arising out of West German murder would be enforced if military officials had actual or apparent authority to make the agreement); *People v. Jackson*, 480 N.W.2d 283, 286 (Mich. Ct. App. 1991) (enforcing a prosecutor's agreement not to prosecute defendant for robbery if she cooperated with the police in their investigation of a bank robbery); *Commonwealth v. Stipetich*, 621 A.2d 606, 608-12 (Pa. Super. Ct.) (finding that the trial court did not abuse its discretion in holding that the prosecutor was bound by an agreement made by the police), *appeal granted*, 631 A.2d 1006 (Pa. 1993). Similarly, lower courts have applied *Santobello* to other types of agreements between the government and defendants. See, e.g., *United States v. Pinter*, 971 F.2d 554, 557 (10th Cir. 1992) (enforcing a cooperation agreement in which the government had agreed to help the defendant get a reduction in sentence in exchange for the defendant's testimony in a drug investigation); *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982) (enforcing an immunity agreement and upholding an injunction of a pending prosecution); *People v. Fisher*, 657 P.2d 922, 925 (Colo. 1983) (upholding the suppression of a videotaped interview granted by defendant in exchange for immunity). Moreover, other courts have held that the government is bound by such agreements without directly referring to *Santobello*. See, e.g., *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983) (enforcing a nonprosecution agreement and dismissing the drug indictment against defendant); *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975) (same). Courts have placed some limitations on the government's obligation to honor such agreements, however. See, e.g., *United States v. Hogan*, 862 F.2d 386, 388 (1st Cir. 1988) (requiring defendant's expectations from the agreement to be objectively reasonable); *United States v. McBride*, 571 F. Supp. 596, 612-13 (S.D. Tex. 1983) (holding that a government promise made under duress is not binding unless ratified), *aff'd*, 915 F.2d 1569 (5th Cir. 1990); *Plaster*, 720 F.2d at 354 (requiring that the promising agent must have at least apparent authority to make the promise).

121. The Court made clear that *Santobello's* prohibition applies regardless of whether the government was acting inadvertently when it failed to fulfill the bargain and regardless of whether the broken promise had any effect on the defendant's ultimate sentence. *Santobello*, 404 U.S. at 262. The Court did not dispute the government's claim "[t]hat the breach of [the] agreement was inadvertent" or that "the prosecutor's recommendation did

ernment promises was not specified. In its brief opinion, the Court stated that the plea must be "voluntary and knowing"¹²² and that it "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."¹²³ This formulation suggests that *Santobello's* prohibition stems either from the requirement that the plea be "knowing," in the sense that it is an intelligent waiver of constitutional rights, or from the requirement that it be "voluntary,"¹²⁴ in the sense that the government's conduct in inducing the plea does not violate fundamental standards of fairness.

If *Santobello's* prohibition derives from the principle that a guilty plea must constitute an intelligent waiver of constitutional rights, the situation in which a confession is induced by an unkept government promise could be distinguished from *Santobello* because a higher standard of waiver is required when a suspect is pleading guilty than when he is relinquishing his privilege against self-incrimination.¹²⁵

As I have indicated, *Miranda's* requirement that a suspect intelligently waive his Fifth Amendment privilege has been narrowly construed.¹²⁶ Moreover, *Schneckloth v. Bustamonte*¹²⁷ indicated that higher standards of waiver will be required when the constitutional right in question "protect[s] a fair trial and the reliability of the truth-determining process."¹²⁸ The Burger-Rehnquist Court has not viewed the *Miranda* protections as necessary to safeguard the accuracy of the fact-finding process.¹²⁹

not influence" the judge but concluded that the defendant was nevertheless entitled to relief. *Id.*

122. *Id.* at 261.

123. *Id.* at 262.

124. As Peter Westen and David Westin have pointed out, the government's breach of a plea bargain does not render the defendant's guilty plea involuntary in the sense that it is coerced because the government promise will have the same coercive effect on the defendant whether it is broken or kept. See Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 499-500 (1978).

125. Once the suspect has been informed of his constitutional rights and elects to make a statement, all that may be required is that the government not compel the suspect to give incriminating evidence against himself. See *supra* text accompanying notes 64-69.

126. See *supra* text accompanying notes 64-71.

127. 412 U.S. 218 (1973).

128. *Id.* at 236.

129. In *Harris v. New York*, 401 U.S. 222 (1971), for example, the Court held that a statement obtained in violation of *Miranda* may be used for impeachment purposes as

The entry of a guilty plea, on the other hand, represents the paradigmatic example of a waiver of the constitutional rights that are designed to ensure a fair trial.¹³⁰ Under *Schneckloth*, therefore, a higher standard of waiver could be imposed for guilty pleas because the constitutional rights involved relate more closely—in fact, are integrally related—to protecting the defendant's right to a fair trial.

A conclusion that *Santobello's* prohibition stems from the requirement of an intelligent waiver of constitutional rights seems anomalous, however, because a defendant who enters a guilty plea as a result of a government promise that is later broken cannot claim that the broken promise affected his awareness of the constitutional rights relinquished by the plea. At most, the defendant can assert that he did not make an intelligent waiver of these rights because he was not accurately informed of the consequences of waiving them,¹³¹ raising the question whether, when an individual is deciding whether to enter a guilty plea, the government is permitted to mislead the individual as to the consequences of his choice. This question, however, seems to relate more to basic standards of fairness—in the sense of defining the government's obligation to an individual who is making a critical choice¹³²—than it does to defining standards of waiver.

Mabry v. Johnson,¹³³ the most recent case to refer to *Santobello's* constitutional source,¹³⁴ provides support for the

long as "the trustworthiness of the evidence satisfies legal standards." *Id.* at 224. Based on *Harris*, it is clear that the Court does not view statements obtained in violation of *Miranda* as inherently unreliable. See also *Oregon v. Hass*, 420 U.S. 714 (1975) (applying *Harris*).

130. See *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (holding that the entry of a guilty plea requires a showing on the record that the defendant has waived his privilege against self-incrimination, his right to jury trial, and his right to confront his accusers).

131. To make a valid waiver of the right to trial counsel, a defendant must make the waiver "with an apprehension of the nature of the charges, . . . range of allowable punishments thereunder, . . . and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (opinion of Black, J.).

132. The defendant's argument is not that the government is required to give him information to make an intelligent decision but rather that "once the state gives a defendant information on which to rely, it has an obligation to see that the information is correct." *Westen & Westin*, *supra* note 124, at 506.

