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UNITED STATES V. LILLY: FUNDAMENTAL UNFAIRNESS

INTRODUCTION

Both federal and state governments have a vested interest in prosecuting individuals who commit crimes. The justice system allows the government to hold these individuals accountable for their actions and repay a debt owed to society. To achieve this result, the government may secure a conviction with the testimony of individuals who witnessed a defendant's criminal act. These prosecution witnesses interact with the justice system through prosecutors and also through law enforcement.

While this interaction benefits the government, it creates issues when a prosecution witness also commits a criminal act. Her testimony, potentially essential to the case against another individual, may also implicate her in a crime. She may be vaguely aware of her constitutional protection against self-incrimination, but this notion does not protect her from enticing recommendations by law enforcement. These recommendations, which seem to convey promises of immunity from prosecution, arguably compel her to make incriminatory statements while providing law enforcement with valuable information in another case. Her statements thus lead to her arrest and prosecution.

Such was the fate for the defendant in *United States v. Lilly*.¹ The Tenth Circuit upheld Ms. Lilly's conviction because of the broad rule and narrow exception related to promises of immunity made by the federal government. This article explores that rule and its exception, ultimately arguing for a change in application to better protect Fifth Amendment privilege. Rather than examining prosecution witness immunity through prosecutorial misconduct² or judicial supervisory powers,³ this article takes a novel approach and examines federal prosecution witness immunity in the context of a federal government entity's actual authority to promise immunity.⁴ This rule, often analogized to the concept of promissory estoppel in contract law, implicates much greater stakes than those typically surrounding contract disputes. Despite the serious nature of the rights at stake, including liberty and even life, the extremely narrow exception to the actual

¹ 810 F.3d 1205 (10th Cir. 2016).

² E.g., Nathaniel Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About It*, 91 TEX. L. REV. 175, 175 (2012).

³ E.g., *Lilly*, 810 F.3d at 1218; Alison M. Field, Note, *Defense Witnesses Need Immunity Too: Why the Supreme Court Should Adopt the Ninth Circuit's Approach to Defense-Witness Immunity*, 49 NEW ENG. L. REV. 231, 233 (2015).

⁴ This article focuses on the actual authority of government entities related to immunity from *federal* prosecution. Additionally, the discussion focuses on witnesses for the *prosecution*.

authority rule⁵ fails to provide adequate protection reflective of these important rights.

Too inflexible to account for these rights, the actual authority rule becomes overly broad and harshly objective. Courts construe the only exception to this rule so narrowly as to make it fundamentally unavailable.⁶ The current state of the rule, as demonstrated in *Lilly*, may require prosecution witnesses to choose either to help the government build a case against another individual or to protect her own interest against self-incrimination. A solution to such a difficult choice may lie in the framework set out in *Miranda v. Arizona*.⁷ In this manner, law enforcement agents should be legally required to affirmatively disclose whether they can grant immunity to potential witnesses. As applied to the actual authority rule, this framework provides a workable method for law enforcement to elicit cooperation from prosecution witnesses while allowing those witnesses to fully understand their rights.⁸

Part I examines general background information regarding criminal prosecutions, *Miranda*, and immunity. Part II deconstructs the facts, holding, and reasoning in *Lilly*. Part III compares the *Lilly* court's reasoning to the general principles of contract law to explain the flaws in this assessment. Part III then applies this analysis within *Miranda*'s framework to demonstrate a workable solution to protect the constitutional rights of those in the criminal justice system.

I. BACKGROUND

A. *The Fifth Amendment and Miranda*

Congress vested in United States attorneys the power to prosecute crimes.⁹ The government suggests that these federal prosecutors pursue criminal charges against any individual believed to have committed a crime.¹⁰ In building a case against a suspected criminal, the prosecution

⁵ The actual authority rule in this context requires a government agent to possess the statutory grant of power necessary to bind the government to an agreement. *See infra* II.B.

⁶ *See, e.g.*, *United States v. Williams*, 780 F.2d 802, 803 (9th Cir. 1986) (holding the fundamental fairness exception inapplicable when an agreement did not induce the defendant to confess or provide information); *see also* *Johnson v. Lumpkin*, 769 F.2d 630, 634 (9th Cir. 1985) (holding that state agents were not bound by promises made by federal agents, even if appellant detrimentally relied on that promise).

⁷ 384 U.S. 436 (1966). There, the Court found that police must state certain procedural safeguards—the right to remain silent, the right to counsel, and the knowledge of the consequences of speaking—before conducting a custodial interrogation. *Id.* at 444.

⁸ The Supreme Court has said that following the *Miranda* decision, “the possibility that the *person under investigation* may be unaware of his right to remain silent . . . is implausible.” *Brogan v. United States*, 522 U.S. 398, 405 (1998) (emphasis added). However, it seems much more plausible that a *witness* may be much less aware of this right.

⁹ 28 U.S.C. § 547(1) (2012).

