Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure

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"Consent" is ubiquitous in our criminal justice system. Its centrality highlights the ironic disjuncture between constitutional principle and the day-to-day practice of criminal justice. The Constitution imposes strict restrictions on the State's ability to investigate and prosecute crimes – the warrant requirement and right to jury trial are examples. But our criminal justice system depends on individuals "consensually" relinquishing these very protections every day. The Supreme Court has encouraged this dependence by deeming an individual's consent valid even when the State pressures her to give it. The police regularly rely on individuals consenting to searches when there is no probable cause. Suspects routinely confess to crimes when it is not in their interest to do so. Defendants routinely plead to charges for which they would not be convicted if brought to trial. This article uses political theory to account for consent's centrality in our criminal justice system and to challenge the Court's broad interpretation of the concept in the search, confession, and plea contexts. The Court has inappropriately relied on a kind of "fictional consent" in criminal procedure. This not only produces unfair results in individual cases, it also threatens the democratic legitimacy of our criminal justice system. Bringing constitutional principle and criminal justice practice into greater harmony will require more stringent rules of consent than we currently have. This article advances a framework for reform.

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Our criminal justice system depends on suspects and defendants regularly agreeing to give up their constitutional rights. Individuals routinely consent to searches that yield damning evidence of criminal wrongdoing.[1] Suspects routinely agree to make confessions that are similarly damning.[2] And there are remarkably few criminal trials because most criminal defendants plead guilty.[3] In each of these contexts, the State asks an individual to relinquish constitutional rights that limit the State's power to incriminate or convict. It is counterintuitive that suspects and defendants would consent to anything that makes their conviction likely if not inevitable.[4] And yet, that happens every day in our criminal justice system. What is more, courts hold that "consent" is valid in each of these three contexts even when the State has used its coercive power to influence a suspect's choice. Political theory exposes the multi-dimensional nature of this contradiction and helps lay the groundwork for a fuller conception of "consent"—a conception that is true to the word's meaning as a precept of democratic legitimacy.

Criminal procedure scholars have not sought to understand the relationship between consent and coercion using political theory. This is surprising given that political theory is a familiar tool for other legal scholars. Additionally, the relationship between consent and coercion constitutes the central preoccupation of political theory; applying criminal sanctions is the paradigmatic example of "legitimate" State coercion.[5] Criminal procedure

[1] *See* Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1172 & n.2 (2007) (noting the frequency of consent searches and lack of quantitative data).

[2] *See* Paul Cassel & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 840–41, 854–55 (1996) (citing the limited data that existed regarding confession rates).

[3] *See, e.g.*, Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 & n.3 (2005) (reviewing GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003)) (citing federal and state statistics). There are other examples of consent in criminal procedure. *See, e.g.*, 18 U.S.C. § 3161(h)(7)(A) (2006) (stating defendant's request for continuance tolls speedy trial); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (permitting waiver of counsel).

[4] *See, e.g.*, Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 211–12 (2001) (noting intuition that it is irrational for an individual to consent to a search when she knows that she is carrying contraband).

[5] *See, e.g.*, Adam Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655–60 (2008) (constitutional interpretation); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1695–96 (2003) (criminal law); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989–90 (1997) (administrative law).

scholars tend to address "consent" as a purely psychological phenomenon,[6] or alternatively, as a placeholder for policy concerns that are entirely unrelated to consent.[7] Although illuminating, both approaches are theoretically unsatisfying. The first takes consent too literally while the second writes it off entirely. Neither approach recognizes, let alone critically engages, the legitimating force that the idea of "consent" provides in criminal procedure. Doing so is particularly important in light of recent Supreme Court cases suggesting renewed interest in consent in the search[8] and confession[9] contexts.

I argue that, in most instances, consent in criminal procedure should be a fully-informed expression of individual agency—what I call "actual consent." This understanding of consent is true to the meaning of the word as developed by political theorists. "Consent" has classical vintage as a precept of democratic governance: consent legitimates the State's monopoly on coercive power by limiting it. Political theory distinguishes between two varieties of consent, "actual" and "fictional."[10] The former roughly conforms to our intuitive understanding of what consent means: an informed expression of choice. The latter, on the other hand, describes a brand of consent that may be presumed from membership in the political community.[11] Fictional consent acknowledges the practical impossibility of governance if "actual consent" were required to legitimate every act of State, particularly the panoply of ministerial and bureaucratic functions that modern governments perform. The danger, of course, is that fictional consent will completely swallow the legitimating power of "consent." This, I argue, is precisely what has happened in the criminal procedure context.

Criminal procedure has adopted a version of fictional consent that largely undermines the limiting (and thus, legitimating) power that "consent" should have. The following four hypotheticals are examples of consent that courts are likely to find valid. A political theory of consent suggests that only the consent in the first hypothetical *ought* to be held valid.

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[6] *See, e.g.*, Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 173–98 (2002).

[7] *See, e.g.*, Daniel Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L. J. 69, 75 (highlighting that "consent" stands in for "reasonableness" in the Fourth Amendment context); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 768–69 (1989) (noting that consent rules protect innocent, third-party beneficiaries whose interests are unrelated to those of defendants).

[8] *See* Georgia v. Randolph, 547 U.S. 103, 106, 116 (2006) (holding that third-party consent does not legitimate search when suspect explicitly withholds consent and noting unseemliness of a "theory of consent that ignores [the search target's] refusal to allow a warrantless search").

[9] *See* Missouri v. Seibert, 542 U.S. 600, 604, 609 (2004) (plurality opinion) (noting that *Miranda* warnings afford "a real choice between talking and remaining silent").

[10] *See infra* Section II.a.ii.

[11] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 63–64 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690). Locke refers to such consent as "tacit consent." For a fuller discussion of tacit consent and other types of fictional consent, see *infra* Section II.a.ii.

In the search context, the Supreme Court has found valid consent in circumstances where an individual is not authorized to give it. Take the following example, which along with all of the hypotheticals that follow, I will return to throughout the article:

> **The Welcoming Housekeeper**: The police are called to the scene of a mugging. The perpetrator struck the victim and snatched her purse. The victim tells the police that she saw the perpetrator flee down the street and toss her purse over a fence into a private backyard. An officer knocks on the door of the identified house, assumes that the person ("P") who answers resides in the house, and asks if it would be okay to look around in the backyard for the purse.[12] P says, "I guess so." The police do not find the purse in the backyard, but discover several marijuana plants there. It only emerges after the search that P was a housekeeper who did not have any authority to permit visitors. The homeowner is charged with a narcotics violation.

The State would likely be permitted to introduce the evidence of marijuana cultivation against the homeowner based on P's consent.[13] "Consent" might seem like tenuous justification for the State given that P did not live in the house or have authority to permit visitors. Nonetheless, I argue that courts would be correct in finding valid consent here because the police did not punitively target the home owners or P.

Courts will find valid consent even when an individual has no idea that she has the right to say "no" to a police search:

> **The Careless Lane Changer**: While on traffic duty, a police officer notices B drive by. The officer has arrested B once in the past for a narcotics offense and has a gut feeling that B might have narcotics in her car. The officer follows B from a distance and observes B change lanes without using her signal. The officer stops B. The officer takes B's license, begins to write a citation, and the following exchange ensues:
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> Officer: "You been up to anything else that I should know about?"
>
> B: "No."
>
> Officer: "Well then, you wouldn't mind if I searched your car would you?"
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> B: "No, go ahead."
>
> The officer discovers narcotics in B's glove box. B did not understand that she had the right to refuse the search.

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[12] *See* Robinette v. Ohio, 519 U.S. 33, 39–40 (1996) (finding police need not make a suspect aware of the right to refuse consent in order to satisfy the test).

[13] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 179 (1990) (noting that police may rely upon the consent of third parties who have apparent authority to give it).

Here, the officer has deliberately targeted B for narcotics investigation, but without reasonable suspicion,[14] let alone probable cause of wrongdoing. That B did not understand that she could say "no" is unsurprising—many in B's position likely would not.[15] That, however, would not prevent a court from finding her consent valid.[16]

The Court purports to be more concerned that suspects have a "real choice" to withhold consent in the interrogation context than in the search context.[17] Toward that end, officers are obliged to recite the iconic *Miranda* warning prior to interrogation:

> **The Reluctant Confessor**: The police are called to break up a bar fight. Upon arrival, the police find that V has died from what appear to be blows to the head. A bloody pool cue lies near the body. C is taken to the police station and is Mirandized. She signs a statement (without reading it) acknowledging as much. C's attorney learns of the arrest and calls the police station. She indicates that she is representing C, and asks that C not be interrogated without her present. The police do not inform C and proceed to interrogate her.[18] The police tell C that the pool cue bears her fingerprints and that a witness observed her striking V with it. Neither fact is true.[19] The police interrogator says that she knows that C did not mean to hurt V, that V probably "had it coming" for starting the fight, and that C should "do the right thing and take responsibility for what happened."[20] C confesses to striking V. C did not actually strike V.

Because the police recited the *Miranda* warning, a court will likely conclude that C's confession was consensual. That is notwithstanding C's failure to read the waiver and the police's deception, withholding of information, and use of "minimization."[21]

At first glance, the *Miranda* warning's formalistic inadequacy seems to be in contrast to a plea colloquy, which occurs in open court and requires

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[14] *See* Terry v. Ohio, 392 U.S. 1, 21 (1967).

[15] *See* Nadler, *supra* note 6, at 173–98 (reviewing results of psychology experiments suggesting that people are highly suggestible and compliant in the face of authority). R

[16] *See Robinette*, 519 U.S. at 40 (finding officers need not inform an individual of the right to refuse consent). *See also* Whren v. United States, 517 U.S. 806, 815 (1998) (holding that courts are not to inquire into officers' subjective state of mind in cases where a lawful stop is challenged as pretextual and racially discriminatory).

[17] *See* Missouri v. Seibert, 542 U.S. 600, 607 (2004) (referring to this "real choice" as a "waiver" as opposed to just "consent"). *See also* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[18] *See* Moran v. Burbine, 475 U.S. 412, 424–25 (1986).

[19] *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 317 (1985) (finding trickery permissible provided that the *Miranda* warning has been properly administered).

[20] *See* FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 254 (4th ed. 2004) (instructing that interrogators blame the victim as a strategy to minimize offense and encourage confession).

[21] *See id.*

actual questioning by the court.[22] The colloquy is supposed to gauge the defendant's actual understanding of the consequences of pleading guilty:

> **The Ready Pleader**: D, a homeless person, is charged with two misdemeanor counts: trespass for sleeping in a park after it is closed and resisting arrest. D is in custody on $100 bail; four weeks will elapse between the trial-setting conference and trial. At the trial-setting conference, the prosecutor offers to recommend a sentence of "credit for time served" and drop the trespass count in exchange for a guilty plea.[23] D's attorney tells D that both counts are weak and should be taken to trial. D believes that she is innocent of both counts, but wants to get out of jail immediately.[24] D's attorney explains the nature of a trial and the risks associated with it. The judge confirms D's understanding during the plea colloquy. D pleads guilty.