133. 467 U.S. 504 (1984).

134. *Blackledge v. Allison*, 431 U.S. 63 (1977), a plea bargaining case decided prior to *Mabry*, referred to *Santobello's* constitutional source. *Blackledge*, however, did not clarify that source but merely reiterated *Santobello's* "voluntary and knowing" language. *Id.* at 75 n.8.

view that *Santobello's* prohibition stems from principles of fairness. In *Mabry*, the Court referred to *Santobello* as illustrating a situation in which a defendant's guilty plea can be challenged under the Due Process Clause because "the defendant was not fairly apprised of its consequences."¹³⁵ The Court's explicit reference to the requirements of fairness, as well as the lack of any reference to the requirement of an intelligent waiver, suggest that *Santobello's* prohibition should now be viewed as emanating from principles of fairness—particularly those principles that are applicable when the government is informing an individual of the consequences of a critical choice.¹³⁶

Based on these principles, the argument for applying *Santobello's* prohibition to the situation in which a confession is induced by a broken government promise is compelling. From the suspect's point of view, the decision whether to confess is of comparable significance to the decision whether to plead guilty. *Miranda's* basic holding—that the Fifth Amendment privilege applies at custodial interrogation—emanated in part from the perception that the suspect's decision whether to speak at the police station is as important as it is at trial.¹³⁷ Although the decision to plead guilty occurs in a more formal setting and is likely to have a more final effect¹³⁸ than the decision to make an incriminating statement, the two decisions are of comparable significance—both are likely to be the determining factor in the outcome of the defendant's criminal case. Once a defendant confesses—or even makes an important incriminating admission—his subsequent

135. 467 U.S. at 509.

136. Such principles, of course, can be viewed as derived from standards of waiver. In discussing standards of waiver, Professor George Dix has maintained that the government has an obligation to respect individual autonomy relating to making critical choices because "an important aspect—perhaps the essence—of the dignity of the individual is his ability to control his own destiny." George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 219 (1977).

137. As the Court noted,

Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

Miranda, 384 U.S. at 466 (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

138. A valid guilty plea marks the end of the criminal trial. On the other hand, even if a defendant's incriminating statement is admitted into evidence, the defendant may still be found not guilty.

trial will often be a formality, his conviction a forgone conclusion.¹³⁹

Moreover, to the extent that the government and individual interests between the two situations differ, the differences favor extension of *Santobello's* prohibition to the interrogation context. One important difference between a suspect who confesses as a result of a police promise and a defendant who pleads guilty as part of a plea bargain is that only the latter is likely to be represented by counsel.¹⁴⁰ From a marketplace perspective, it could be argued that the presence of counsel at the plea stage makes it especially important for the government to honor whatever commitments it makes at that stage. If defense attorneys believed that government promises made to induce a plea were unlikely to be honored, they would be less willing to engage in negotiations with prosecutors, and plea bargaining—which *Santobello* called “an essential component of the administration of justice”¹⁴¹—would diminish. On the other hand, unrepresented suspects dealing with the police are neither likely to be aware of the circumstances under which police are bound by promises that they make to induce confessions nor to be guided by whatever knowledge that they may have relating to that subject.¹⁴² Thus, from a market-

139. See Kamisar, *supra* note 18, at 6, 7 (observing that in many cases the defendant's confession will amount to a surrender).

140. Barring unusual circumstances, suspects represented by counsel will not submit to police interrogation because, as Justice Jackson once said, “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring). In the rare situation in which a defendant subjected to custodial interrogation is represented by counsel, that defendant should have the same protections from broken government promises as one who is not represented by counsel. Thus, if *Santobello* prohibits the government from admitting confessions induced by broken government promises, this prohibition should apply regardless of whether the defendant was represented by counsel at the time that he confessed.

141. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

142. John Griffiths and Richard Ayres examined the FBI's questioning of 21 Yale undergraduate and graduate students, faculty, and staff who had returned their draft cards to the Justice Department in protest of the Vietnam War. The FBI agents gave these individuals their *Miranda* warnings and each signed a form waiving his constitutional rights. Griffiths and Ayres nevertheless concluded that, because these suspects “lacked knowledge of the legal context of the decisions they faced, they could not make an informed choice whether to exercise their rights, even though they were more or less aware of the literal meaning of the statements on the waiver form.” John Griffiths & Richard E. Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 *YALE L.J.* 300, 313 (1967). Griffiths and Ayres further concluded that the suspects’ “nervousness . . . interfere[d] with the[ir] capacity . . . to exercise their powers of judg-

place perspective, requiring the government to honor prosecutors' promises at the plea bargaining stage is more important than requiring them to honor police promises at the interrogation stage. Breach of the latter are less likely to have an impact on the extent to which suspects supply the government with useful information.

This argument is unconvincing, however, because it seeks to exploit the unrepresented suspect's vulnerability. As the Court recognized in *Brady v. United States*,¹⁴³ unrepresented suspects are in greater need of protection from government inducements than represented ones because they are more "sensitive to inducement."¹⁴⁴ Moreover, unrepresented suspects have additional disadvantages. Lacking legal knowledge, they will generally not know the value of commitments made by the police; lacking legal skills, they will not be in a position to pin the police down to precisely what, if any, commitments are being made.¹⁴⁵ That the government may be able to take advantage of such suspects with greater impunity should not be a basis for restricting a suspect's right to have the government honor its commitments to him. On the contrary, the suspect's right to have the government honor its commitments should stem from the government's obligations to the sus-

ment in conducting themselves deliberately during their interrogations." *Id.* at 315.

143. 397 U.S. 742 (1970).

144. *Id.* at 754.