¹⁰ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.220 (1999).

may elicit cooperation from a witness with information about the suspected crime.¹¹ While witnesses for both the prosecution and the defense may receive immunity,¹² prosecution witnesses have a broader right to seek immunity than do defense witnesses¹³ because the federal prosecutor possesses the actual authority to grant immunity.¹⁴ When a witness cannot testify in a criminal case without self-incriminating, the government can grant the witness immunity from prosecution.¹⁵ The government may grant a witness one of three types of immunity: transactional immunity, use immunity, and derivative use immunity.¹⁶ Transactional immunity broadly protects a witness from prosecution for criminal activity.¹⁷ Use immunity, on the other hand, protects an individual under a more narrow set of circumstances because it only prevents a witness's testimony from becoming the basis of prosecution.¹⁸ However, derivative use immunity slightly expands this basis and prevents prosecution based on a witness's testimony or any fruits of that testimony.¹⁹ Only derivative use immunity and transactional immunity are sufficiently protective to compel a witness to testify without violating the witness's Fifth Amendment privilege against self-incrimination.²⁰

Without any type of immunity, a prosecution witness must rely on her understanding of the Fifth Amendment for protection against self-incrimination. The Fifth Amendment provides a basic guarantee that no person "shall be compelled in any criminal case to be a witness against himself."²¹ In *Miranda*, the Supreme Court applied this protection to custodial interrogations.²² There, police questioned a suspect without first advising him of his constitutional rights, including those provided for in the Fifth Amendment.²³ Because of the inherent "dignity and

¹¹ See *id.* at 9-27.600 (discussing a prosecutor's power to enter into non-prosecution agreements with such individuals in exchange for cooperation).

¹² See Lipanovich, *supra* note 2, at 176.

¹³ *Id.* at 175-76.

¹⁴ Robert M. Schoenhaus, Annotation, *Prosecutor's Power to Grant Prosecution Witness Immunity from Prosecution*, 4 A.L.R.4TH 1221 (1999).

¹⁵ See 18 U.S.C. § 6003 (2012).

¹⁶ See, e.g., *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (discussing derivative use immunity) *State v. Belanger*, 146 N.M. 357, 361 (N.M. 2009) (discussing transactional immunity and use immunity).

¹⁷ See, e.g., *Belanger*, 146 N.M. at 361.

¹⁸ *Id.*

¹⁹ See *Kastigar*, 406 U.S. at 460.

²⁰ See *id.* at 453 (holding that derivative use testimony may compel testimony); see also *Brown v. Walker*, 161 U.S. 591, 593-94, 610 (holding that a statute conferring transactional immunity sufficiently protected Fifth Amendment interests and could compel testimony).

²¹ U.S. CONST. amend. V.

²² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²³ *Id.* at 456-57.

integrity” that the Fifth Amendment protects,²⁴ the Court held that its protections apply in custodial interrogation settings.²⁵

This protection requires that law enforcement advise a suspect of the right to remain silent,²⁶ that anything a suspect says “can and will be used against the individual in court,”²⁷ and that the suspect has the right to have an attorney present.²⁸ The Court noted that a failure to provide such a warning “would discriminate against the defendant who does not know his rights. . . . To require the [defendant to make the] request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.”²⁹ This privilege “is so fundamental to our system of constitutional rule” that it requires an affirmative warning in every case, even if the individual already knew of his or her rights.³⁰ The best method to ensure that the individual may fully exercise his or her rights³¹ is to provide affirmative warnings in every interrogation.³² Despite this extremely favorable analysis of Fifth Amendment rights, law enforcement officers need not provide such affirmative warnings when interviewing a prosecution witness.³³ This disconnect exists despite the fact that the same rights at stake during a custodial interrogation may be implicated when a prosecution witness speaks to law enforcement.

B. The Actual Authority Rule

A government entity must have the authority to grant immunity for the individual to enforce an immunity agreement.³⁴ This authority may be either express or implied.³⁵ A federal prosecutor’s authority is express because federal statutes enumerate the power and its scope.³⁶ Other government agents may have implied authority to act on behalf of the

²⁴ *Id.* at 460.

²⁵ *Id.* at 461.

²⁶ *Id.* at 467–68.

²⁷ *Id.* at 469.

²⁸ *Id.*

²⁹ *Id.* at 471 (quoting *People v. Dorado*, 398 P.2d 361, 369–370 (Cal. 1965)).

³⁰ *Id.* at 468.

³¹ *Id.* at 469 (noting that “a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is *free to exercise the privilege at that point in time*”) (emphasis added).

³² *Id.* at 472.

³³ *Id.* at 444 (holding that such requirements apply only during custodial interrogations).

³⁴ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

³⁵ *United States v. Flemmi*, 225 F.3d 78, 85 (1st Cir. 2000).