A court would likely find the plea valid despite the fact that D did not meaningfully consider the low risk of losing at trial. Rather, the prospect of immediate release drove D to accept the plea. If a post-trial conviction was, as D's lawyer believed, unlikely, it is not terribly comforting that D actually understood the rights she was waiving.

In each hypothetical above, the suspect's or defendant's "consent" is supposed to legitimate the State's method of obtaining incriminating evidence or conviction. This is ironic because the State obtained the individual's consent only after partially exercising the very coercion for which it sought justification. Political theory suggests that such "consent" is not really consent at all.

Whenever the State seeks to legitimate "individually-directed" coercion with a suspect's consent, it should obtain that suspect's "actual consent"—i.e., an expression of consent following a meaningful opportunity to consider one's interests. Both law and political theory distinguish "individually-directed" from "generally-directed" coercion.[25] The former occurs when a State targets a particular individual for investigation, punishment, or some other severe deprivation of liberty. Generally-directed coercion, on the other hand, occurs when the State uses its power to advance some nonpunitive, public welfare function. In the hypotheticals given above, generally-directed coercion was only apparent in *The Welcoming Housekeeper*,

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[22] *See, e.g.*, FED. R. CRIM. P. 11(b) (requiring courts to ask if defendant understands the charges and that she is waiving a trial). The Supreme Court has required a similar colloquy in all pleas. *See* Boykin v. Alabama, 395 U.S. 238, 245 (1969) (Harlan, J., dissenting) (characterizing the majority's opinion as imposing Federal Rule of Criminal Procedure 11 as a matter of constitutional law).

[23] *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 384 (1982) (noting that the possibility of receiving "increased punishment" following trial does not violate the Constitution).

[24] *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 31 (1969) (permitting defendant who believes himself innocent to plead guilty).

[25] *See infra* notes 185–191 and accompanying text. R

where the police sought entry to the home to retrieve the victim's purse. Because they tend to impact broad swathes of the body politic, acts of generally-directed coercion are more readily challenged through political channels. A significant constituency can readily revoke its consent to an unpopular law that affects it. Actual consent, therefore, need not be required to justify acts of generally-directed coercion. An individual, standing alone, is not in the same position when punitively targeted by the State. Except for *The Welcoming Housekeeper*, the hypotheticals above exemplify individually-directed coercion. Therefore, I argue that courts should require actual consent in each of the hypotheticals except for *The Welcoming Housekeeper*. This, however, is not the current state of the law, as the hypotheticals seek to illuminate. Criminal procedure's definitions of "consent" and "waiver" lack theoretical integrity when held up to the liberal and republican principles from which those concepts are derived.

Section I describes how the Court's reliance on fictional consent in search, plea, and confession cases makes the four hypotheticals above possible. Section II uses political theory to identify what the relationship between state coercion and consent ought to be and to argue that criminal procedure falls far short of using consent in a principled way. Section III identifies specific normative implications of the discussion in Sections I and II, arguing for greater judicial attention to the police purpose animating "consent searches," increased protections to ensure that plea bargains do not lead to convictions which would be difficult to prove at trial, and a role for juries in Fifth Amendment suppression motions.

I. The Law of Consent

This section describes how the Supreme Court has made it too easy for individuals to "consensually" waive constitutional rights. The hypotheticals above illustrate the breadth of the Court's understanding of "consent" in criminal procedure cases. The Fourth, Fifth, and Sixth Amendments specify the procedural protections that legitimate the State's exercise of coercive power in conducting criminal investigations and prosecutions—namely, warrants based on probable cause, the ban on compelled testimony, and jury trials.[26] These procedural protections legitimate the State's use of its coercive power to override an individual's will in the interest of enforcing criminal law. For example, a warrant allows the State to search an individual regardless of whether or not she permits the search. Section I.a. briefly describes this intuitive idea. The remaining sections describe the consent-based exceptions to these constitutionally required procedural protections.

In the consent search context, the police must ask for permission to conduct a consent search, but if someone with apparent authority, like in *The Welcoming Housekeeper*, says "yes," that is sufficient. The police need not

[26] U.S. Const. amends. IV, V, VI, XIV.

make the individual whose consent is sought aware of her right to refuse. Nor are courts concerned with the myriad ways in which coercion that falls shy of physical threat compels individuals to say "yes" to a police officer's request to search. Courts also do not distinguish between situations in which the police do not punitively target an individual, such as in *The Welcoming Housekeeper*, and situations in which the police punitively target an individual and deliberately use "consent" to avoid the Fourth Amendment's individualized suspicion requirement, such as in *The Careless Lane Changer*. The Court demands more of "consent" in the plea context. The Court uses the term "waiver" as opposed to "consent" to describe the more muscular form of consent required for a plea: that is, a "knowing and intelligent" articulation of "yes."[27] Prior to accepting a plea of guilty, the Court requires a plea colloquy and counseling from competent defense counsel. These procedures, however, teeter toward empty formalism whenever, as in *The Ready Pleader*, the plea process yields convictions that would be unlikely following trial.

The Court has virtually resigned itself to empty formalism in the confession context—courts will generally conclude that a confession was legitimately consensual if the police properly recited the *Miranda* warning. Station-house confessions inhabit an intermediate position between consent searches and pleas. As with pleas, the State necessarily targets an individual, but as with searches, there is no officially sanctioned form of bargained-for exchange. Extracting a confession, by definition, requires obtaining "something for nothing." As in *The Reluctant Confessor*, there is little to suggest that the *Miranda* warning helps suspects make an informed choice about whether to consent, but courts nonetheless take it as a guarantee of such.

A. Non-Consent is the Baseline Constitutional Principle

In principle, "consent" is an exception in criminal procedure. Principle and practice, however, coexist in ironic disjuncture. Even if consent searches, confessions, and pleas are mainstays of our criminal machinery's quotidian operation, warrants and trials are the mainstays of our constitutional ideals. Consent is an exception because, in principle, we expect it to rarely be in an individual's interest to volunteer incriminating evidence or agree to conviction. This is precisely when we would expect an individual to resist the State's power. Few if any rational persons would voluntarily offer their liberty for the taking. Constitutional protections are supposed to ensure that the State overrides an individual's will and deprives her of liberty only under circumstances that justify such a profound exercise of coercive power. Consent, however, relieves the State of the rigorous procedural protections that restrict its ability to investigate and prosecute.

[27] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 238 (1973).

In the Fourth Amendment context, a search conducted without a warrant based on probable cause is unreasonable per se.[28] The Supreme Court's opinion in *Katz v. United States* has been reviled and celebrated for its cornerstone role in modern criminal procedure.[29] *Katz* noted that even if the officers in that case had good reason to carry out surveillance against the defendant, doing so without a warrant afforded them a constitutionally impermissible level of discretion to intrude upon the individual's privacy.[30] Bringing the State's police power to bear upon an individual has implications too grave to leave its exercise to officers' unsupervised judgment.[31] Although the Court's jurisprudence has eroded *Katz*'s holding,[32] the warrant requirement remains a salient principle in modern Fourth Amendment jurisprudence and highlights the extent to which non-consent is a constitutional baseline.

A warrant gives police license to conduct a search regardless of whether the target objects to, or is even aware of, the search. The Court typically associates the warrant requirement with "privacy," not "consent."[33] But, Fourth Amendment privacy impliedly depends upon a concept of consent. The warrant and individualized suspicion requirements assume that a search's target has not, would not, or should not consent to such a search if given the opportunity.[34] The subjective value that a defendant

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[28] *See* Katz v. United States, 389 U.S. 347, 357 (1967).

[29] *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 7–20 (1997); Dan Fenske, Comment, *All Enemies, Foreign and Domestic: Erasing the Distinction Between Foreign and Domestic Intelligence Gathering Under the Fourth Amendment*, 102 NW. U. L. REV. 343, 349–50 (2008); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 224 (2001).

[30] *See Katz*, 389 U.S. at 354, 356.

[31] *See id.* at 356–57.

[32] *See* RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 462–633 (2005) (suggesting that the numerous exceptions to the *Katz* warrant requirement may, cumulatively, have swallowed the rule). The Supreme Court has also increasingly opted for an interpretation of the Fourth Amendment that permits "reasonable" searches regardless of whether police officers obtained a warrant prior to the search. *See* Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999).

[33] *See Katz*, 389 U.S. at 358 n.21; Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (finding that a thermal sensing device intrudes upon expectations of privacy in the home); California v. Greenwood, 486 U.S. 35, 40 (1988) (finding no privacy expectation in trash bags left street-side). Exceptions to the warrant requirements emphasize the need to strike a proper balance between law enforcement objectives and privacy. For example, an individual's privacy interests may be overcome only if there is probable cause to believe that a crime has occurred (or is about to occur) and if circumstances make it impractical to obtain a warrant. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978).

[34] The Court has at times formulated the inquiry to suggest that it encompasses a subjective dimension. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). The Court, however, has indicated that the subjective dimension is satisfied by one having taken "ordinary" precautions to protect one's privacy. *See* California v. Ciraolo, 476 U.S. 207, 211–12 (1986) (finding the placement of a fence around a backyard is an ordinary precaution). There is a circularity here: if one takes reasonable precautions to protect a privacy interest that is reasonable, the individual

places upon privacy is only incidentally relevant. The police would be no less obliged to obtain a warrant to use thermal-imaging technology to ascertain whether a social individual's house was emitting unnatural amounts of heat than they would for a hermit's house.[35] "Privacy" is a metaphor for those spheres of autonomy into which there is broad social consensus that the State should not intrude without compelling justification.[36] For example, in *Kyllo v. United States* the Court concluded that the use of a thermal imager by the police to detect heat patterns radiating from a private home was too intrusive.[37] The Court concluded that thermal imaging runs afoul of the social consensus view that the home is sacrosanct.[38]

Once the Court settles on a social consensus view, it imputes that view to a specific individual even if it is unclear whether she shared that view prior to the search. There is good reason for this. It will often be impossible to obtain an individual's actual consent prior to conducting a search.[39] There is reason to be skeptical of a target's expression of consent when elicited prior to or in the course of a police search.[40] An individual may permit a search for any number of reasons that have nothing to do with whether she shares the "consensus view"—e.g., fear, ignorance, or folly.[41]

It is even more evident that non-consent is our constitutional baseline with regard to prosecution. Both in popular culture and law school, the criminal trial is imagined as the ultimate juridical morality play—it is where the gravest accusations a society can level are publicly tested. The Fifth, Sixth, and Fourteenth Amendments require that the State prove a defendant's guilt beyond a reasonable doubt without forcing her to testify. That is to say, in principle, the State cannot force a defendant to participate in her own conviction. Although there is debate as to how far outside the courtroom this protection should reach,[42] the principle, at the very least, suggests that it is wholly the State's obligation to prove guilt. The State cannot make a de-

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has a protectable Fourth Amendment right. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1973). The core inquiry, in other words, is whether the privacy interest is reasonable. *See Ciraolo*, 476 U.S. at 212.