145. Furthermore, without an attorney present, the suspect who claims that a police promise induced his confession will find it extremely difficult to re-create the precise interchange between himself and the police, thus making it difficult for him to establish the precise terms of the police promise. *Cf. United States v. Wade*, 388 U.S. 218, 230-31 (1967) (observing that a suspect experiencing the emotional tension of being confronted by potential accusers will find it difficult to re-create improper influences at line-ups and other forms of identification confrontations). Significantly, cases in which defendants have asserted a plausible claim that a confession was induced by a broken government promise almost invariably have been cases in which the interrogation was taped. *See, e.g., Williams v. Withrow*, 944 F.2d 284, 286-87 (6th Cir. 1991) (considering verbatim quotes from officers' questioning of Williams indicating that the officers tape-recorded the interrogation), *aff'd in part, rev'd in part*, 113 S. Ct. 1745 (1993); *Miller v. Fenton*, 796 F.2d 598, 628-43 (3d Cir.) (considering transcript of the tape-recorded interrogation of Frank Miller), *cert. denied*, 479 U.S. 989 (1986). When the interrogation has not been taped, it will obviously be more difficult for the defendant to show either that his confession was induced by a promise or the nature of the promise that induced the confession. For an incisive examination of the difficulties in determining facts relevant to the admissibility of confessions when the interrogation has not been recorded, see Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974), reprinted in KAMISAR, *ESSAYS*, *supra* note 18, at 77, 86-89.

pect, rather than from the benefits the government may gain from honoring the commitments.¹⁴⁶

The confession and guilty plea situations also may be distinguished on the ground that the government interests in the two situations are different. A proper analysis of these interests indicates, however, that applying *Santobello's* prohibition to confessions induced by broken government promises is even more appropriate than applying it to guilty pleas induced by broken government promises. The government may argue that it has a greater interest in inducing incriminating statements before formal charges have been brought. In several cases, the Court has intimated that the government has a stronger interest in inducing a confession at the earlier stage because the police are still trying to solve a crime at that point.¹⁴⁷ Moreover, the Court's Sixth Amendment confession cases¹⁴⁸ establish that in some contexts fewer restrictions are imposed on the means the government may employ to induce such a statement.¹⁴⁹ In particular, the police are permitted to use informers and other tactics to elicit incriminating statements before a suspect has been formally charged but are not allowed to do so

146. Peter Westen and David Westin have described the differing interests of the government and defendant in the context of plea bargaining.

[T]he prosecutor, the courts, and even the state itself may have a legitimate interest in the continued vitality of plea bargaining. To that end they may also have a legitimate interest in giving defendants the assurances necessary to induce them to engage in plea negotiations. . . . But those are institutional interests on the part of the state, not personal interests of the defendant.

Westen & Westin, *supra* note 124, at 513.

147. See, e.g., *United States v. Henry*, 447 U.S. 264, 272 (1980) (drawing a distinction between using "undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity" before and after "charges are filed"); *Spano v. New York*, 360 U.S. 315, 323-24 (1959) (observing that, since the defendant was already indicted, "[t]he police were not . . . merely trying to solve a crime, or even to absolve a suspect. . . . They were rather concerned primarily with securing a statement from defendant on which they could convict him"). See generally HENRY J. FRIENDLY, *BENCHMARKS* 254-59 (1967) (discussing the differing government interests at the investigatory and accusatory stages).

148. See, e.g., *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964). For a discussion of these cases, see James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988).

149. The suspect's Sixth Amendment right attaches after arraignment. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 398 (1977). After that point, the police are prohibited from deliberately eliciting incriminating statements from the suspect, regardless of whether the suspect is in custody. See *Moulton*, 474 U.S. at 170-71; *Massiah*, 377 U.S. at 206.

afterwards.¹⁵⁰ Based on these cases, the government might argue that confessions obtained through broken government promises at the interrogation stage should be admissible, although guilty pleas obtained after the suspect has been formally charged are not.

This argument is dubious for two reasons. First, the Court's confession cases merely suggest that the government has a greater interest in inducing incriminating statements before formal charges have been brought than it does afterwards. Comparing the government's interest in inducing an incriminating statement with its interest in inducing a guilty plea is more difficult, however; in the latter situation the government has the additional interests of avoiding the uncertainties of litigation and saving the time and expense involved in the prosecution of a criminal trial.

Second, even if the police are permitted to use a broader array of interrogation tactics before charges are brought than afterward, it does not follow that the stage of the proceedings affects the government's authority to induce admissions by broken promises. The primary justification for granting the police greater leeway prior to formal charges is that at that stage the police are still trying to solve a crime.¹⁵¹ To solve a crime, the police may need to induce a confession by promising the suspect something in exchange for a confession. Under *Fulminante's* dicta, they are not prohibited from doing so.¹⁵² The government interest in solving the crime, however, could never justify breaking the promise that induced the confession. From the government's perspective, the

150. Compare *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that the use of an undercover agent to obtain incriminating statements from a suspect not in custody or charged with a criminal offense was constitutionally permissible) with *United States v. Henry*, 447 U.S. 264 (1980) (holding that an undercover agent's deliberate elicitation of incriminating statements from an indicted defendant violated defendant's Sixth Amendment right to an attorney).

151. See *supra* text accompanying note 147. Another explanation for their wider authority at the earlier stage is that the commencement of adversary proceedings invokes the suspect's Sixth Amendment protection and therefore restricts the circumstances under which the government can circumvent the protection of the right to counsel by seeking to elicit incriminating statements without the presence of an attorney. See generally *Tomkovicz, supra* note 148, at 22-24 (explaining the right to counsel in *Massiah v. United States*, 377 U.S. 201 (1964)). If this is the sole justification for the distinction, however, the fact that a defendant is represented by counsel during plea bargaining would remove any reason for imposing stricter limitations on the methods the government may use to induce a guilty plea than those imposed on the methods it may use to induce a confession.

152. See *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991); *supra* text accompanying note 50.

crime is solved whether the defendant confesses in response to a police promise of leniency or pleads guilty as a result of a negotiated plea bargain. Barring unusual circumstances, the defendant's admission of guilt terminates the investigatory phase of the case as to that defendant. All that remains is to adjudicate the defendant's guilt and impose sentence. In the case of both the suspect who confesses in response to a promise of leniency and the defendant who pleads guilty as a result of a negotiated plea bargain,¹⁵³ the government's interest is in obtaining an appropriate resolution of the case. In both situations, the government may want to breach its promise to obtain what it believes to be a more appropriate resolution of the case—a maximum sentence for the defendant, for example—but this interest does not relate to solving the crime. Moreover, since *Santobello's* prohibition precludes the government from breaching a plea bargain to obtain what it perceives to be an appropriate resolution of the case, that prohibition also should apply when the government seeks to obtain a more appropriate resolution of the case by violating a promise that induced a confession.

Thus, the differences between *Santobello* and the hypothetical variation of the *Williams* case are either insignificant or weigh in favor of applying *Santobello's* prohibition to the interrogation/confession context. In both the plea bargain and interrogation contexts, the central question is whether the government should be required to honor its commitments to criminal suspects. Even those who favor adopting a marketplace perspective with respect to issues of criminal justice have suggested that this question should be answered in the affirmative. For example, in arguing that the Court should repudiate *Bram*, Judge Easterbrook asserted that “an exchange of leniency for information, a common trade in the criminal justice system, is a good thing.”¹⁵⁴ Implicit in this statement is the assumption that the defendant will receive the leniency promised. In the plea bargaining context, measures are taken to protect the defendant's interest. If similar measures are not taken to protect the defendant at the interrogation stage, then the dual systems of criminal justice afforded at the “gatehouses”

153. Often the suspect's confession will lead to a guilty plea, thus aborting the need for a trial. See Kamisar, *supra* note 18, at 6.