³⁶ *See id.* (holding that “a government agent possesses express authority to bind the government if—and only if—the Constitution, a federal statute, or a duly promulgated regulation grants such authority in clear and unequivocal terms”).

government “when that act is integral to the tasks assigned to him or otherwise necessary for the due accomplishment of those tasks.”³⁷

Regardless of whether a government entity possesses the express or implied power to act, the entity must possess the actual authority to bind the government in agreements with individuals.³⁸ If an individual seeking to enforce a promise made on behalf of the government can demonstrate that the government actor possessed the legal authority to make a promise at that time, then the government must fulfill that promise.³⁹ As applied to immunity, the rule strictly limits enforceable promises to prevent perpetrators of especially terrible crimes from going unpunished because a government agent made a promise that seemed advantageous in the moment.⁴⁰ Whereas apparent authority may suffice in some instances,⁴¹ immunity agreements require actual authority.⁴²

The power to grant immunity rests entirely at a prosecutor’s discretion.⁴³ This discretion allows the government to selectively honor an agreement with a prosecution witness, even though such a notion violates basic ideas of fairness.⁴⁴ An individual may not enforce all promises made between the individual and a government entity.⁴⁵ This policy shifts the risk of an unenforceable agreement onto the individual.⁴⁶

This general rule and its policy justification give way to one limited exception. A United States attorney must fulfill promises made by other government entities, even if the entity made the promise without the actual authority to do so, if “breach of the agreement [would] render[] a prosecution fundamentally unfair.”⁴⁷ While this fundamental fairness

³⁷ *Id.*

³⁸ *Id.* (citations omitted).

³⁹ *Id.* at 84; *see also* Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994) (discussing actual authority possessed by law enforcement to enforce promises made during plea agreements).

⁴⁰ Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1236-37 (5th Cir. 1979) (stating that “otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department”).

⁴¹ *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 184 (1990) (justifying a search under the Fourth Amendment based on an individual’s apparent authority over the dwelling by stating that “the government [need not] be factually correct in its assessment” of the situation in order to be deemed to have acted reasonably).

⁴² *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

⁴³ *See generally* United States v. Cooper, 70 F.3d 563, 567 (10th Cir 1995).

⁴⁴ It seems fair to bind parties to the promises they make. This idea, known as promissory estoppel, dominates contract law. *See infra* III.A.2.

⁴⁵ Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (holding that government entities are not subject to promissory estoppel considerations); *see also* United States v. Irwin, 612 F.2d 1182, 1191 n.20 (9th Cir. 1980) (holding that promises made by a government employee regarding criminal charges may not always bind the United States Attorney to honoring that promise).

⁴⁶ Fed. Crop Ins. Corp., 332 U.S. at 384.

⁴⁷ United States v. Williams, 780 F.2d 802, 803 (9th Cir. 1986) (citing United States v. Rodman, 519 F.2d 1058, 1059–60 (1st Cir. 1975) (per curiam)).

standard appears broad and subjective, courts construe it narrowly.⁴⁸ This narrow interpretation prevents the exception from “swallow[ing] the rule” and becoming more powerful than the actual authority rule.⁴⁹ Government actors may therefore act unfairly and remain unbound to promises because the particular situation may not fit within this narrow exception.⁵⁰

C. Scope of the Rule and Exception

By requiring a government entity to possess the actual authority to grant immunity, the government can prosecute more crimes.⁵¹ The actual authority rule extends this power to prosecutors as a function of their role in the executive branch in furtherance of their duty to faithfully execute federal laws.⁵² This discretionary power allows a prosecutor to determine whether to pursue a criminal case against an individual. Courts largely cannot review this discretionary power,⁵³ so the actual authority requirement for immunity simplifies the process by explicitly granting it to a certain class of government actors.

Courts rationalize the fundamental fairness exception in a similar fashion. Courts construe the fundamental fairness exception narrowly to avoid making it broader than the rule.⁵⁴ A narrow exception to a generally broad rule necessarily results in fewer instances for witnesses to utilize it. This rationale likewise reduces the number of grants of immunity and therefore increases the number of individuals prosecuted. This notion fits with the general grant of power to United States attorneys to prosecute “all offenses against the United States.”⁵⁵ Thus, the actual authority requirement to grant criminal immunity limited by the narrow fundamental fairness exception mirrors the broad grant of power to prosecute federal crimes limited only by a narrow exception.

The Tenth Circuit treats immunity agreements of any kind like plea agreements in terms of the scope of the rights they confer.⁵⁶ However, most discussion related to witness immunity in the Tenth Circuit focuses

⁴⁸ See, e.g., *First Nat'l Bank v. Woods*, 743 F.3d 689, 699 (10th Cir. 2014).

⁴⁹ *Id.* (quoting *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009)).

⁵⁰ See *United States v. Lilly*, 810 F.3d 1205, 1216–17 (10th Cir. 2016) (citing typical examples of failed attempts to utilize the fundamental fairness exception).

⁵¹ See *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1236–37 (5th Cir. 1979).

⁵² *United States v. Cox*, 342 F.2d 167, 190–91 (5th Cir. 1965).

⁵³ *Id.* at 190.

⁵⁴ See, e.g., *Cuomo*, 557 U.S. at 530 (discussing the need to construe the exception narrowly to ensure it does not “swallow the rule”).

⁵⁵ 28 U.S.C. § 547(1) (2012).