[35] *See Kyllo*, 533 U.S. at 34–35.

[36] *Cf. Katz*, 389 U.S. at 350–51 (noting the Fourth Amendment does not protect a "general right to privacy").

[37] *See Kyllo*, 533 U.S. at 38–39.

[38] *See id.* at 37.

[39] *See Katz*, 389 U.S. at 358 n.22.

[40] Critics charge that a utilitarian approach is more consistent with the Amendment's plain meaning. *See* AMAR, *supra* note 29, at 19–20 (explaining that "reasonableness" should mean police do not need individualized knowledge if the crime is serious enough). This view presumably admits some contractarian dimension to the extent that greater suspicion (whether in the quantitative or qualitative dimension) would be required to justify those spheres in which there was greater expectation of privacy. R

[41] *See* discussion *infra* notes 44–46 and accompanying text. R

[42] *Compare* AMAR, *supra* note 29, at 59 (arguing that the Fifth Amendment should protect against use of compelled testimony in court only), *with* Miranda v. United States, 384 U.S. 436, 467 (1966) ("Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way. . . ."). R

fendant prove her innocence. But, again, practice and principle bear little resemblance in criminal justice.

While non-consent is our constitutional baseline in principle, the Court has authorized expansive consent-based exceptions with regard to criminal investigations and prosecutions.

B. Searches

1. The Consent Search "Exception"

The "consent exception" to the warrant requirement relies on fictional consent. As suggested in *The Welcoming Housekeeper* and *The Careless Lane Changer*, the "consent exception" to the warrant requirement permits the police to search an individual by obtaining her permission just prior to conducting the search.[43] The police need not have any individualized suspicion. The consent search is different from the actual consent illustrated in *The Careless Lane Changer* above because: (1) consent is sought immediately prior to the search's execution and (2) there is no material quid pro quo for an individual's consent—the State does not condition receipt of any tangible benefit on the target's consent. Individuals who possess evidence of a crime that they have committed, as in *The Careless Lane Changer*, stand to lose by consenting to a search.[44] The regularity with which individuals give consent when it is against their interest to do so is telling.[45] Empirical research suggests that answering "yes" to some version of the question, "can we search [you]?" should not be thought of as meaningful manifestation of consent. Individuals are quick to comply with authority, even when it is not in their interest to do so—in part, because they often do not understand that they have the option to say "no."[46]

An officer's decision not to inform an individual of her right to say "no" does not preclude the finding that she "consented" to a search.[47] In *Schneckloth v. Bustamonte*, the Court created a "totality of the circumstances" test for assessing the validity of consent. An officer's decision to inform an individual of her rights is just one factor among many.[48] The Court has justified this by reasoning that consent is objective and presumes a "reasonable *innocent*" person.[49] It is not at all clear why an innocent person

[43] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

[44] *See* Strauss, *supra* note 4, at 211. R

[45] The Court has remarked that when officers ask for and receive consent, "this exchange . . . dispels inferences of coercion." United States v. Drayton, 536 U.S. 194, 207 (2002).

[46] *See* Nadler, *supra* note 6, 174–98.

[47] *Schneckloth*, 412 U.S. at 249.

[48] The Court borrowed this test from the Fifth Amendment context. *See Schneckloth*, 412 U.S. at 225–26. Until the Court's decision in *Miranda*, a confession was deemed to have been "compelled" if the totality of the circumstances indicated that it was involuntary. *See id.*

[49] *Drayton*, 536 U.S. at 202.

would make a better-informed choice about whether to permit a search.[50] If anything, innocent persons have an incentive to permit searches because they have nothing to lose, save for the dignitary benefit of not being searched. Of course, this is one of the benefits that a right to privacy is supposed to secure.[51] Academic commentators have criticized the Court's benchmark of the "reasonable innocent person" because she bears little resemblance to an actual person.

The Court has not hesitated to find searches consensual even in scenarios in which a "reasonable innocent person" would likely conclude that she had no choice but to submit.[52] The limited survey data that exists suggest that most motorists do not understand that they have the right to refuse consent in the traffic stop context.[53] The mere presence of a gun-bearing officer with a badge is likely to impel many reasonable people to comply with her requests. One might imagine *The Welcoming Housekeeper* rewritten to make this explicit. *United States v. Drayton* presents an even more dramatic example.[54] There, the Court considered the legality of drug interdiction searches on buses.[55] Three officers boarded a Ft. Lauderdale-to-Detroit Greyhound bus at a scheduled stop in Tallahassee, Florida.[56] Weapon-clad officers boarded the bus, displayed their badges, and blocked the exit path.[57] Two officers stood at the bus' rear, while the third moved down the aisle from the front of the bus asking passengers to identify any bags stowed overhead.[58] Coming upon passengers Drayton and Brown, the officer, from twelve to eighteen inches away, identified himself and asked for permission to search their bags.[59] He did not inform them (or anyone else) of their

[50] This point has not been lost on academic commentators. *See, e.g.*, Strauss, *supra* note 4, at 225–26 (examining suspect's actual voluntariness is irrelevant); Nadler, *supra* note 46, at 155–56 (questioning the extent to which actual consent is possible in police-citizen encounters); Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 718 (1998) (arguing that "objective person" is simply the police perspective); Brian A. Sutherland, Note, *Whether Consent To Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2215 (2006) (empirical study reveals that lower courts pay little heed to subjective factors). R R

[51] *See* Katz v. United States, 389 U.S. 347, 350 (1967).

[52] *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (during traffic stop, officer need not inform the motorist that she is "free to go" prior to seeking permission to search her vehicle). *See id.* at 41 (Ginsburg, J., concurring) (quoting Ohio Supreme Court's explanation that a motorist stopped by a police officer would not feel free to leave while the officer was asking questions).

[53] *See* Nadler, *supra* note 46, at 202. R

[54] 536 U.S. 194, 198 (2002). The Court in *Drayton* revisited a question left open by its earlier opinion in *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (holding that drug interdiction searches on buses were not per se unreasonable and remanded for a "totality of the circumstances" determination).

[55] *Drayton*, 536 U.S. at 197.

[56] *Id.*

[57] *Id.* at 197–98.

[58] *Id.* at 197–99.

[59] *Id.* at 198–99.

rights to refuse consent or leave the bus.[60] Both passengers consented; the search revealed narcotics.[61] The Court held that, under the totality of circumstances, Drayton and Brown voluntarily elected to remain on the bus after the officers boarded (i.e., there was no "seizure") and voluntarily allowed the officers to search their bags.[62]

Most people would say "yes" in a *Drayton*-like situation, just as they would if in the position of the housekeeper in *The Welcoming Housekeeper* or the driver in *The Careless Lane Changer*.[63] Six members of the Court, however, concluded that a "reasonable innocent person" would have felt free to leave the bus or withhold permission to search. Implausibly, and contrary to empirical research, the Court stated that the incidents of official authority—i.e., uniforms, weapons, and badges—are unlikely to affect a reasonable innocent person's capacity for fully voluntary action.[64] The Court suggested that such incidents of the State's coercive power would never be enough to challenge a suspect's "consent" to a search.[65] Were it otherwise, courts would have to look askance at most consent searches, potentially depriving law enforcement of "the only means of obtaining important and reliable evidence" when it lacks "probable cause to arrest or search."[66]

The Court's acceptance of a third party's—a party other than the search's target—consent to the police's carrying out a search brings into sharp relief that the Court's notion of consent is thoroughly detached from the ideal of actual consent.[67] The Court has offered an "assumption of risk" rationale for this rule. When an individual has agreed to share premises with another, the individual assumes the risk that the co-inhabitant might give the police permission to search the shared premises.[68] "Assumption of risk" has a contractual resonance—a co-inhabitant's willingness to permit a search is a "cost" that one incurs in exchange for living with a co-inhabitant or employing an overly welcoming housekeeper, as in my first hypothetical. This sort of contractual understanding might seem close to actual consent, but the

[60] *Id.* During the suppression motion, there was testimony that the officers sometimes informed passengers of their right to refuse to cooperate, but had not done so on this particular occasion. *Id. But see* Nadler, *supra* note 6, at 205 (questioning whether advisement would be effective in search context).

[61] 536 U.S. at 199. The Court considered both: 1) whether the interdiction effort constituted a "seizure" and, if not, 2) whether Drayton's and Clifton's expressions of consent were voluntary. *Drayton* treats the analysis of whether a seizure occurred as coterminous with the analysis of whether consent was valid. *Id.* at 206.

[62] *Id.* at 205, 207.

[63] *See* Nadler, *supra* note 6, at 190–91.

[64] *Drayton*, 536 U.S. at 204–05. The officers did not do any of the following: 1) apply force or show it in an "overwhelming" way; 2) "brandish" their weapons; 3) deliberately block an exit; or 4) use threats or commands. *Id.*

[65] *See id.*

[66] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[67] *See* United States v. Matlock, 415 U.S. 164, 171 (1974).

[68] *Id.*

Court has expanded it to permit searches based on the consent of someone with apparent, but not actual, authority.[69]

In *Illinois v. Rodriguez*, the Court expanded the "assumption of risk" rationale such that suspects must bear the costs of "innocent" police mistakes. In that case, the police responded to an emergency call and found a woman who bore the signs of severe beating. She indicated that her boyfriend had assaulted her earlier in an apartment. She indicated that she had belongings in the apartment and agreed to give officers access so that they could arrest Rodriguez.[70] Upon entering the apartment, the officers discovered drugs and related paraphernalia, for which Rodriguez was arrested and ultimately convicted.[71] After the arrest, it came to light that the complainant was not actually Rodriguez's co-inhabitant and had taken a key unbeknownst to him.[72] The Court deemed the search valid because the officers reasonably believed that the complainant had authority to allow entry to the apartment.[73] In *Rodriguez*, however, the Court did not seem bothered by the fact that the officers had ample opportunity to obtain a warrant prior to the search, but chose not to.[74]

Rodriguez calls the very presumption of non-consent into question. The warrant requirement is supposed to ensure that the police have sufficient justification to use coercive power to overcome presumed non-consent. *Rodriguez*, however, gives wide latitude to conduct searches provided the police obtain a "yes" from someone. An individual's strong inclination to say "yes" is often an effect of the coercive power officers wield. It is circular to allow the State to justify an exertion of power with consent that is obtained by virtue of that very power. The Court, however, dodged the most severe consequences of this circularity in *Georgia v. Randolph*.[75]

2. Georgia v. Randolph

In *Georgia v. Randolph*, the Court refused to validate a third-party consent search because it was conducted over the actual objection of the search's target.[76] The police responded to a call from Janet Randolph. When the police arrived at the home that she shared with her husband, Scott Randolph, she told officers that he had taken their son away from her following a domestic dispute.[77] In addition, she informed officers that her husband had a