154. *United States v. Long*, 852 F.2d 975, 980 (7th Cir. 1988) (Easterbrook, J., concurring).

and the "mansions" of American criminal procedure,¹⁵⁵ which the Court sought to repudiate in *Miranda*,¹⁵⁶ will continue. The suspect will be denied the protections at the police station that he is afforded in the courtroom.

III. APPLYING *SANTOBELLO*'S PROHIBITION TO CONFESSIONS INDUCED BY IMPLICIT OR ILLUSORY GOVERNMENT PROMISES

If *Santobello*'s prohibition were narrowly construed, extending its holding to the interrogation context would have only limited significance. Practice indicates that the police are less likely to make an explicit promise that the defendant will be rewarded for a confession than they are to suggest—sometimes with the skillful use of metaphor¹⁵⁷ and innuendo¹⁵⁸—that he will be in a better situation if he confesses. Thus, a due process prohibition that applied only to situations in which the police make and break explicit promises would have only a limited effect on police conduct¹⁵⁹ and would provide only minimal protection to suspects. If due process¹⁶⁰ bars the introduction of a confession induced by a broken

155. See *Kamisar*, *supra* note 56, at 27-40; *Miranda v. Arizona*, 384 U.S. 436, 472 (1966) (citing *Kamisar*, *supra* note 56).

156. *Miranda*'s central holding, which has not been repudiated by subsequent cases, was that the protection that the privilege against self-incrimination provides a criminal defendant at trial also should be afforded to a criminal suspect who is being subjected to custodial interrogation. *Miranda*, 384 U.S. at 460-61.

157. Consider the following interrogation:

You're the one guy who's got the shovel; you're the one fellow who's digging the hole. You just figure out how deep you want to . . . bury yourself; and you just keep right on digging. Of course, if you would start telling the truth, we could throw a little of that dirt back in, and make it a little shallower.

White, *supra* note 79, at 619 (quoting from the taped interrogation of John Biron, who was convicted of first degree murder in 1963).

158. See *infra* text accompanying notes 203-08 (recounting the facts of the Leo Bruce interrogation).

159. The police might be deterred from making explicit promises to induce confessions, but if they are still permitted to use the more common practice of suggesting or implying that benefits will follow a confession, this change would not be significant.

160. In using the term due process, I am, of course, referring to a due process prohibition emanating from the *Santobello* case, rather than the due process test that has been traditionally applied to exclude involuntary confessions. See *supra* notes 114-25 and accompanying text. The due process prohibition emanating from *Santobello*, however, could be integrated into the traditional test by recognizing that it is fundamentally unfair for the government to make use of a confession that was induced by a government promise that was breached. Cf. *supra* text accompanying notes 20-32 (discussing due process limits on interrogation techniques).

government promise, determining the circumstances under which a government promise is broken is critical. In this Part, I discuss how the prohibition might be applied when a confession is induced by an implicit or illusory government promise.

A. *Confessions Induced by Implicit Government Promises*

1. *The Reasonable Expectations Test.* Courts that have dealt with claims that a defendant's guilty plea was induced by an implicit government promise that was broken have taken differing approaches. Adopting the view that plea agreements are similar to other contracts, some courts have held that a defendant's constitutional rights under a plea agreement are coextensive with the rights provided by traditional contract principles.¹⁶¹ Drawing on the due process themes evoked in *Santobello* and its progeny,¹⁶² other courts have concluded that they "should consider not only contract principles but also ensure that the plea bargaining process is 'attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances.'" ¹⁶³ Under this approach, a plea bargain is interpreted in accordance with the defendant's reasonable expectations.¹⁶⁴ If the "circumstances as they existed at the time of the guilty plea, *judged by objective standards*, reasonably justified" the defendant's expectations, then the government's failure to fulfill those expectations constitutes a broken promise.¹⁶⁵

Modern contract principles are generally directed toward protecting the parties' reasonable expectations.¹⁶⁶ Thus, the enforce-

161. See *United States v. McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972). See generally Daniel F. Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751, 756 n.21 (1985) (discussing the relationship between constitutional rights and contract analysis).

162. See *supra* text accompanying notes 114-36.

163. *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989) (alteration in original) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

164. See, e.g., *State v. Allen*, 720 P.2d 761, 764 (Or. Ct. App.) (stating that "[a] defendant's legitimate expectations must be protected" when enforcing a plea agreement), *review denied*, 736 P.2d 377 (Or. 1986).

165. *United States v. Crusco*, 536 F.2d 21, 24 (3d Cir. 1976) (quoting *Mosher v. Lavalley*, 491 F.2d 1346, 1348 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974)); cf. *Closson v. State*, 812 P.2d 966, 973 (Alaska 1991) (stating that the court determines whether an immunity agreement was breached by looking to what "a reasonable person in [the defendant's] position would expect").

166. This principle is evidenced both in contract interpretation, see, e.g., *Stepanov v.*

ment of a plea agreement generally will not vary based on whether it is interpreted in accordance with contract principles or on the defendant's reasonable expectations. Moreover, when there might be a potential discrepancy, defense counsel, presumably familiar with contract principles, can alleviate any problems by explaining the application of those principles to their clients.

In the interrogation context, relying solely on contract principles to determine whether the government has violated a promise to a suspect is more problematic. Although contract principles would presumably enforce an implicit promise as well as an explicit one,¹⁶⁷ in the highly charged atmosphere of the interrogation room the suspect and interrogating officers are likely to have reasonable differences concerning both the existence and the terms of promises made by the police. Since the Due Process Clause is designed to ensure fairness to the individual charged with a criminal offense, the determination whether a government promise has been made and breached should be made on the basis of the suspect's reasonable expectations. Accordingly, admission of a confession induced by government statements that the suspect reasonably believes to constitute a promise should violate due process whenever the government's fulfillment of the promise falls short of the suspect's reasonable expectations.