⁵⁶ See *United States v. Lilly*, 810 F.3d 1205, 1212 (10th Cir. 2016) (calling the context of plea agreements “analogous”) (citing *United States v. Pinter*, 971 F.2d 554, 557 (10th Cir. 1992) (holding that “the same analysis applies to both” plea agreements and immunity agreements)).

on various aspects of federalism⁵⁷ or prosecutorial misconduct⁵⁸ without much analysis of the actual authority rule.⁵⁹ Much of the analysis appears to accept this rule and view skeptically any attempt to raise the fundamental fairness exception.⁶⁰ Indeed, the reasoning generally relies heavily on canons of narrow interpretation of exceptions to rules rather than analyzing the context in which those rules apply.⁶¹

II. *UNITED STATES V. LILLY*

A. *Facts*

United States v. Lilly demonstrates how this rule and exception work in a typical, “mine-run” case.⁶² Defendant Janet Lilly spoke with federal Drug Enforcement Agency (DEA) agents in connection with her fiancé’s arrest for methamphetamine possession.⁶³ She then spoke to Wyoming Division of Criminal Investigation (DCI) agents, who work for the state of Wyoming, about her involvement in methamphetamine distribution.⁶⁴ During this discussion, Ms. Lilly incriminated herself in her fiancé’s methamphetamine operation.⁶⁵ The DCI agents assured Ms. Lilly that they would help her and that they would do their best to ensure the government would not prosecute her based on her testimony.⁶⁶ Based on these suggestive statements, Ms. Lilly believed that she would receive immunity from prosecution.⁶⁷

Ms. Lilly attended other meetings with both federal DEA agents and state DCI agents.⁶⁸ While Ms. Lilly discussed her cooperation with the state agents, she never discussed immunity with federal agents.⁶⁹ Ms. Lilly did not engage a lawyer until after several meetings with DCI

⁵⁷ See, e.g., *United States v. Sells*, 477 F.3d 1226, 1234 (10th Cir. 2007) (noting that an agreement with state officials cannot bind a federal prosecutor); *United States v. Padilla*, 589 F.2d 481, 484 (10th Cir. 1978).

⁵⁸ See, e.g., *United States v. Heath*, 580 F.2d 1011, 1031 (10th Cir. 1978) (discussing the prosecutor’s duty to disclose whether any prosecution witnesses will receive immunity for their testimony).

⁵⁹ See *United States v. Cooper*, 70 F.3d 563, 567 (10th Cir. 1995) (noting that the *prosecutor* had made promises to the defendant and therefore must fulfill those promises because that particular government actor had the actual authority to make the promises).

⁶⁰ See *Lilly*, 810 F.3d at 1216 (stating that this exception would not apply, even if Ms. Lilly could prove that the law enforcement officers had promised her immunity).

⁶¹ *Id.* (citing *First Nat’l Bank of Durango v. Woods*, 743 F.3d 689, 699 (10th Cir. 2014)).

⁶² *Id.* (classifying Ms. Lilly’s case as “mine-run,” or a typical example of how a witness-turned-defendant may attempt to utilize the exception to the actual authority rule).

⁶³ *Id.* at 1208.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

agents.⁷⁰ But during these meetings, both Ms. Lilly and her lawyer believed that the DCI agents' actions implied that Ms. Lilly would receive immunity from federal prosecution.⁷¹ However, nearly two years following her initial questioning, a grand jury indicted Ms. Lilly on federal drug charges related to her fiancé's operation.⁷²

B. Procedure

At trial, Ms. Lilly moved to dismiss the charges.⁷³ The district court reasoned that because the DCI agents do not possess the actual authority to promise her immunity, the government need not provide her with immunity.⁷⁴ Based on this finding, Ms. Lilly accepted a conditional plea agreement and appealed the denial.⁷⁵ The judge sentenced Ms. Lilly to eighty-seven months in prison and four years of supervised release.⁷⁶

On appeal, Ms. Lilly raises a factual issue based on her conversations with the DCI and DEA agents and a legal issue related to the actual authority that agents from either agency possessed at the time they spoke to her.⁷⁷ Noting that the authority to investigate crimes does not imply the authority to authorize immunity,⁷⁸ the Tenth Circuit upheld Ms. Lilly's conviction because none of the agents who spoke to Ms. Lilly possessed the actual authority to promise her immunity.⁷⁹ For the Tenth Circuit, this holding ended the inquiry.⁸⁰

III. ANALYSIS

Ms. Lilly's case demonstrates the issues related to immunity from prosecution in federal criminal cases. Because the legal inquiry focuses solely on the actual authority a government entity possesses at the time of the discussion, it does not protect against the potential for persuasive suggestions by law enforcement agents. As Ms. Lilly's case shows, suggestions for cooperation can be easily misinterpreted to convey a grant of immunity. This causes the individual to essentially self-

⁷⁰ *Id.* at 1208–09.

⁷¹ *Id.* at 1209.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1210.

⁷⁸ *Id.* at 1213.

⁷⁹ *Id.* at 1210.