[69] *See* Illinois v. Rodriguez, 497 U.S. 177, 179, 188–89 (1990).
[70] *Id.* at 179.
[71] *Id.* at 180.
[72] *Id.* at 181.
[73] *Id.* at 189 (remanding for fact-finding).
[74] *See id.* at 188–89 (determining that failure to mention the opportunity to obtain a warrant is among the factors to consider on remand in assessing reasonableness).
[75] 547 U.S. 103 (2006).
[76] *Id.* at 116.
[77] *Id.* at 107.

cocaine problem and that there was evidence of this in the house.[78] Scott Randolph, who arrived home while the police were present, denied that he was a cocaine user, and "unequivocally refused" to allow the police to search the house.[79] An officer then asked Janet Randolph for permission to search the house, which she gave.[80] Inside, the officer found evidence that laid the basis for convicting Scott Randolph on narcotics charges.[81] The Court narrowly held that where a search target is "at the door" with a co-tenant, the co-tenant's consent to search does not trump the target's objection.[82] The opinion's reasoning turns on the social consensus view that "[u]nless the people living together fall within some recognized hierarchy . . . there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another."[83] In addition, and perhaps more compellingly, "a theory of consent that ignores an inhabitant's refusal to allow a warrantless search" is unseemly.[84] Scott Randolph apparently understood that he had the right to refuse a warrantless search.[85] If it is deemed "reasonable" to disregard a search target's express non-consent, it would seem difficult to justify the presumption of non-consent that has defined Fourth Amendment jurisprudence since *Katz*.[86]

On its surface, *Randolph* suggests that there is new interest in requiring actual consent. Although the *Randolph* holding is narrow,[87] the Court indicates that the police cannot remove "the potentially objecting tenant . . . for the sake of avoiding a possible objection."[88] Physically preventing the search's target from articulating an objection is tantamount to ignoring an objection actually articulated. This, however, is only a partial victory for those who believe that consent should be a narrow exception to the warrant requirement. The meaning of "no" is far easier to ascertain than the meaning of "yes," and *Randolph* says much more about the former than the latter. Individuals agree to searches for any number of reasons—e.g., fear or lack of information—that cannot easily be cast as exercises of "free will."[89]

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 121.

[83] *Id.* at 114. The dissent contests this argument, noting that it is inconsistent with the "assumption of risk" rationale that is among the justifications for the third-party consent rule. *Id.* at 134 (Roberts, C.J., dissenting).

[84] *Id.* at 116.

[85] *Id.* at 107.

[86] The State in *Randolph* did not argue that exigent circumstances justified the police's decision to search the home. *Id.* at 116 n.6. Had such circumstances existed, *Randolph* very likely never would have made it to the Supreme Court as it would have fallen into one of the standard warrant exceptions in which only a showing of probable cause is necessary to justify the search.

[87] *Id.* at 121 (noting that a "potential objector" must be at the door when consent is sought, otherwise the objector "loses out").

[88] *Id.*

[89] *See* Nadler, *supra* note 6, at 173–97.

Randolph is unusual because the suspect had the knowledge and temerity to refuse permission to search. The State, through police officers, may not use its coercive power to completely foreclose such opportunity to refuse. But because most persons will not have the temerity or knowledge to refuse a search, it is a foregone conclusion that most people will say "yes." That this is true seems less troublesome in a situation like the one in *The Welcoming Housekeeper* than the one in *The Careless Lane Changer*.

In *The Welcoming Housekeeper*, the police were not punitively targeting the homeowner or the housekeeper. They were performing a public welfare function (retrieving the victim's property) and, perhaps, gathering evidence. In *The Careless Lane Changer*, the police officer was punitively targeting the driver. This distinction is significant, although unacknowledged by the Court. Sections II and III substantiate the distinction as a theoretical matter. But, before that, I offer a description of the law of consent as it operates in the plea and confession contexts.

C. Plea Bargaining

Charging someone with a crime may very well be the ultimate expression of the State's coercive power. And plea bargains are often likened to actual contracts in that they require a criminal defendant's actual consent in order to be valid.[90] This makes sense to the extent that the State's coercive power is individually targeted. Actual consent means more than just accepting that a defendant said "yes"; it means in addition that there is assurance that she considered the alternatives and had good reason for saying "yes." In principle, this should mean that the defendant actually considered the risk and consequences of conviction following trial. *The Ready Pleader*, however, suggests that principle and practice diverge. Defendants regularly make plea decisions based on considerations that have little to do with the risks of trial.

1. Actual Consent in the Face of Legitimate Coercion

Criminal trials are rare because the vast majority of criminal cases filed in the United States are resolved through plea bargains.[91] This is ironic because the procedural protections that are attendant to trial underwrite our confidence in a defendant's guilt and, thereby, justify punishment. A foundational assumption undergirding the right to trial is better to let a guilty individual go free than to convict an innocent one.[92]

There is considerable scholarship that wrongly treats "guilt" and "innocence" as ontologically predetermined categories and the criminal trial as

[90] *See* Santobello v. New York, 404 U.S. 257, 261–63 (1971) (remanding to determine the appropriate remedy for prosecutor's breach of plea agreement).

[91] *See, e.g.*, Mnookin, *supra* note 3, at 1722 n.3. **R**

[92] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

a sifting device.[93] This interpretation understates the criminal trial's significance because the distinction between "guilt" and "innocence" is more than just a straightforward question of empirical fact.[94] Deciding on the truth of a particular account of the facts often requires difficult probabilistic judgments that are not subject to categorical proof—e.g., circumstantial evidence that gives rise to inferences. Moreover, determining guilt often requires complex moral judgments about underlying facts.[95] It is often the defendant's "state of mind" that determines whether a crime occurred and if it did, its seriousness.[96] State of mind is not an empirical fact, but rather a judgment about whether blame can be ascribed to the defendant and if so, to what degree. Because there is both existential and moral uncertainty regarding guilt, a liberal society should be hesitant about pronouncing individual guilt, at least in theory.[97] The criminal trial, with its formalism and procedural protections, reflects that hesitation. The criminal trial rationalizes the State's exercise of its coercive power against an individual by subjecting all information relevant to guilt to the close scrutiny of a jury.

Given that there is theoretical anxiety surrounding the idea of individual guilt, pleas seem quite strange. To plead guilty is, in effect, to consent to conviction.[98] The accused not only waives the right to trial, but also affirmatively admits to the acts with which she is charged. In exchange for pleading, the prosecutor usually confers some benefit upon the accused, typically dropping charges or making a favorable sentencing recommendation to the court. The debate as to whether plea bargaining exists because of, or despite the existence of, elaborate trial rights is beyond this paper's scope. It suffices to say that plea bargaining is a longstanding practice[99] that was only explicitly validated by the Supreme Court in the 1970s.[100]

Courts describe pleas using the word "waiver," which is meant to be a more muscular brand of consent than that required in the search context.[101] Waiver, however, only requires that the defendant be able to make a "voluntary" choice among the constrained menu of options presented by the

[93] *See, e.g.*, AMAR, *supra* note 29, at 154 (noting that Constitution protects the innocent, not the guilty); Stuntz, *supra* note 7, at 780 (highlighting that consent and waiver rules are supposed to protect innocent third parties). R R

[94] *See In re* Winship, 397 U.S. at 370; Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Doctrines*, 72 GEO. L.J. 185, 197–98 (1983). *See also* Craig M. Bradley & Joseph L. Hoffman, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1272 (1996) (arguing that trials are "morality plays" and "civic theater").

[95] *See* Arenella, *supra* note 94, at 213–15.

[96] *See, e.g.*, MODEL PENAL CODE §§ 210.1–210.4 (1981) (criminal homicide).

[97] *See infra* discussion Section II.a.

[98] *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 36 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[99] *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003).

[100] *See Boykin*, 395 U.S. at 243 (right to trial may be waived provided that it is done so voluntarily).

[101] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 237.

State.[102] Nevertheless, the Court has held that for a defendant's consent to be valid, there must be an exacting demonstration that the defendant has actually considered the risks of going to trial and the consequences of pleading guilty.[103] Whether a "reasonable person" under the circumstances would consent is irrelevant. A court accepting a defendant's plea must establish that the defendant herself has "knowingly and intelligently" elected to consent to conviction.[104] Towards this end, courts must engage in an extensive colloquy on the record with the defendant in order to ensure that she actually understands the immediate implications of entering a guilty plea.[105] At a minimum, the colloquy requires courts to establish that the defendant understands the charges against her, the kind of punishment she might expect, the nature of the rights associated with a trial, that she is giving up those rights, and that her decision to plead was not prompted by any threats or promises (other than those contained within the plea agreement).[106] In addition, the defendant must be represented by competent counsel who is obliged to discuss the proposed plea agreement with her client in detail prior to the court's plea colloquy.[107] This brand of consent may appear to approximate actual consent.

The Supreme Court has expressly likened plea bargains to ordinary contracts. Plea bargains are the culmination of a "bargaining process" that is predicated upon the "mutuality of advantage."[108] In the face of uncertainty regarding trial outcome, both the State and defendant have incentives to negotiate.[109] But, *The Ready Pleader* counsels that the contract metaphor should not be accepted too hastily.

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[102] *See id*. at 238.

[103] *See id.*

[104] *Boykin*, 395 U.S. at 243 n.5 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[105] *See* FED. R. CRIM. P. 11(b). *See also* Blackledge v. Allison, 431 U.S. 63, 79–80 (1977) (explaining that a plea colloquy should be on the record); *Boykin*, 395 U.S. at 245 (Harlan, J., dissenting) (characterizing the decision as imposing Federal Rule of Criminal Procedure 11 on states).

[106] *See* FED. R. CRIM. P. 11(b). *But see* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1401 (2004) (suggesting the plea colloquy is rote and unintelligible to most defendants).

[107] *See* Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (applying Strickland v. Washington, 466 U.S. 668 (1984) to claim of ineffective assistance of counsel in plea negotiations). Criminal defendants may, of course, waive the right to counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (requiring that waiver be knowing and voluntary). It is troubling to imagine a criminal defendant waiving both his right to counsel and right to trial. Unfortunately, this happens regularly, sometimes at courts' urging to expedite the disposition of cases. *See, e.g.*, Robert C. Boruchowitz, *Right to Counsel Remains Threatened in Washington*, WASH. ST. B. NEWS, Feb. 2007, at 30.

[108] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (quoting Brady v. United States, 397 U.S. 742, 752 (1970)).