Homer Elec. Ass'n, 814 P.2d 731, 734 (Alaska 1991) (noting that in interpreting a contract "the goal is to 'give effect to the reasonable expectations of the parties'") (quoting *Mitford v. de Lasala*, 666 P.2d 1000, 1005 (Alaska 1983)); *District of Columbia v. C.J. Langenfelder & Son, Inc.*, 558 A.2d 1155, 1159 (D.C. 1989) ("It is a fundamental principle that '[t]he first step in contract interpretation is determining what a reasonable person in the position of the parties' [would have thought the agreement meant].") (quoting *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982)) (alteration in original), and in contract formation, *see, e.g., Hagrish v. Olson*, 603 A.2d 108, 110 (N.J. Super. Ct. App. Div. 1992) ("A contracting party is bound by the apparent intention he or she outwardly manifests to the other party."); *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) (enforcing a contract, although the offer had been made in jest, because in light of the surrounding circumstances the offeree was "warranted in believing" that a serious offer had been made and because the "[t]he law imputes to [the offeror] an intention corresponding to the reasonable meaning of his words and acts") (quoting *First Nat'l Exch. Bank v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937)).

167. *E.g., Chem-Tronix Lab. v. Solocast Co.*, 258 A.2d 110, 112-13 (Conn. Cir. Ct. 1968) (stating that an implied contract may be formed when "an implied promise to compensate [a party] in some manner . . . [may be] 'inferred from the conduct of the parties though not expressed in words'") (quoting *Collins v. Lewis*, 149 A. 668, 670 (1930)).

2. *Applying the Reasonable Expectations Test.* To illustrate how the reasonable expectations test might be applied, I will consider a tactic employed in *Miller v. Fenton*. Detective Boyce was questioning Frank Miller in connection with an investigation of the murder of seventeen-year-old Deborah Margolin. During the course of an hour-long interrogation, Boyce repeatedly suggested to Miller that he would not be "treated as a criminal" if he confessed. For example, Boyce told Miller that the person responsible for the killing was "*not a criminal*."¹⁶⁸ He went on to say that the perpetrator had "[a] problem, and a good thing about that Frank, is a problem can be rectified."¹⁶⁹ After Miller agreed, Boyce developed his implicit proposal to Miller as follows: "I want to help you. I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank."¹⁷⁰

Miller, who had previously served time in prison, expressed skepticism concerning Boyce's good intentions toward him. When Boyce reiterated, "*I don't think you're a criminal, Frank*," Miller replied, "No, but you're trying to make me one."¹⁷¹ Boyce, however, denied this assertion and reiterated that he wanted to provide Miller with the "proper help" if he told the truth about the killing.¹⁷² Boyce was never explicit about the kind of help that would be provided. His most direct assurance to Miller was contained in a question: "If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, . . . will you talk to me about it?"¹⁷³ Miller never answered this question,¹⁷⁴ but he eventually confessed to the killing. His confession was admitted into evidence, and he was convicted of first degree murder.¹⁷⁵

Miller would seem to have a good argument that his confession was induced by a broken government promise. Boyce at least

168. *Miller v. Fenton*, 796 F.2d 598, 618 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 479 U.S. 989 (1986).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 622.

173. *Id.*

174. His immediate response, "I can't talk to you about something I'm not . . . ," was interrupted by Boyce. *Id.*

175. See *State v. Miller*, 388 A.2d 218, 220 (N.J. 1978).

implicitly, and perhaps explicitly, promised Miller that he would provide him with psychiatric help if he confessed. There is no indication that this promise was ever honored. To establish a claim based on *Santobello*, however, Miller would need to establish that Boyce's promise of psychiatric help meant something more than that Miller would be allowed to meet with a psychiatrist after he confessed. Otherwise, even after Miller's confession and conviction, the government would be able to honor its commitment by having Miller meet with a psychiatrist while in prison.¹⁷⁶ To establish a valid constitutional claim, Miller probably would need to establish that Boyce implicitly promised him that he would not be prosecuted if he confessed.¹⁷⁷

Although Boyce never stated that Miller would not be prosecuted, he did repeatedly state that Miller was "not a criminal"¹⁷⁸ because he did not "have the criminal mind."¹⁷⁹ These statements, taken in conjunction with Boyce's statements that he wanted to help Miller, would arguably lead a reasonable person in Miller's position to believe that Boyce was promising him that his confession would lead to psychiatric treatment, rather than criminal prosecution.

On the other hand, Miller, who had prior experience with the criminal justice system,¹⁸⁰ seemed to indicate an awareness that

176. Moreover, in both the guilty plea and confession contexts, it seems questionable whether *Santobello's* prohibition should apply to government promises that have no relationship to the legal consequences of pleading guilty or confessing. Broken promises with respect to unrelated matters (such as a promise to give the suspect ice cream if he confesses) are arguably not within *Santobello's* prohibition. *Santobello* is based on the principle that the government is not permitted to mislead a criminal suspect as to the consequences of a critical choice. In most instances, misrepresentation concerning matters unrelated to the legal consequences of confessing will not distort the suspect's understanding of the consequences of confessing.

177. The *Miller* case illustrates the difficulties a criminal suspect has in pinning down the police as to the precise meaning of their commitments. If Miller had been represented by an attorney when Boyce made statements intimating that Miller would not be treated as a criminal if he confessed, the attorney would undoubtedly press Boyce to explain what, if any, commitments he was making to induce a confession. A suspect could not be expected to engage in this process, however.

178. *Miller*, 796 F.2d at 618.

179. *Id.* at 617-18.

180. In deciding that Miller's confession was voluntary, the Third Circuit put considerable weight on Miller's previous experience with the criminal justice system, observing that, as a result of this experience, he "was aware of the consequences of confessing." *Id.* at 606.

he was likely to be prosecuted if he confessed.¹⁸¹ Moreover, Boyce never explicitly said that Miller could avoid prosecution by confessing. Based on these facts, the government could argue that a reasonable person with Miller's background would be aware that Detective Boyce would lack authority to decide that a killer would be sent to a mental hospital rather than being prosecuted and, therefore, would not interpret Boyce's ambiguous remarks as a promise that he would not be prosecuted if he confessed.