⁸⁰ *Id.* at 1219. Indeed, the Tenth Circuit stated that even assuming the DCI agents did promise her immunity, she could not receive it because the agents did not possess the legal authority to make the promise. *Id.* at 1210.

incriminate without Fifth Amendment protections that would provide protection at later stages in a criminal prosecution.⁸¹

The individual unfairly bears the risk in this kind of encounter when his or her constitutional rights could be at stake. This kind of burden demonstrates the unfairness in comparing agreements for immunity with concepts in contract law. To better shift the risk and ensure that constitutional rights receive proper protection, the Tenth Circuit should consider adopting a *Miranda*-style approach to encounters with potential prosecution witnesses. A *Miranda*-type warning would ensure that individuals understand that an agent cannot promise to immunize a witness in exchange for testimony in another case because law enforcement would have to inform the witness of an agent's inability to grant immunity unless the agent has the actual authority to do so. This type of protection would leave intact the actual authority rule while preserving the narrow interpretation of the fundamental fairness exception.

A. Flawed Comparison to Contract Law

Agreements to grant immunity to prosecution witnesses are often compared to contractual relationships. In many ways, the two exchanges appear similar: two parties with individual interests seize an opportunity for cooperation to provide a service in exchange for more valuable consideration. However, this comparison oversimplifies the nature of the rights at stake in both exchanges, ignores the difference in enforceability in the two types of agreements, and fails to take into account the remedies available for breach in both situations. In particular, contract law does not so strictly contemplate elements of fairness in the way that constitutional law does.⁸² Because of the more serious rights at stake in immunity agreements, the argument focusing on promissory estoppel holds little weight compared to the notions of fairness that favor expanding the fundamental fairness exception.⁸³ Even though contract law would not produce a remedy for an aggrieved individual, a right may still have been violated and therefore relief may be required.⁸⁴ But, as it currently stands, the law affords no relief.

1. The Nature of the Rights at Stake

First, immunity agreements for prosecution witness immunity implicate much more serious consequences than do contractual

⁸¹ See *Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (noting, for example, that a defendant “must be counseled, absent a waiver” when accepting a plea deal, indicating the serious nature of the rights at stake).

⁸² See *Cooper v. United States*, 594 F.2d 12, 15 (4th Cir. 1979).

⁸³ See *id.* at 15–16.

⁸⁴ See *id.* at 16.

agreements. While parties can contract for nearly any good or service,⁸⁵ these kinds of bargains do not implicate the same fundamental rights that a potential criminal proceeding might. Contractual disputes primarily implicate monetary⁸⁶ and property⁸⁷ interests. These interests, while worthy of protection,⁸⁸ do not implicate fundamental rights in the same way that a potential immunity agreement does. A prosecution witness providing information in a case could implicate the Fifth Amendment right against self-incrimination.⁸⁹

While immunity agreements bear elements of contract law, they are primarily governed by constitutional law.⁹⁰ Decisions made pursuant to constitutional rights “cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals.”⁹¹ This constitutional protection “reflects . . . our fundamental values and aspirations, and marks an important advance in the development of our liberty.”⁹² Contract law embodies a much less profound purpose—to understand and enforce agreements between parties.⁹³ These differing purposes reflect the difference in the importance of the two concepts. While contractual disputes may be complex in nature and affect important aspects of an individual’s livelihood,⁹⁴ no contractual agreement could so profoundly affect a person’s interest in liberty.⁹⁵ The comparison between immunity agreements and contract law fails to consider the profound nature of the rights implicated in the immunity discussion. It would oversimplify the nature of these rights to compare them to disputes over goods or services.

⁸⁵ *But see* U.S. CONST. amend. XIII (stating that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States,” thereby prohibiting a party from contracting away his or her liberty to a private individual).

⁸⁶ *See infra* III.A.3. This discussion points out that monetary damages are a common remedy for breach of contract, thereby monetizing the interests at stake.

⁸⁷ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 125 (AM. LAW INST. 1981) (discussing special contractual concerns for agreements to buy or sell land).

⁸⁸ *See, e.g., id.* § 110 (requiring certain types of contracts to be in writing, thereby providing extra protection for those particular interests).

⁸⁹ *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972) (discussing why the Fifth Amendment may limit a prosecutor’s ability to compel testimony).

⁹⁰ *See Cooper v. United States*, 594 F.2d 12, 17 (4th Cir. 1979).

⁹¹ *Id.*

⁹² *Kastigar*, 406 U.S. at 444.

⁹³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1)–(2) (discussing the manner in which to determine the parties’ intent in an agreement as a method of enforcing such an agreement).

⁹⁴ For example, an employment contract dispute could hinder an individual’s ability to earn a living. This concern undoubtedly reflects the importance of such contracts in protecting workers’ interests.

⁹⁵ *See* U.S. CONST. amend. XIII, *supra* note 81.

While an agreement to testify on behalf of the prosecution bears similarities to an agreement to perform a service in exchange for consideration, the immunity agreement reflects consideration of much more substantial rights. The consideration in this instance, remaining free from prosecution, involves the right to liberty. This right profoundly reflects important, foundational ideals.⁹⁶ While property rights are subject to much discussion, they are much less inherent.⁹⁷ At a minimum, these property rights are not “self-evident” in the way that the right to liberty is.⁹⁸ Based on this inherent notion, the rights at stake in a discussion of immunity are much more powerful than the rights protected by contract law.