[109] *See* Robert E. Scott & William J. Stuntz, *Plea Bargain As Contract*, 101 YALE L.J. 1909, 1914–18 (1992). One might view the State as possessing a right to seek punishment and the defendant possessing a right to require proof beyond a reasonable doubt of the charges leveled against her. *Id.*

2. *Not Quite a Contract*

The problem with the contract metaphor is that mutuality of advantage is not the touchstone of our criminal justice system—establishing guilt is.[110] As discussed above, the categories "innocent" and "guilty" are not matters of straightforward, empirical fact.[111] The procedural rigors of trial (e.g., proof beyond a reasonable doubt) legitimate the State's deprivation of a defendant's liberty. It is troubling to think that, as in *The Ready Pleader*, plea bargaining yields convictions that would not otherwise be obtainable through trial. There is good reason to think plea agreements do generate such convictions, and likely in substantial numbers.[112]

The State has considerable power to make trial seem like an unattractive option for a criminal defendant. The inducements that prosecutors provide to encourage guilty pleas, such as reduced charges and sentencing leniency, create powerful incentives to plead guilty even when the State's case for trial may be quite weak.[113] A prosecutor can permissibly threaten to add additional charges to an indictment in order to induce a guilty plea.[114]

Prosecutors typically have a vast menu of choices insofar as charging decisions go. The criminal code is replete with overlapping and redundant crimes, leading William Stuntz to observe that plea bargaining occurs, not in "the shadow of the law," but rather in "the shadow of prosecutors' preferences."[115] Determinate sentencing, which restrains a court's sentencing discretion by creating sentencing ranges tied to specific criminal charges, has amplified prosecutorial power.[116] For risk-averse criminal defendants,[117] the prosecutor's promise to drop charges (or threat to add charges) is likely to have significant effect on their willingness to demand a trial.[118] Pleas in-

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[110] *See id.* at 1919–34 (discussing how principles of duress and unconscionability support plea bargains); *id.* at 1935–49.

[111] *See supra* notes 93–95 and accompanying text.

[112] *See* Stephen J. Schulhoffer, *Criminal Justice Discretion As a Regulatory System*, 17 J. LEGAL STUD. 43, 74 (1988) (noting that the plea system generates unreliable convictions).

[113] Scott & Stuntz, *supra* note 109, at 1967.

[114] *See* United States v. Goodwin, 457 U.S. 368, 384 (1982) (finding no presumption of vindictiveness when prosecutors increase charges following a defendant's rejection of plea offer). Doing so is no different from charging all conceivable crimes and then offering to drop some. *See* Bordenkircher v. Hayes, 434 U.S. 357, 360–61 (1978).

[115] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004).

[116] *See id.* Courts are not to delve deeply into a prosecutor's motives—only physical threats or wholly implausible charges are likely to invalidate a plea. *See Goodwin*, 457 U.S. at 384; Corbitt v. New Jersey, 439 U.S. 212, 223 (1978); Brady v. United States, 397 U.S. 742, 750 (1970). *See also* Schulhoffer, *supra* note 112, at 74 (finding that massive sentencing concessions create incentives to plead for the innocent and guilty alike).

[117] It is difficult to make any empirically supportable claims about how risk-averse defendants are, but that does not prevent legal scholars from doing so. *See, e.g.*, Scott & Stuntz, *supra* note 109, at 1939 (stating that criminal defendants are likely less risk-averse than others). R

[118] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2508–09 (2004).

duced by the fear of receiving the death penalty are also constitutional.[119] This is true even when the suspect asserts that she is innocent of the crime charged.[120] Given prosecutors' incentives to maximize their conviction rates,[121] one can readily imagine prosecutors making charging decisions with a view towards maximizing their leverage for bargaining purposes rather than based upon what might be proved beyond a reasonable doubt at trial.

For many criminal defendants, the risk of conviction following trial does not even enter the calculus of whether to plead guilty. *The Ready Pleader*, for example, illustrates the common phenomenon of "pleading to get out." This occurs when a defendant is unable to post bail and the time spent in pretrial detention exceeds the recommended sentence on a plea of guilty. Waiving litigation of Fourth and Fifth Amendment violations is typically one of the conditions of pleading guilty. Depending upon how congested the trial schedule is in a particular jurisdiction, the time spent waiting for a trial can far exceed the maximum exposure upon a finding of guilt after trial.[122] In such cases, there will be a nearly irresistible incentive to plead guilty regardless of the strength of the State's case or the egregiousness of any legal violations that may have occurred during the police investigation. There is very little incentive for prosecutors to investigate or evaluate the likelihood of trial success for such cases.

There is not quantitative data on the prevalence of "pleading out" and commentators have paid little attention to it. Gathering quantitative data is difficult because the actual motivation for a defendant's decision to plead guilty is not reflected anywhere in the formal record for a case—only the defendant and her lawyer would know why the defendant elected to plead. Anecdotal evidence, however, suggests that "pleading to get out" is commonplace, particularly in cases where the pre-trial "offer" for a guilty plea is "credit for time served."[123] In such cases, the defendant's "voluntary" decision to plead may have nothing whatsoever to do with the risks of conviction following trial.

Whether a set of charges is actually provable beyond a reasonable doubt is often entirely irrelevant in pre-trial litigation and plea bargaining. Plea bargains, particularly in less serious cases, are often offered and accepted before a case has been prepared for trial.[124] Docket congestion is a ubiquitous feature of state criminal courts. Pleas are, in part, an institutional response to the workload. They are offered (and accepted) in order to elimi-

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[119] *Brady*, 397 U.S. at 747.

[120] *See* North Carolina v. Alford, 400 U.S. 25, 37 (1969).

[121] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 (2001) (describing line prosecutors' incentives to manage their dockets).

[122] One of the few scholarly pieces to address the subject is Bibas, *supra* note 118, at 2540.

[123] Scholars have noted the phenomenon. *See, e.g.*, *id.*; Klein, *supra* note 106, at 1382.

[124] *See, e.g.*, Klein, *supra* note 106, at 1388.

nate the need to prepare for trial.[125] As such, pleas are frequently entered without either the State or the defense having conducted a meaningful investigation.[126] The "factual basis" for many pleas is little more than a police report.[127] Given that the vast majority of cases are disposed of through plea bargains, it is logical to think that it is plea dynamics, as opposed to trial dynamics, that structure charging decisions. In the unlikely event that a case does go to trial, non-viable trial claims are easily dropped.[128] A prosecutor need not ask whether a particular charge is provable at trial, but only whether a particular charge increases bargaining leverage for plea purposes.

Although courts go to some pains to ensure that a plea bargain is the product of a defendant's actual consent, we have seen that the menu of choices from which a defendant must choose is often constrained in a manner that makes it virtually inevitable that she will consent to conviction. In *The Ready Pleader*, the defendant understands that she is waiving trial, but pleads nonetheless. The colloquy does not address the underlying motivations for her election to plead. Unless courts and policy makers pay heed to the reasons why a particular defendant elects to say "yes" to a plea, there is a risk that the procedural protections designed to guarantee that pleas are voluntary will become entirely formalistic.

D. Confessions

The dangers of formalism alluded to above are fully realized in the confession context. Although a confession is typically elicited after a search and before a plea, it bears likeness to both. A confession is elicited as part of the police investigation, but only once an individual has been targeted specifically. As in the search context, the suspect is not offered any specific benefit in exchange for volunteering a confession. As in the plea context, courts require that the suspect's decision to confess be "knowing and intelligent"—i.e., the more muscular brand of consent called "waiver."[129] However, as *The Reluctant Confessor* illustrates, the inquiry into consent's legitimacy typically begins and ends with whether the police properly recited the *Miranda* warning.[130]

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[125] *Id.*; *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (2000) (plea bargaining developed in the nineteenth century, in part because of prosecutorial workload).

[126] Klein, *supra* note 106, at 1388. **R**

[127] There must be a "factual basis" for a plea in order for a court to approve it. *See* FED. R. CRIM. P. 11(b). This is particularly true where a defendant refuses to confess guilt, but still seeks to enter a plea of guilty. *See* North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1969).

[128] *See* FED. R. CRIM. P. 7(e) (amending information).

[129] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973).

[130] *See* AMAR, *supra* note 29, at 53. **R**

1. Miranda

Miranda v. Arizona fundamentally redefined confession jurisprudence and laid the groundwork for the formalism that now defines the area. A station-house confession is typically the most compelling piece of evidence that the State will have against a criminal defendant.[131] And, when the police properly administer *Miranda* warnings, it is unlikely that a court will suppress any evidence obtained from the interrogation.[132]

Miranda may be the most prominent example of the Warren Court's criminal procedure revolution. It has been discussed in considerable detail elsewhere, so only a short summary is provided here. The Fifth Amendment prohibits the State from compelling an individual "in any criminal case to be a witness against himself."[133] Prior to *Miranda*, the primary device for ascertaining whether unconstitutional compulsion had occurred was a due process test for "voluntariness" that looked to the totality of circumstances.[134] This test was indeterminate and inconsistent. Although the voluntariness inquiry remains a feature of the confession landscape,[135] *Miranda* has supplanted it, becoming the landscape's primary feature. Failure to properly administer the *Miranda* warning creates an irrebutable presumption of unconstitutional compulsion.[136] By the same token, proper administration of the *Miranda* warning virtually ensures the constitutionality of any confession obtained following the suspect's waiver of the right to remain silent.[137]

In *Miranda*, Justice Warren emphasized the inherently coercive nature of custodial interrogation. Any time "incommunicado interrogation of individuals in a police dominated atmosphere" occurs, there will be psychological coercion.[138] Three substantially overlapping rationales account for the Court's conclusion. First, the State's power to punish is targeted at a specific individual.[139] Second, custodial interrogation typically involves isolating the individual from "impartial observers [who can] guard against intimidation or trickery."[140] Third, the actual tactics brought to bear (of which isolation is

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[131] *See, e.g.*, Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) [hereinafter Leo & Ofshe, *Consequences*].

[132] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (noting the rarity with which a confession can be challenged as "compelled" when "law enforcement authorities adhered to the dictates of *Miranda*").

[133] U.S. CONST. amend. V.

[134] *See* RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 807 (2d ed. 2005). This was the very test that was imported into the Fourth Amendment consent search context. *See Schneckloth*, 412 U.S. at 224.

[135] *See* Colorado v. Connelley, 479 U.S. 157, 170 (1986) (applying due process voluntariness analysis). *See also* Paul Marcus, *It's Not Just About Miranda*, 40 VAL. U. L. REV. 601, 605 (2006) (reviewing federal opinions on voluntariness).

[136] *See* United States v. Patane, 542 U.S. 630, 639 (2004).

[137] *See id.*; Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) (plurality opinion).

[138] 384 U.S. 436, 445–46, 478 (1966).

[139] *Id.* at 455–56, 460, 469.