In resolving this issue, little or no weight should be given to Miller's expressed skepticism concerning Boyce's good intentions toward him. As long as Miller confessed because he reasonably believed that Boyce had promised he would not be prosecuted if he confessed,¹⁸² his skepticism as to whether Boyce would fulfill his commitment should be irrelevant. Moreover, Miller's prior experience with the criminal justice system should be given only minimal weight. It cannot be assumed that this experience would give Miller an awareness of Boyce's limited authority. Even assuming that Miller's experience would give him some knowledge of the criminal justice system,¹⁸³ he would not necessarily be able to act on that knowledge while being subjected to custodial interrogation.¹⁸⁴ As David Simon has said, a suspect who is being questioned by the police will be looking for "a small, open window at the top of [a] long wall"¹⁸⁵ through which he can miraculously

181. See *supra* text accompanying note 171.

182. Of course, if Miller did not believe that Boyce had made a promise or was certain that whatever promise Boyce made would not be kept, then admitting Miller's confession would not violate due process, see *supra* note 166, because it could not be said that Boyce's promise induced Miller's confession.

183. Cf. Yale Kamisar, Gideon v. Wainwright *A Quarter-Century Later*, 10 PACE L. REV. 343, 348 (1990) ("Well, I have appeared in a doctor's office many times and I am not wholly unfamiliar with medicine. But does it follow that I am qualified to practice medicine?") (commenting on the Court's assertion in *Betts v. Brady*, 316 U.S. 455, 472 (1942), that *Betts* could competently represent himself because he had previously pled guilty to a criminal charge and was "not wholly unfamiliar with criminal procedure").

184. See *supra* note 140 and accompanying text.

185. See SIMON, *supra* note 1, at 197.

escape the possibility of prosecution.¹⁸⁶ In this setting, a reasonable person in Miller's position would give great weight to Boyce's statements that Miller was "not a criminal."¹⁸⁷ In light of these statements, the reasonable person would interpret Boyce's promise to provide Miller with psychiatric help to mean that Miller would not be prosecuted if he confessed. Thus, under the proposed test, admitting Miller's confession at his trial for murder would violate due process.¹⁸⁸

B. Confessions Induced by Illusory Government Promises

1. *Barring Confessions Induced by Illusory Government Promises.* In the plea bargaining context, courts have at times invalidated pleas induced by illusory promises on the ground that accepting such pleas would violate due process.¹⁸⁹ In a case that predates *Santobello*, for example, the defendant entered into a plea agreement under which the prosecutor agreed to make a particular sentencing recommendation if asked to do so by the sentencing judge.¹⁹⁰ The prosecutor knew, however, that the sentencing judge had not asked for a sentencing recommendation during the previous three years. Under these circumstances, the court found that the prosecutor's promise was "wholly illusory" and held that "a plea induced by" such a promise "violate[d] due process."¹⁹¹

In another case, the prosecutor promised to drop certain charges if the defendant pled guilty to other charges.¹⁹² After the

186. Simon vividly portrays the suspect's illusion.

The open window is the escape hatch, the Out. It is the perfect representation of what every suspect believes when he opens his mouth during an interrogation. Every last one envisions himself parrying questions with the right combination of alibi and excuse; every last one sees himself coming up with the right words, then crawling out the window to go home and sleep in his own bed.

Id. at 209.

187. *Miller v. Fenton*, 796 F.2d 598, 618 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 479 U.S. 989 (1986).

188. *Cf. Johnson*, *supra* note 55, at 311 (stating that Boyce implied "that, upon confession, the suspect would receive 'good medical help' rather than punishment") (citation omitted).

189. *See, e.g., Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962); *Nash v. Israel*, 533 F. Supp. 1378 (E.D. Wis. 1982), *aff'd*, 707 F.2d 298 (7th Cir. 1983); *People v. McKay*, 159 Cal. Rptr. 174 (App. Dep't Super. Ct. 1979).

190. *Dillon*, 307 F.2d at 449.

191. *Id.*

192. *McKay*, 159 Cal. Rptr. at 175-76.

defendant pled guilty, it was determined that the charges the prosecutor dropped lacked any legal basis.¹⁹³ Determining that the benefits the defendant derived from the plea agreement were illusory, the California Supreme Court vacated the plea.¹⁹⁴

In yet another case, a federal court applied a similar principle even though the government's promise did have some value. In *Nash v. Israel*,¹⁹⁵ the defendant agreed to plead guilty to first degree murder in exchange for the prosecutor's promise to write the governor and recommend commutation of the mandatory life sentence and the judge's promise to write that he had "no objection" to commutation.¹⁹⁶ Although the prosecutor and judge were both found to have "technically" complied with the plea agreement, the court nevertheless concluded that "the spirit of the law [was] violated in this case"¹⁹⁷ because, although the defendant undoubtedly believed he was receiving some benefit in exchange for his guilty plea,¹⁹⁸ the benefit provided was in fact illusory given the "entirely discretionary nature of gubernatorial commutation of sentence[s]."¹⁹⁹

Admission of confessions induced by illusory government promises also should violate due process.²⁰⁰ Applying *Santobello* to government promises of this type is even more appropriate at

193. *Id.* at 177. In 1977, the defendant was charged with numerous violations of § 2399.5 of the Business and Professions Code (prescribing dangerous drugs with medical indication therefor). *Id.* at 175. In 1979, however, the California Supreme Court held that a violation of that section is not a criminal offense. See *People v. Superior Court*, 595 P.2d 139, 139 (Cal. 1979).

194. *McKay*, 159 Cal. Rptr. at 177-78. In justifying this result, the court stated, "A plea bargain is a two-way street 'Critical to plea bargaining is the concept of reciprocal benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made.'" *Id.* at 178 (quoting *People v. Collins*, 577 P.2d 1026, 1029 (Cal. 1978)).

195. 533 F. Supp. 1378 (E.D. Wis. 1982), *aff'd*, 707 F.2d 298 (7th Cir. 1983).

196. *Id.* at 1379-80.

197. *Id.* at 1384.

198. Because the defendant was required to testify in two murder trials in exchange for the prosecutor's recommendation of clemency, the defendant was risking placement in the same prison as those he testified against and therefore subsequent bodily harm. Hence, the court reasoned that acceptance of such an exchange raised the inference that the defendant believed the plea was of some benefit to him. *Id.*

199. *Id.* Because commutation of the defendant's sentence was "the essential element of the bargain" and the defendant did not understand and had not been informed that he might not receive that benefit, the court found that his due process rights had been denied. *Id.*

200. See *supra* note 160.

the interrogation stage than it is at the plea bargaining stage because suspects offered promises by the police are generally not represented by counsel and therefore are not in a position to evaluate the value of promises made by the government.²⁰¹ To avoid allowing the government to exploit the suspect's ignorance, suspects should be afforded the same protection from empty promises as they are from broken ones.