2. Promissory Estoppel and Enforceability

Second, contract law includes a built-in safeguard that promises of immunity do not have. Contract law allows for promissory estoppel which can require enforcement of a contract that lacks consideration when a party reasonably and foreseeably relies on the agreement.⁹⁹ However, promissory estoppel cannot bind the government in most circumstances.¹⁰⁰ Without this safeguard, individuals entering into an agreement with the government bear the risk that the government cannot or will not fulfill its promise.¹⁰¹

This risk-bearing rationale creates a simple rule with a simple justification that courts can easily apply. However, this reasoning does not account for the fundamental unfairness in shifting such a large risk to such a relatively powerless individual. Without a promissory estoppel-type method of enforcement, individuals may make agreements that lead them to believe an entity possesses the authority to help him or her avoid prosecution. While providing a service to the government by agreeing to furnish testimony to aid in a different criminal case, the individual additionally could feel compelled to answer in a self-incriminatory manner.

Choosing to exercise the Fifth Amendment right against self-incrimination may fail for several reasons in this situation. Most importantly, an individual must affirmatively invoke it in order to receive

⁹⁶ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness) (emphasis added).

⁹⁷ But see JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18–19 (C. B. Macpherson ed., Hackett Publishing Co., Inc. 1980) (1690) (arguing for the inherent nature of property rights, but only after an individual has invested time and labor into that property).

⁹⁸ THE DECLARATION OF INDEPENDENCE, *supra* note 92.

⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

¹⁰⁰ Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (holding that government entities are not subject to promissory estoppel considerations).

¹⁰¹ *Id.*

its protections.¹⁰² But without the knowledge of this right or of its applicability in the current situation, the individual could not invoke it. While courts have not found incrimination based on a lack of knowledge to constitute a compelled confession within the meaning of the Fifth Amendment,¹⁰³ such is the effect.

Without the knowledge that the Fifth Amendment may protect an individual in an interaction with law enforcement related to a different suspect, an individual may act in reliance on promises made by law enforcement designed to induce cooperation. Without the knowledge that the right against self-incrimination must be affirmatively exercised, an individual could admit to criminal wrongdoing when aiding the government in another case based on the expectation that such testimony would not lead to prosecution. Because the individual is helping the government, it seems reasonable that the government would offer immunity in exchange for the individual's testimony. It seems fundamentally unfair to punish an individual for acting off his or her limited knowledge while allowing the government to essentially compel incriminating testimony from an individual who provides information in another case. Whereas contract law could allow for enforceability based on this reliance, immunity agreements afford no such benefit to aggrieved individuals.

3. Remedies for Breach

Third, the remedies for a breach of contract are much more extensive than the remedies that may result from a breach of immunity agreement. Remedies for breach of contract are generally available in the case of breach by the other party.¹⁰⁴ Even when the breach did not result in any net loss, the aggrieved party may still receive damages.¹⁰⁵ Indeed, “[e]very breach of contract gives the injured party a *right* to damages against the party in breach,” except for a select few limited circumstances.¹⁰⁶

In contrast, the only potential avenue for relief under the actual authority rule comes from the fundamental fairness exception. However, this narrow exception is functionally unavailable in all but the most serious cases.¹⁰⁷ Courts construe the fundamental fairness too narrowly to

¹⁰² See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (noting that the police's failure to inform defendant of his rights was “certainly [a] factor[] to be evaluated in assessing the ‘voluntariness’ of an accused's responses,” it was not “determinative”) (citations omitted).

¹⁰³ See, e.g., *Garner v. United States*, 424 U.S. 648, 653–54 (1976).

¹⁰⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 346.

¹⁰⁵ See *id.* § 346(1).

¹⁰⁶ *Id.* § 346 cmt. a (emphasis added).

¹⁰⁷ *United States v. Lilly*, 810 F.3d 1205, 1216–17 (10th Cir. 2016) (discussion the inapplicability of the fundamental fairness exception in “mine-run” cases).

provide an adequate remedy for aggrieved individuals in immunity agreements. This potential threat to a constitutionally protected right should not “be eroded by strained applications of the law of agency.”¹⁰⁸ While a prosecutor’s power to file criminal charges and grant immunity mirror each other in its broad scope, this similarity should not guide how courts apply the rules relating to immunity.

The same logic applies to the fundamental fairness exception. The requirement of actual authority, applied literally, creates the potential for abuse and prohibits courts from addressing that abuse except in the most egregious cases. The fundamental fairness exception permits law enforcement to suggest or promise immunity for a witness while allowing the government to simultaneously build a case against that witness. Such a result surely increases the number of crimes prosecuted, but also undoubtedly elicits admissions of guilt from individuals who might otherwise choose to speak differently. The government should shift focus from increasing the number of prosecutions to the principles of fairness that govern the constitutional rights potentially threatened by an overly broad rule with one limited and nearly unworkable exception.