[140] *Id.* at 461.

but one) have been specifically conceived to "subjugate the individual to the will of the examiner."[141] The Court specifically noted that, at the time that the case was decided, such techniques included deceit and trickery (e.g., falsely claiming that a co-suspect had confessed), deemphasizing the moral gravity of the offense, offering the suspect moral and legal excuses for the offense, and interrogating relentlessly in order to create a sense of "domination."[142] In the face of such coercion, the Court held that police must advise an individual who is taken into custody of her rights to counsel and to remain silent.[143] The *Miranda* warning is supposed to trigger the suspect's agency and permit her to make a knowing and intelligent decision about whether to confess.[144] The Court reasoned that the *Miranda* warning would alert the suspect not only to the fact that he is in "a phase of the adversary system,"[145] but also to the fact that "his interrogators are prepared to recognize his privilege should he choose to exercise it."[146]

The psychologically coercive techniques that the Court specifically described in *Miranda* are not singled out as unlawful in and of themselves. As *The Reluctant Confessor* reveals, the very same techniques are still used today. The leading manual on criminal interrogation and confessions describes an interrogation as an "accusatory" process designed to elicit "admissions against self-interest."[147] The entire purpose of an interrogation is to wear down a suspect psychologically so that she is willing to confess without receiving a commensurate benefit in exchange.[148] In *The Reluctant Confessor*, the police tried to create the false impression that they had sufficient information to convict the suspect and that the costs of confessing were substantially lower than the costs of refusing to do so.[149] The concern of the due process voluntariness test for "overcoming a suspect's will" is not only nebulous, but also utterly misplaced given that the whole point of an interrogation is to "overcome" a suspect's will.[150] Courts will not question the

[141] *Id.* at 457.
[142] *Id.* at 450–51.
[143] *Id.* at 473–74.
[144] *Id.* at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1966)).
[145] *Id.* at 469. *See also* Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) ("[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.") (footnotes omitted). In *Escobedo*, the Court, interpreting the Sixth Amendment, used language that suggested a profound skepticism of all interrogation directed at eliciting a confession. *Id. Miranda*, of course, answered the question of whether the Court would prohibit confessions altogether. *See* ALLEN ET AL., *supra* note 134, at 819.
[146] *Miranda*, 384 U.S. at 468–69.
[147] INBAU ET AL., *supra* note 20, at 7. R
[148] *See, e.g.*, *id.* at 210–16 (detailing "Reid Nine Steps of Interrogation").
[149] *See* Leo & Ofshe, *Consequences*, *supra* note 131, at 441; Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1004–10 (1997) [hereinafter Leo & Ofshe, *Decision*].
[150] *See* Ofshe & Leo, *Decision*, *supra* note 149, at 1053.

actual effect that police interrogation tactics have upon a suspect.[151] Rather, proper administration of the *Miranda* warning virtually guarantees that any subsequent admission will be deemed admissible.[152]

Although there is little in the way of direct empirical research, there is good reason to think that the *Miranda* warning does not actually enhance suspects' capacity to resist the coercion inherent in custodial interrogation.[153] Most people tend to be compliant in the face of State authority.[154] The police have a lot of discretion regarding when and how they give the *Miranda* warning. When the police recite it during moments of high stress, as in *The Reluctant Confessor*, there is reason to doubt that most suspects will fully comprehend its significance.[155] Given that the *Miranda* warning is culturally associated with arrest, it might even be the case that the *Miranda* warning renders a suspect more, rather than less, pliant.[156]

Miranda has saved courts from the difficult task of establishing whether a suspect's expression of consent was actually voluntary. If the police properly administer the *Miranda* warning and the suspect confesses following waiver, courts will almost always conclude that the suspect's consent is "knowing and voluntary."[157] As such, it is an ossified formalism.

2. The Pitfalls of Formalism

Confession-related litigation tends to coalesce around the question of whether *Miranda* warnings were properly administered. Once an arrest has occurred,[158] any confession obtained without proper recitation of the *Miranda* warning will likely be suppressed.[159] In its most recent opinion on the *Miranda* warning, the Court echoed its original understanding that "*Mi-*

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[151] Of course, due process still applies, but it only forbids the most extreme forms of coercion, of which the threat of or actual physical violence is paradigmatic. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

[152] *See* Oregon v. Elstad, 470 U.S. 298, 317 (1985) (noting that trickery is permitted provided that *Miranda* warning has been read and waiver obtained).

[153] *See, e.g.*, Nadler, *supra* note 46, at 204–05; William T. Pizzi & Morris B. Hoffman, *Taking* Miranda's *Pulse*, 58 VAND. L. REV. 813, 845 n.21 (2005) (reviewing scholarship suggesting that individuals do not exercise right to remain silent despite receiving *Miranda* warning). There has been animated debate over whether there are significantly fewer confessions obtained as a result of *Miranda*. *See* ALLEN ET AL., *supra* note 134, at 889–90 (summarizing studies). **R**

[154] *See* ALLEN ET AL., *supra* note 134, at 889–90.

[155] *See id.*

[156] *See* George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79, 103–04 (1993).

[157] *See* Missouri v. Seibert, 542 U.S. 600, 609 (2004) (plurality opinion); Pizzi & Hoffman, *supra* note 153, at 845.

[158] "Consent" is also central in defining whether an individual is "in custody." An individual is "in custody" whenever a reasonable person in the same position would not have felt free to leave. *See* Stansbury v. California, 511 U.S. 318, 322, 325 (1994). The Court recently held that the reasonable person standard does not account for youth or inexperience. Yarborough v. Alvarado, 541 U.S. 652, 666 (2004).

[159] United States v. Patane, 542 U.S. 630, 639 (2004) (finding that a failure to Mirandize creates irrebuttable presumption of coercion). *But see* Harris v. New York, 401 U.S. 222, 226

randa warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent."[160] *The Reluctant Confessor* suggests that there is reason to think that the opposite is true.[161]

If the *Miranda* warning was intended to facilitate "real choice," one would expect the Court to require that the police tread gingerly whenever a suspect appears to invoke the constitutional rights described in the *Miranda* warning. One might think that the police would have an obligation to clarify the suspect's understanding of the rights at stake or, as in the plea context, see that counsel is made available to explain the rights at stake. The Court, however, has held the exact opposite. A suspect's invocation of the rights specified in the *Miranda* warning must be objectively clear in order for the police to be required to discontinue questioning.[162] The Court has concluded that the statement, "[m]aybe I should talk to a lawyer[,]" is not objectively clear.[163] It is virtually impossible to imagine that the Court would ever require that counsel be provided to suspects from whom a confession is sought. As in *The Reluctant Confessor*, the police do not have an obligation to inform a suspect that her retained attorney has sought to represent the suspect during an interrogation.[164] The police need not even inform a suspect of the crime they are investigating.[165]

Courts will assume that virtually any confession is "knowing and voluntary" when the *Miranda* warning has been administered.[166] The warning's power to render a confession admissible extends to even those instances when the warning is administered *after* a damning confession is made. In *Oregon v. Elstad*, the police obtained a confession from a robbery suspect in the course of arresting him at home. The police later administered the *Miranda* warning, obtained a waiver, and then obtained a second confession. The Court deemed the second confession admissible.[167] Provided that the first questioning was not deliberately coercive, proper administration of the

(1971) (maintaining that an un-Mirandized statement may be used to impeach if defendant elects to testify at trial).

[160] Missouri v. Seibert, 542 U.S. 600, 609 (2004) (plurality opinion).

[161] *See infra*.

[162] Davis v. United States, 512 U.S. 452, 459 (1994).

[163] *Id.* at 455. *See also* Fare v. Michael C., 442 U.S. 707, 724 (1979) (concluding that a minor's request to speak with probation officer during interrogation does not constitute an invocation of *Miranda* rights).

[164] Moran v. Burbine, 475 U.S. 412, 421 (1986) (refusing to extend *Miranda* to require police to divulge information that suspect's sister had retained attorney for suspect).

[165] *See* Colorado v. Spring, 479 U.S. 564, 575 (1987) (explaining that due process does not require that police give information about the crime).

[166] *E.g.*, Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) (plurality opinion) (stating that *Miranda* warning and waiver is "ticket of admissibility"); Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that *Miranda* is a constitutional rule, not just a prophylactic mechanism for protecting constitutional rights).

[167] *Elstad*, 470 U.S. at 314. The first statement was, of course, inadmissible. *Id.* at 322–23.

Miranda warning, "should suffice to remove the conditions that" render the initial statement inadmissible.[168]

There is reason to be uncomfortable with such formalism given the individually-directed nature of the coercion. The Court's recent case of *Seibert v. Missouri* highlighted this. In *Elstad*, the police accidentally obtained an initial confession without Mirandizing; in *Seibert*, the police deliberately did so pursuant to policy.[169] The police obtained a confession, Mirandized, and then asked the suspect to repeat the confession.[170] A formalistic understanding of the *Miranda* warning supports such a practice. If administering a *Miranda* warning clears the slate with respect to pre-Mirandized confessions, as *Elstad* suggests, why should it matter whether the first confession was deliberately or accidentally obtained?[171]

The Court, however, decided that the practice in *Seibert* violated the Fifth Amendment. The plurality reasoned that not only was the initial failure to Mirandize in *Seibert* a deliberate "strategy adopted to undermine *Miranda* warnings,"[172] but also that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge'" required to make a knowing and intelligent choice to waive her rights.[173] The Court did not allude to any empirical evidence that supports the latter point. One of the problems with the Court's reasoning is that it appears to turn on the *Miranda* warning's efficacy.[174] According to the plurality, the practice was unlawful not only because of the police's bad faith, but also because of the possibility that the police's stratagem actually enervated the *Miranda* warning's purpose of creating the opportunity "for a real choice between talking and remaining silent."[175] The plurality's reasoning raises the empirical question whether *Miranda* warnings ever achieve that purpose.

Because the warning's purpose is said to be to permit suspects to make a knowing choice, it is entirely unclear how one would go about assessing whether an officer sought to undermine *Miranda* without some reference to the stratagem's effect upon the suspect. Even if this were not true, eliciting a confession is, by definition, an exercise in coercion. Police are charged with "getting something for nothing"—i.e., a statement against interest for nothing in exchange. It is nearly impossible to distinguish between a legitimate

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[168] *Id.* at 314.

[169] *Seibert*, 542 U.S. at 605–06.

[170] *Id.*

[171] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 423 (1986). The *Seibert* dissenters note that an officer's state of mind should not enter the analysis. *Seibert*, 542 U.S. at 625 (O'Connor, J., dissenting).

[172] *Seibert*, 542 U.S. at 616.

[173] *Id.* at 613–14 (quoting *Moran*, 475 U.S. at 424).

[174] *Id.* at 612–13.

[175] *Id.* at 609. In his concurrence, Justice Kennedy indicated his disagreement with the plurality, noting that it is a mistake to focus on the warning's efficacy, and instead proposed a test that focuses exclusively on the police's bad faith. *Id.* at 621–22 (Kennedy, J., concurring).

effort to overcome a suspect's will and an illegitimate one that undermines the *Miranda* warning's purpose. One can imagine any number of strategies to minimize the *Miranda* warning's effectiveness. An officer might read the warnings quickly or, as in *The Reluctant Confessor*, when the suspect is not paying attention. The *Seibert* dissenters correctly emphasized that *Miranda* was supposed to obviate the need for the kind of subjective inquiry that the plurality and Justice Kennedy seem to endorse.[176]

The police practice in *Seibert* is troubling, but so too is the psychological coercion that interrogators exercise as a matter of course once a suspect is Mirandized. The fact that suspects are induced to confess in exchange for nothing is inconsistent with actual consent. To the extent that the Court has relied upon the *Miranda* warning's rigid formalism to avoid confronting this dilemma, the *Seibert* plurality implicitly calls the Court's tact into question. To ask if *Miranda* actually works is to open a Pandora's box, one that five justices are very unlikely to open any time in the near future.