As in the previous Section, the determination of whether a government promise is illusory should be made from the perspective of a reasonable person in the suspect's position. Accordingly, a confession induced by a government promise should be constitutionally inadmissible when a reasonable person in the suspect's position would believe that the government's promise is worth substantially more than it is in fact.²⁰²

2. *Applying the Illusory Promise Test.* To illustrate how the proposed test might apply, I will consider the police interrogation of Leo Bruce. Bruce was suspected of murdering several people at a Thai Buddhist Temple west of Phoenix, Arizona. After he was arrested and driven to police headquarters, Bruce was questioned for several hours about the murders.²⁰³ Near the beginning of the interrogation, FBI Agent Casey falsely told Bruce that the police already had evidence establishing that he was at the temple on the night of the killings. After Bruce repeatedly denied ever being there, Casey said to him, "The best thing to do is to cooperate now. . . . Don't you think it's smart to get your version of the story down . . . before everybody else gives theirs?"²⁰⁴ Bruce reiterated sixteen more times that he was not at the temple. Casey then told Bruce that, if he stuck with that story, he was "gonna end up being sorry, I think."²⁰⁵ He added, "You're making a

201. See *supra* text accompanying notes 140-43.

202. As in the plea bargaining context, the government's good faith should be irrelevant. Thus, an interrogating officer's belief either that the benefits promised to the suspect had substantial value or that the suspect would know that the benefits promised had little or no value should be irrelevant as long as a reasonable person in the suspect's position would believe that the benefits promised were of substantially greater value than they were in fact.

203. See Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58, 58. Bruce asserted his innocence for seven hours. The questioning continued until, almost thirteen hours after it had begun, Bruce began to incriminate himself. *Id.*

204. *Id.* at 59.

205. *Id.* at 60.

mistake by not cooperating at this point."²⁰⁶ After several more hours of interrogation, Bruce confessed to the killings.²⁰⁷ Bruce was never brought to trial, however, because subsequently discovered evidence established that his confession was false.²⁰⁸

Taken literally, Casey's statements to Bruce promised nothing. Casey said it would be best to cooperate but never that cooperation would lead to any reward from the government. To the contrary, Casey suggested that the only tangible benefit of cooperation would be that Bruce would then "get [his] version of the story down . . . before everybody else gives theirs."²⁰⁹ This benefit, a tenuous one to be sure, in fact accrued to the suspect as soon as he told his story.²¹⁰

On the other hand, when Casey's statements about cooperation are considered in the context of the total interrogation, they seem to promise a good deal more. Consider Bruce's situation. Apparently unfamiliar with the criminal justice system,²¹¹ he had been taken from familiar surroundings,²¹² subjected to several hours of interrogation,²¹³ and told that the police had strong incriminating evidence against him.²¹⁴ A suspect in this situation who hears not only the specific statement about the benefits of cooperation but also the further assurance that he's "making a mistake by not cooperating at this point"²¹⁵ would not be able to calibrate the actual value of the benefits being offered for his cooperation. A reasonable person in the suspect's position could

206. *Id.*

207. *Id.*

208. *Id.* at 58, 60-61. Not only was Bruce's testimony inaccurate in many respects but the real killer later confessed when police linked him with the murder weapon. *Id.* at 61.

209. *Id.* at 59.

210. If the government is likely to offer one or more suspects immunity in exchange for their testimony, the suspect who first tells his story to the police might be more likely to receive an immunity offer than those who tell their stories later.

211. Bruce had no prior criminal record. See Parloff, *supra* note 203, at 59.

212. On the day of his arrest, Bruce left work for his Tucson apartment. Police officers arrested him outside his apartment and put him into a police car. After a two-hour drive to Phoenix, Bruce was taken to a 10-by-6 foot, windowless room for questioning. *Id.*

213. Police began questioning Bruce at 2:30 a.m. By 3:15 p.m. the next afternoon, almost 13 hours after the interrogation had begun, he finally began to incriminate himself. *Id.* at 59-60.

214. See, e.g., *id.* at 59 ("The bottom line is . . . we got you in the Blazer and the Bronco goin' to the church that night. Okay? You're one of [the] eight people. . . . The games are up, all right?").

215. *Id.* at 60.

believe that the "benefit" of having his story down first would later lead to a more tangible benefit, such as a reduced charge or the opportunity to be a government witness on favorable terms. If the government did not in fact provide any benefit of this magnitude, then the promise that induced the defendant's confession was illusory and admission of the confession into evidence should violate due process.

The government could present plausible counterarguments, of course. First, it could emphasize that Casey never promised anything except that, if Bruce gave a statement, he would get his version of the story down first. To a reasonable person, Casey's statement that Bruce was making a mistake by not cooperating would not provide a gloss on Casey's earlier statement but merely constitute an expression of Casey's opinion. In other words, Casey thought it would be best for Bruce to confess and get his story recorded first, but he never suggested that any concrete benefits would accrue to Bruce if he did get his story down first.

Moreover, the government could make a slippery slope argument. If Casey's comments to Bruce constituted an illusory promise, then wouldn't the police be precluded from making any statement about the benefits of confessing? For example, would a detective be prohibited from telling the suspect that the prosecuting attorney will be told of his cooperation if he makes a statement?²¹⁶ Would the police even be prohibited from telling the suspect that he will feel better if he confesses?

The first set of these arguments raise factual issues as to which reasonable minds could differ. Based on the transcript of the Bruce interrogation, determining whether a reasonable person in Bruce's position would believe that Casey had promised a tangible benefit in exchange for a confession would be difficult. Giving weight to the atmosphere of the interrogation, I would conclude that a reasonable person in Bruce's position would reach this conclusion. On the other hand, a court could reasonably reach the opposite result. Applying a reasonable person test in this context will inevitably lead to difficult issues of fact.²¹⁷

216. Courts have generally held that a statement of this type will not render a resulting confession involuntary. See, e.g., *United States v. Toscano-Padilla*, No. 92-30247, 1993 U.S. App. LEXIS 15411, at *4 (9th Cir. June 16, 1993); *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *United States v. Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983).

217. Under the Court's post-*Miranda* cases, similar issues must be resolved in deter-

As to the government's slippery slope argument, I have two responses. First, although the slope is slippery, there is a clear stopping point. The case in which the detective promises the suspect that the prosecutor will be informed of his cooperation if he confesses can be distinguished from one in which the suspect is told he will feel better if he tells the truth. Only in the former situation is there an allusion to some consequences that relate to the suspect's situation *vis-à-vis* the legal system. Unless a statement relating to the suspect's mental or emotional well-being is an implicit threat of force or other improper treatment,²¹⁸ the suspect has no basis for believing that the statement is anything more than a prediction. On the other hand, an officer's statement relating to the suspect's legal situation has the potential for holding out an illusory benefit because the suspect is likely to believe that the officer has both superior knowledge of the criminal justice system and the ability to control those aspects of the system that relate to the suspect's case.