B. Balancing the Relative Interests—A Miranda Comparison

The law should bind the government to promises that a reasonable person would believe to constitute offers of immunity. This analysis would simply require weighing the relative burdens on the government and on the individual.¹⁰⁹ Balancing the relative interests would expand the exception to the requirement of actual authority and honor agreements that more adversely affect a defendant than positively benefit the government. One potential solution imposes a *Miranda*-style affirmative warning before questioning a potential prosecution witness to ensure that police act reasonably in questioning prosecution witnesses. Such a warning would fully inform witnesses of their rights while also informing them that a law enforcement officer could not grant them immunity. Additionally, such a warning would likely not affect the number of witnesses who provide information, even potentially incriminating information, because of the influence of law enforcement.¹¹⁰

¹⁰⁸ *Stoner v. California*, 376 U.S. 483, 488 (1964) (discussing Fourth Amendment rights).

¹⁰⁹ *See Cooper v. United States*, 594 F.2d 12, 19 (4th Cir. 1979).

¹¹⁰ *See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 205 (noting that “we comply with the police not because we make a deliberate conscious choice to respond in a particular way, but rather because we mindlessly respond in a manner consistent with social roles”).

While immunity bargaining stages do not constitutionally require due process,¹¹¹ extending the requirement to act reasonably at this stage would benefit both parties. While rights do not vest in a defendant until an authorized party makes the official decision to offer a deal in exchange for an individual's testimony,¹¹² reckless admission of criminal wrongdoing can hamper an individual's ability to receive immunity for testimony related to that activity.¹¹³ But it may remain unclear as to at what point an understanding of immunity or an agreement not to pursue criminal charges against an individual arises. Individuals likely do not know that law enforcement officials do not have the actual authority to confer immunity.¹¹⁴ Therefore, if law enforcement encourages an individual to talk to them and that interaction creates a risk that an individual may make incriminating statements, then the law should require law enforcement agents to provide an affirmative warning about their inability to grant immunity.

Witnesses for the prosecution, unlike witnesses for the defense, typically help the government make its case against another individual. This benefit the government receives lacks an element of symmetrical fairness if an individual can face prosecution based on the same testimony that helped the government. It seems even more unfair that this result could occur simply because an individual did not know of his or her Fifth Amendment rights and the scope of those rights. Requiring law enforcement officers to make an affirmative and formal statement dispelling any notion that they may have the authority to grant immunity in a federal investigation would create a more symmetrical element of fairness. Indeed, the *Miranda* Court commented on this element of fairness when it stated:

Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.¹¹⁵

¹¹¹ *Cooper*, 594 F.2d at 19–20 (noting that due process considerations must only factor into the discussion at the plea bargaining stage).

¹¹² *Id.*

¹¹³ *United States v. Costello*, 750 F.2d 553, 556 (7th Cir. 1984).

¹¹⁴ *See, e.g., United States v. Lilly*, 810 F.3d 1205, 1209 (10th Cir. 2016) (noting that both Ms. Lilly and her attorney believed the law enforcement officials would take steps to ensure she received immunity for her testimony against her fiancé).

¹¹⁵ *Miranda v. Arizona*, 384 U.S. 436, 468–69 (1966).

Any slight promise of immunity or some other benefit given to induce a confession or testimony cannot be accepted.¹¹⁶

Even though individuals bear the risk in government interactions,¹¹⁷ the government can bear the risks of miscommunication better than an individual. However, the same principle applies when the government actor does not understand the extent of the government's authority in the situation.¹¹⁸ While such knowledge may be publicly available, suggestions by law enforcement officers to individuals who may have committed crimes can be very powerful. An individual could reasonably construe a law enforcement agent's encouragement cooperation as a promise not to pursue criminal charges based on the content of that statement. To avoid this risk of potentially inducing a confession as part of a tactic to elicit information, the government should bear the burden of providing individuals with actual knowledge of the bounds of its authority when such interactions could reasonably implicate protections against self-incrimination.¹¹⁹

On its face, this suggestion seems as though it would lead to a decrease in cooperation between prosecution witnesses and law enforcement. However, empirical data of similar situations indicates that such affirmative warnings do not significantly alter an individual's willingness to cooperate.¹²⁰ When law enforcement informs individuals of their right in a certain situation, individuals still fully cooperate.¹²¹ On its face, this result seems to indicate that informing individuals of their rights does not matter. But this conclusion does not recognize the importance of informing individuals of their rights as a prerequisite to exercising them. The *Miranda* Court noted that individuals who do not know of their rights cannot exercise them.¹²² Indeed the very act by law enforcement officers of informing prosecution witnesses that the officer cannot promise immunity to the witness recognizes these important

¹¹⁶ *Bram v. United States*, 168 U.S. 532, 542–43 (1987) (finding “any direct or implied promise, however slight” to be intolerable).

¹¹⁷ *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

¹¹⁸ *Id.*

¹¹⁹ *See Cooper v. United States*, 594 F.2d 12, 20 (4th Cir. 1979) (stating that requiring signatures from individuals is a “simple and obvious precaution” that the government can take when entering into agreements).