II. Can the Accused's Consent Ever Be Valid?

The "consent of the accused" has an ironic relation to the "consent of the governed." Section I showed that high levels of psychological and social pressure do not prevent the Court from finding valid "consent." This might lead one to ask why the Court bothers relying upon "consent" at all.[177] This Section shows that the Court's reliance on "consent" resonates with the DNA of our political and legal culture. Consent is central to how we distinguish legitimate from illegitimate exercises of state coercion.

Using political theory, Section II.a argues that if the State is to justify individually-directed coercion with the consent of the individual against whom it is applied, the consent must be "actual." "Individually-directed" coercion describes those exertions of State power that are punitive and, in the first instance, targeted at a specific person or people. I term all other exertions of State coercion "generally-directed." Where an individual is subjected to generally-directed coercion, as P was in *The Welcoming Housekeeper*, "fictional consent" may provide appropriate justification. I use "fictional consent" to describe any theory of consent that is not actual—e.g., consent that is presumed from membership in the political community.

Section II.b uses the theoretical framework developed in Section II.a to argue that the law of consent in criminal procedure is not true to the concept of "consent" as understood in our political history and culture.

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[176] *Id.* at 624 (O'Connor, J., dissenting) (noting that a challenge to the two-step approach is properly evaluated using the due process voluntariness test).

[177] *See* Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 Va. L. Rev. 79, 94 (1981).

A. Coercion's Ubiquity and the Social Contract

1. "Coercion" Need Not Be a Dirty Word

"Coercion" is often a dirty word in common parlance. It is counterposed to "freedom," and imagined as synonymous with immorality.[178] Nearly a hundred years ago, legal realists explicitly called the freedom-coercion binary into question. Robert Hale, for instance, suggested that State coercion is ubiquitous and, in some measure, a necessary precondition for freedom.[179] He concluded that "coercion" should be thought of as a neutral, descriptive term.[180] The State's threat of force underwrites the system of rights and rules that ensures organized social existence. The State deliberately uses (or promises to use) its power to guarantee specific distributive, behavioral, and other outcomes. Hale did not advance any particular normative framework, but powerfully suggested that the law should seek to distinguish between legitimate and illegitimate coercion, as opposed to coercion and freedom.[181] This echoes liberal political theory. The State's coercive power underwrites individual freedom by sustaining the social and political order; this saves individuals from expending time and energy guarding against potential harms inflicted by nature and other individuals.[182]

In the liberal tradition, the State holds its monopoly on coercive power with the "consent of the governed." More than just a theory, "consent of the governed" is an entrenched precept of political awareness and discourse in the United States.[183] It shapes our conceptualization of democratic legitimacy and the individual's relationship to the State. From the Constitution's emphasis on "We the People" to the contemporary media's reliance on approval ratings to assess the government's efficacy, the language of "consent" saturates our political consciousness. Even at the level of political humor, it is only a short while after a presidential election that one begins seeing bumper stickers to the effect of, "Don't Blame Me, I Didn't Vote For . . . ." The ubiquity of the concept of consent makes it entirely unsurprising that the Court would use it as a vehicle for expressing how State power should be circumscribed.

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[178] *See* Peter Westen, *"Freedom" and "Coercion" – Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 547 (1985).

[179] Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 476–78 (1923).

[180] *Id.* at 476.

[181] *Id*. at 476–77.

[182] *See* DON HERZOG, HAPPY SLAVES 149 (1989). Hobbes' "war of all against all" in *Leviathan* is the most famous formulation of this dilemma. *Id.* at 134–38. In such a pre-statist condition, each individual is a kind of state unto herself with complete liberty, but also complete responsibility for defending against wrongs committed by others. *See, e.g.*, LOCKE, *supra* note 11, at 16. R

[183] *See* HERZOG, *supra* note 182, at 215.

This set of ideas is expounded systematically in political theory. It is by consenting that individuals invest the State with coercive power.[184] The social contract distinguishes between legitimate and illegitimate assertions of State coercion. Anything exceeding the social contract's terms is illegitimate. When the State impinges upon (or totally compromises) an individual's liberty, it is justified to the extent that she previously agreed that the State should have such power.[185] We would not expect an individual to consent to the State's use of its power against her if presented with a choice at the moment of application. It is by virtue of her *a priori* consent that the State's power is legitimate. As discussed below, such *a priori* consent is "fictional."

The question is how literally the idea of "consent" should be interpreted. In classical formulations, the "consent of the governed" often referred to the actual consent of each individual member of the polity. This was most famously true in Rousseau's formulation of the social contract.[186] It is certainly no coincidence that he was writing from within a small city-state. Rousseau did not imagine his vision applying to a large, pluralist state.[187] The modern state is exceptionally complex in its morphology and operation—the instances in which the State exercises its powers are so varied as to be uncountable, and the consequences are so far-reaching as to sometimes be invisible.[188] Because it is impossible to disaggregate the State's exercise of different kinds of coercive power, it is silly to imagine that power being subject to individual consent on a piecemeal basis.[189] For example, collecting taxes or forming an elected government would be nearly

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[184] Consent theory begins with the assumption that the world is peopled by autonomous individuals who are capable of making choices. *Id.* at 1. This assumption is the subject of fierce debate the details of which are beyond this article's scope.

[185] *See* Noah Feldman, *Cosmopolitan Law*, 116 YALE L.J. 1022, 1038 (2007).

[186] Rousseau's vision of the social contract approaches that of requiring unanimity of the governed. JEAN JACQUES ROUSSEAU, *Of the Social Contract*, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 121, 123 (Victor Gourevitch ed., Cambridge Univ. Press 1997). He imagined republican government working best in a small city-state. *Id.* at 89–90 (suggesting that large states are best suited for monarchical rule and small ones for democratic rule). This was precisely because, in the small city-state, the "general will" would tend to converge with the sum of individual wills. *Id.* at 84. That said, even in a small polity, Rousseau recognized that the "general will" amounted to something more than (and qualitatively different from) a simple summation of the citizens' individual wills. *Id.* at 60.

[187] Victor Gourevitch, *Introduction* to ROUSSEAU, *supra* note 186, at ix, xv (noting that Rousseau was theorizing the legitimacy of a city-state). R

[188] The dilemma presented by the complexities of the modern state for consent-based theories of legitimacy is, perhaps, most acutely perceived by administrative law scholars. *See, e.g.*, Farina, *supra* note 5, at 1019 (arguing that basis for legitimacy of administrative law has never been unitary). R

[189] *See* A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 818–19 (1984) (noting that "consent" has a hold on popular conscience, but cannot account for State's legitimacy because most citizens never have opportunity actually to consent). *But see* Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753, 761–62 (2000) (arguing that individual citizens should have the right to opt out of state programs on piecemeal basis).

impossible if each citizen had a right of refusal.[190] In the latter case, even if a substantial number of individuals did not vote for the winning candidate, that does not mean that an elected government is ruling without "the consent of the governed."[191] How is one to reconcile these realities with the notion of "consent?"

2. The Typology of Consent: Actual Versus Fictional

Under both classical and contemporary theories, "consent" is not homogeneous.[192] Political theorists have devised various notions of what I call "fictional consent." "Fictional consent" reconciles the contradiction of a consent-justified State apparatus that cannot practicably obtain actual consent for anything but a few State functions. Prominent examples of fictional consent include Lockean "tacit consent" and Rawlsian "hypothetical consent." The former describes consent that may be presumed from membership in the political community.[193] The latter describes consent that *would have* been given under ideal conditions.[194] There is animated debate as to whether these concepts should be thought of as consent at all.[195] Resolving those debates is beyond this article's scope. The main point here is that if individually-directed coercion is to be justified by seeking the consent of the individual against whom it is directed at the moment of application, that

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[190] HERZOG, *supra* note 182, at 201.

[191] *But see* ROUSSEAU, *supra* note 186, at 123. In Rousseau's republican vision, subjecting a citizen to personal taxes or a government without obtaining that citizen's individual consent would be unjustified. Rousseau considered both of those to be individually-directed exertions of coercive power. *Id.* The distinction between individually-directed and generally-directed coercion will vary considerably from one theorist to another and, certainly, across time. It would make no sense to use Locke's or Rousseau's specific examples to assess whether contemporary, American constitutional principles satisfy liberal (or republican) principles of justice. The span of what constitutes legitimate, generally-directed coercion will have to be considerably broader than anything Locke (and, certainly, Rousseau) could have ever imagined for a contemporary liberal democracy to operate. One might, for example, consider generally-directed coercion to encompass State acts that may be effectively challenged by those negatively affected through the political process. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 136–79 (1980) (arguing for a democratic process-based approach to distributive justice). By this definition, the income tax rate satisfies the definition of generally-directed coercion while a criminal prosecution does not. There are a number of instances where the distinction will be unclear, and it will therefore be unclear what kind of consent should be required to justify the exertion. But that is the stuff of intense debate. Presently, my core point is methodological. Having extracted a general, theoretical distinction, one cannot use it mechanically as a measure of present political and legal arrangements. Rather, one must revise the distinction's contents to suit the time and place whose measure is sought. This process roughly approximates what Rawls called "reflective equilibrium." *See infra* note 220 and discussion.

[192] *See* James S. Fishkin, *Towards a New Social Contract*, 24 NOÛS 217, 218 (1990) (describing different notions of consent in political theory).

[193] *See* Cynthia A. Stark, *Consent and Justification*, 97 J. PHIL. 313, 315–16 (2000).

[194] *See* JOHN RAWLS, A THEORY OF JUSTICE 15–19 (Harvard Univ. Press rev. ed. 1999).

[195] *See, e.g.*, A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 279–80 (1976) (positing that tacit consent must be the same as express consent in order to be meaningful); Stark, *supra* note 193, at 325–26.

consent must be actual, not fictional. Support for that proposition exists in the work of iconic political theorists of classical and more recent vintage.