Second, the presence of a slippery slope in this area of police interrogation may not be such a bad thing. If the prohibition on confessions induced by broken government promises is to have any real effect, it must apply to illusory promises as well as to explicit or implicit ones. Although it will undoubtedly often be difficult to determine whether a particular police statement should properly be found to constitute an illusory promise, the police are in a position to alleviate this problem. To eliminate the possibility of a confession induced by an illusory promise, an interrogating officer can either avoid making any statements relating to the effect that the suspect's confession will have on his criminal case or, if he does make such a statement, delineate clearly and accurately the consequences the suspect can expect if he confesses.²¹⁹ As the Bruce

mining whether the suspect was in custody at the time he was interrogated, *see, e.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (suspect is in custody if a reasonable person in the suspect's position would believe he was under restraint equivalent to an arrest), and whether he was interrogated within the meaning of *Miranda*, *see, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (defining interrogation as express questioning or police conduct "that the police should know is reasonably likely to evoke an incriminating response from a suspect") (footnotes omitted).

218. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) (finding, in the context of that case, that an offer to provide the suspect with protection if he confessed was an implicit threat that he would be subjected to unlawful physical force if he did not confess).

219. To avoid a possible illusory promise issue, for example, an officer who tells the

case demonstrates, police statements that may be interpreted by suspects as promising a legal advantage have the potential to elicit a false confession.²²⁰ Accordingly, a judicial approach that encourages the police to monitor such statements carefully is desirable.

IV. CONCLUSION

Fulminante's repudiation of *Bram* makes it appropriate to consider the circumstances under which confessions induced by government promises may be admitted. In this Article, I address the question whether the admission of confessions induced by broken or illusory government promises violates due process or the privilege against self-incrimination. In particular, I consider whether *Santobello's* prohibition of guilty pleas induced by broken government promises should apply in this situation.

The police use of promises to induce confessions is analogous to plea bargaining in that in both situations the government is offering leniency to obtain an incriminating admission. The two situations differ in at least one critical respect, however: whereas defendants engaged in plea bargaining are generally represented by counsel, suspects interrogated by the police rarely are. Because of the absence of counsel, suspects who deal with the police are not in a good position to exact a favorable bargain in exchange for a confession. In most cases, they lack both knowledge to enable them to assess the value of information that they would give the police and negotiating skills to assist them in exacting reciprocal benefits.

Santobello is based on the principle that, when an individual is making a vitally important decision, the government should not be permitted to mislead him as to the consequences of his choice. This fundamental principle should apply when an unrepresented suspect is dealing with the police²²¹ as much as it does when a counseled defendant is negotiating with the prosecutor. As the

suspect that he will inform the prosecutor of the suspect's cooperation if he confesses also should be required to make a reasonably accurate assessment of the consequences of his statement to the prosecutor. If the officer lacked knowledge with respect to these consequences, a statement that he did not know whether telling the prosecutor would benefit the suspect should be sufficient.

220. See Johnson, *supra* note 55, at 310-11.

221. The principle also should apply to the rare case in which a defendant being interrogated by the police is represented by counsel. See *supra* note 140.

Supreme Court has recognized, the unrepresented suspect is more vulnerable to government inducement than the represented defendant. In addition, he is less able to negotiate effectively or even to understand the actual value of the commitments the police have made to him. To protect him from government overreaching, he should at least have the same protection from broken government bargains as the less vulnerable defendant who is engaged in plea bargaining.

Applying *Santobello's* prohibition to confessions induced by broken government promises will be difficult because government promises made in the interrogation context are likely to be far more ambiguous than those made in the more carefully monitored plea bargaining context. To make *Santobello's* prohibition meaningful in the interrogation context, the prohibition must apply to confessions induced by implicit and illusory, as well as explicit, government promises. Moreover, since the objective is to protect an individual who is making a critical decision from the effect of government misrepresentation, the determination whether there has been a broken or illusory government promise should be made from the perspective of a reasonable person in the position of the suspect.

Examination of two actual interrogations illustrates the advantages of this approach. One of the critical issues in the *Miller* case²²² concerned the nature of the promise Detective Boyce made to Miller. Did Boyce merely promise that Miller would see a psychiatrist if he confessed? Or did he promise that if Miller confessed he would not be criminally prosecuted? If Miller had been represented by counsel during the interrogation, counsel would have pummed Boyce down, requiring him to be more precise. Since Miller was not represented by counsel, the statements that induced his confession were ambiguous. To ensure that the government is prohibited from misleading an individual who is making a critical choice, Boyce's statements should be interpreted from the perspective of a reasonable person in Miller's position. When evaluating the *Miller* interrogation from this perspective, a court should exclude Miller's confession because it was induced by an implicit government promise that was breached.

222. See *supra* text accompanying notes 168-75.

When conducting the interrogation of Leo Bruce,²²³ Detective Casey did not appear to promise any tangible benefits if Bruce confessed. On the other hand, given the atmosphere of the interrogation, Bruce would arguably believe that the benefit of "getting his story down first" was worth considerably more than it was in fact. Indeed, this illusory benefit may have been enough to induce a false confession. The *Bruce* case not only illustrates the difficulty of determining whether a police promise is illusory but also suggests that, at least from the perspective of the suspect, many police statements will constitute illusory promises. In an atmosphere in which the suspect is desperately trying to escape responsibility and the police are trying to make him believe that "with the help of the detective, [he will] be judged less evil than [he truly is],"²²⁴ it is inevitable that suspects will reasonably interpret seemingly equivocal or innocuous police statements as inducements to confess. Consideration of cases like *Bruce* suggests that an interrogating officer should be restricted from making statements relating to the effect that the suspect's confession will have on his criminal case unless that officer delineates clearly and accurately the consequences the suspect can expect from such a confession.

Such a restriction goes beyond what I am advocating in this Article, however. Based on principles of fairness, I argue simply that *Santobello* should provide the same protection to suspects who are dealing with the police as it does to defendants who are negotiating with the prosecutor. Accordingly, a confession induced by a broken or illusory government promise should be constitutionally inadmissible.

223. See *supra* text accompanying notes 203-210.

224. SIMON, *supra* note 1, at 198.