¹²⁰ *See Nadler, supra* note 106 (collecting data regarding individuals who consent to police searches).

¹²¹ *Id.* (finding no change in cooperation in a study of Ohio law enforcement officers who advised motorists of their right to refuse consensual searches).

¹²² *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (noting that requiring individuals to affirmatively exercise their rights without confirming that they are aware of those rights “would be to favor the defendant whose sophistication or status had fortuitously prompted him” to do so).

rights and further promotes the importance of these rights conferred in *Miranda*.¹²³

While a discussion with a prosecution witness may not feel as coercive as a custodial interrogation, the process can potentially implicate the same rights. For example, even though law enforcement officers interviewed Ms. Lilly in her home, they still made statements suggesting that full cooperation would lead to a grant of immunity.¹²⁴ These statements led to her self-incrimination.¹²⁵ While this situation does not appear as coercive as the interrogation in *Miranda*,¹²⁶ it still implicates the same constitutional protections. An affirmative warning would at least advise witnesses, like Ms. Lilly, that their statements are not immune from prosecution. This warning likely would not change how an individual interacts with law enforcement, but it provides valuable information to an individual who might not otherwise know of the rules regarding witness immunity. Because an affirmative warning would recognize the important rights at stake, inform individuals of these rights, and likely would not affect witness cooperation, such a warning would best protect witnesses from self-incrimination.

The government should bear this burden of providing a warning because individual interests in protection from self-incrimination outweigh the burden of disclosing additional information. Additionally, the government benefits from these individuals who provide information to help prosecute another case. One individual's statement can provide invaluable information without which the government could not prosecute a case against another individual. For the same reason, society as a whole also benefits from this exchange between a prosecution witness and law enforcement. The support provided by prosecution witnesses helps to secure convictions in other, more serious cases.

This consideration weighs much more strongly against the government's interest in prosecuting all crimes and balances nicely with the broad discretion afforded to prosecutors and law enforcement officials. Additionally, an affirmative warning recognizes the fundamental nature of the rights provided for in the Fifth Amendment and allows individuals to make an informed decision about what they say

¹²³ While Nadler, *supra* note 106, focuses on exercise of Fourth Amendment rights to refuse searches, the same logic applies in the Fifth Amendment context given the *Miranda* court's focus on the fundamental nature of Fifth Amendment rights.

¹²⁴ *United States v. Lilly*, 810F.3d 1205, 1208 (10th Cir. 2016). The court noted that even if Ms. Lilly could prove that government agents affirmatively promised her immunity, her claim would still fail because the agents lacked the actual authority to grant her immunity. *Id.* at 1212.

¹²⁵ *Id.* at 1208.

¹²⁶ *Compare Miranda v. Ariz.*, 384 U.S. 436, 491 (1966) (noting that law enforcement interrogated Mr. Miranda in a special interrogation room at the police station after arresting him) *with Lilly*, 810 F.3d at 1208–09 (discussing Ms. Lilly's various conversation with law enforcement in her home and later with an attorney present).

to law enforcement. Any burden an affirmative warning requirement would place on law enforcement, prosecutors, or society¹²⁷ would be minimal compared to the benefit afforded to witnesses who might otherwise receive no protection for their right against self-incrimination.

This balancing consideration warrants expanding the fundamental fairness exception to include instances when police officers do not affirmatively dispel their lack of actual authority to grant immunity to prosecution witnesses. If the government receives such a large benefit from individual statements given by witnesses for the prosecution, then the extension of immunity or an agreement not to prosecute based on the content of that statement is a fair way to both prosecute important cases and protect individuals and encourage them to aid the prosecution when possible. By implicating the idea of fundamental fairness before constitutional rights are even at stake, the actual authority rule becomes much more flexible and responsive to the practical realities of prosecution witnesses.

IV. CONCLUSION

In conclusion, the actual authority rule for immunity is unworkably broad. The fundamental fairness exception to the rule is likewise unworkably narrow. Both the rule and the exception lead to situations like that in *Lilly* where an individual may be charged with a crime because the government officials promising her immunity simply did not have the statutory grant of power required to fulfill that promise. Such a hard and fast rule ignores the practical implications of securing cooperation from a witness for the prosecution. Additional protections can be taken to preserve the general rule and the exception while recognizing the realities of the modern criminal justice system.

Such a protection, like providing a *Miranda*-style warning before interviewing witnesses, recognizes the importance of these rights. The discussion surrounding these rights analogizes them more to contract law than to *Miranda* and other Fifth Amendment cases. However, these comparisons fail because contract law cannot provide adequate protection for these constitutional rights. A *Miranda*-style warning provides a simple and effective way to inform individuals of their rights while achieving the same desired cooperation.

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¹²⁷ See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 NW. U. L. REV. 500, 509–10 (1996) (noting that the affirmative requirements imposed on law enforcement by *Miranda* have had seemingly no impact on confessions obtained during interrogation, indicating that any burden placed on law enforcement is minimal compared to the result).

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