Although both Locke's and Rousseau's conceptualizations relied on notions of fictional consent,[196] Locke's conceptualization of consent did so forthrightly under the rubric of "tacit consent." He specifically noted that an individual's consent may be inferred from having "possessions [ ] or enjoyment" within the State's dominion.[197] At times, Locke advances a perilously attenuated notion of tacit consent, suggesting that it may be inferred from "barely traveling freely on the highway. . . ."[198] Taken to its extreme, "tacit consent" becomes such a diluted expression of agency as to be unfit for the label of even fictional consent.[199] It seems hardly appropriate to conclude that, just by treading upon a public sidewalk, an individual consents to the entire system of rights and obligations underwritten by the State that has built the sidewalk. Political theorists will continue to debate the scope of the political obligations that tacit consent should generate.[200]

Both Locke's and Rouseau's classical formulations suggest that actual consent is required to justify individually-directed coercion, while fictional consent might justify generally-directed coercion. In both Locke's and Rousseau's property-centered conceptualizations, fictional consent is insufficient to justify the State's deprivation of real property. Locke specifies that the State may not "take from any man any part of his property without *his own* consent . . . ."[201] This is in contrast to the range of State functions for which Locke indicates that tacit consent provides sufficient justification. Rousseau makes a similar claim about personal taxes, likening them to an infringement of personal property, which thus requires the actual consent of the individual affected.[202] In contrast, Rousseau suggests that excise duties may be imposed without actual consent because they are not directed against any specific individual.[203] Both philosophers suggest that State coercion directed at an individual requires actual consent.

Contemporary social contract theory, exemplified by the work of John Rawls,[204] also supports the idea that individually-directed State coercion requires actual consent. Rawls advances the notion of "hypothetical con-

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[196] JEAN JACQUES ROUSSEAU, *Discourse on Political Economy, in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS, *supra* note 186, at 3, 37.

[197] *Id.*

[198] *Id.*

[199] *See* Simmons, *supra* note 195, at 280 (arguing that "implied consent" is better label than "tacit consent" because the only difference from express consent is the mode of the consent's expression).

[200] *See, e.g., id.*; Edward Harris, *From Social Contract To Hypothetical Agreement: Consent and the Obligation To Obey the Law*, 92 COLUM. L. REV. 651, 654 (1992) (arguing that only express consent is sufficient to justify political obligation); Stark, *supra* note 193, at 326.

[201] LOCKE, *supra* note 11, at 73. R

[202] ROUSSEAU, *supra* note 196, at 37.

[203] *Id.*

[204] *See* Feldman, *supra* note 185, at 1028 (arguing that Rawls resuscitated consent theory by reconceptualizing it as a rationalization of an egalitarian, welfarist state structure).

sent."[205] Under the guise of an "original position,"[206] he asks what individuals *would have* consented to under ideal conditions at a hypothetical moment preceding the State's creation. That hypothetical agreement generates principles for the proper distribution of rights, resources, and obligations.[207] In the original position, individuals are completely rational and each is cloaked by a "veil of ignorance."[208] The veil blinds each participant to her own particularities, including religion, class, and race. Although each participant is aware that she has such identity features, she is not aware of what significance they will have once the veil is lifted.[209] The veil of ignorance ensures that individuals do not jockey for advantage based upon morally irrelevant characteristics.[210] Two fundamental principles emerge from the original position: (1) each individual has "an equal right to the most extensive scheme of equal basic liberties compatible" with similar liberties for all, and (2) "[s]ocial and economic inequalities" are to be distributed in such a way that that they limit disadvantage within a system of equal opportunity.[211] The first principle guarantees liberties like freedom of speech and conscience that are the hallmarks of liberal democracies, while the second principle guarantees relative social and economic equality in a system of capitalist enterprise.[212]

Rawls does not specifically discuss to what, if any, rules of criminal law and procedure the two fundamental principles of justice would give rise. One can safely conclude that only a stringent showing of actual consent could legitimate any State power to extract incriminating evidence from or to convict an individual, if such a power is permissible at all. The veil of ignorance ensures that impermissible incentives do not taint the "consent" that legitimates the exercise of the State's coercive power.[213] The State may only use its coercive power to override individual autonomy when doing so does not unduly impinge upon basic rights of privacy and conscience or unduly threaten distributive rights (equality).[214] One might imagine hypothetical consent in the original position rationalizing a panoply of restrictions

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[205] There is debate as to whether this should be thought of as a contract at all. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 51 (1978) (arguing that a hypothetical contract has no power to bind and thus is no contract at all). Even for those who accept the theoretical integrity of Rawls' device, there are questions whether "consent" is the right metaphor for describing it. *See, e.g.*, Stark, *supra* note 193, at 326 (arguing that Rawls justifies "non-consent based obligations," not consent-based ones).

[206] RAWLS, *supra* note 194, at 15–18.

[207] *Id.* at 4, 185.

[208] *Id.* at 11, 17.

[209] *Id.* at 16–17, 118–22.

[210] *Id*.

[211] *Id.* at 53.

[212] *See id.* at 53, 73. Equality of opportunity is consonant with the notion of "procedural justice." *Id.* at 75. That is to say, equal opportunity does not guarantee any particular position for any particular person, only that the procedures for accessing the position are consistent and fair. *Id.* at 76.

[213] *Id.*

[214] *Id.*

upon the State's ability to investigate and prosecute crime. If the State were to seek waiver of such restrictions by reference to an individual suspect's or defendant's consent, such consent would have to be actual. "Hypothetical consent" (i.e., fictional consent) could not possibly justify such waiver because the set of procedural restrictions themselves would have been generated by fictional consent. It is not clear that Rawls' formulation would permit waiver of procedural protections at all.

Don Herzog has attempted to synthesize liberal notions of consent and has concluded that, in the aggregate, they mean that the State must be "responsive" to the body politic.[215] That is to say, they mean that the State must offer plausible justifications to its citizens and that they must have sufficient power to affect policy-making.[216] This notion of responsiveness resonates with our shared understanding of political legitimacy and popular agency—i.e., a legitimate government is one that does the people's bidding, and to the extent that it fails to do so, the people have the opportunity to select another one. Even Locke, with his attenuated notions of tacit consent, accepted that "the governed" could revoke their consent if the government failed to abide by the social contract.[217] Rawls's hypothetical consent supports the existence of a similar dynamic.[218] "Responsiveness" must distinguish between generally-directed and individually-directed coercion because it will typically be more true of the former that consent can be readily withdrawn through collective political action. Generally-directed coercion will typically impact broad segments of the population in simultaneity (e.g., taxes) and thus will be subject to collective political action—i.e., citizens will have ready opportunity to withdraw consent through the political process. This will not typically be true when coercion is individually-directed. The criminal prosecution is the classic example. Accordingly, the principle of responsiveness dictates that only actual consent can justify obligations involving severe assertions of State power against individuals standing alone.

Although political theory indicates when actual consent is morally necessary, it does not explain how to operationalize that idea.[219] Rather, one must rely upon reflective equilibrium to generate a context-specific normative vision—i.e., one must put political theory in dialogue with existing intuition and institutions of justice; by adjusting each in response to the other,

[215] HERZOG, *supra* note 182, at 202.
[216] *Id.* at 203–04.
[217] LOCKE, *supra* note 11, at 61. R
[218] RAWLS, *supra* note 194, at 313–14.
[219] *See* Feldman, *supra* note 185, at 1039.

one may arrive at a theory of consent that has normative applicability.[220] The next subsection moves in that direction.[221]

3. The Court Permits Fictional Consent Where it Should Require Actual Consent

The Court uses a kind of "fictional consent" to justify exercises of State coercion, whether individually-directed or not. Each of the hypotheticals, save for *The Welcoming Housekeeper*, describes an instance of individually-directed coercion. That notwithstanding, the Court is likely to find valid consent in each of them. The Court purports to recognize both the distinction between generally-directed and individually-directed coercion and the fact that the latter requires actual consent. But there is a gulf separating what the Court says from what it does. In its consent search cases, it treats consent searches as if they were *all* instances of generally-directed coercion and, accordingly, requires a transparently fictional brand of consent. The Court recognizes interrogation and prosecution as instances of individually-directed coercion and, accordingly, suggests that it is necessary to secure a suspect's (defendant's) actual consent. The manner in which the

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[220] *See* RAWLS, *supra* note 194, at 18–19. Discrepancies between justice as fairness and existing arrangements counsel in favor of revising either the former or latter with sensitivity to "our considered convictions of justice." *Id.* This process of adjustment and revision that flows from moving between justice as fairness and existing arrangements is "reflective equilibrium." *Id.*

[221] Some readers might wonder why Alan Wertheimer's and Robert Nozick's appropriately titled pieces do not ground the theoretical claims here. *See* ALAN WERTHEIMER, COERCION (1987); Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD 440 (Sidney Morgenbesser et al. eds.). Neither theory provides a useful theoretical basis for understanding consent in the criminal procedure context because neither offers an account of legitimate State coercion. This is revealed most clearly by what might be called the "baseline dilemma." Both Wertheimer's and Nozick's theories turn on the distinction between "threats" and "offers." The former are coercive while the latter are not. A threat makes an individual worse off with regard to a predefined baseline, while an offer makes an individual better off with regard to the baseline. A baseline may be moral or empirical. A moral baseline is one that embodies some normative vision of correct behavior while an empirical baseline is one that embodies an individual's reasonable expectations based upon past events and community understandings. WERTHEIMER, *supra*, at 207–11; Nozick, *supra*, at 450. *See also* George Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79, 90 (1993) (noting that an empirical baseline may indirectly be a moral one to the extent that the reasonableness of expected events is a function of normatively correct behavior). Neither theory, however, offers any concrete guidance on how to establish determinate baselines for particular contexts. Asking whether a proposal is a threat or offer relative to a baseline is circular when the State has control over baseline definition, as it does in the criminal context. You might prefer a blue leg cast to a white one, but you would hardly consider the former an "offer" if presented by he who is about to break your leg. *See* Nozick, *supra*, at 463. Whether the cast proposal is an offer or threat turns on how one characterizes the underlying leg-breaking proposal; i.e., does the relevant baseline legitimize the leg breaking? The leg-breaking "proposal" may, in turn, depend upon some other baseline. Neither Wertheimer nor Nozick provide a solution to this cascading-baseline dilemma. This problem will always be manifest when the same entity has power, as the State does in criminal procedure, to define both the proposal and the baseline by which it will be judged. *See* Murphy, *supra* note 177, at 91.

State secures consent in both contexts, however, falls short of actual consent, egregiously so in the confession context.

The Court, without using the precise vocabulary, acknowledges that individually-directed coercion is only justifiable if there is actual consent. This is not true of generally-directed coercion. The Court has suggested that the moment of accusation is when State coercion becomes individually-directed.[222] It is at this moment that the State announces itself as the suspect's enemy and, through its agents, begins amassing the information that will be used to convict her.[223] The individual alone bears the burden of accusation, a reality that suffuses the *Miranda* opinion, with its repeated references to a suspect's isolation at the stationhouse and the coercion that is intrinsic to any process designed to evince incriminating information.[224] Under such circumstances, the Court acknowledges that consent must be actual consent.[225] The Court specifically distinguishes this moment of individually-directed coercion from instances of generally-directed coercion. It states that the *Miranda* warning is not required for "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens . . . . It is an act of responsible citizenship for individuals" to cooperate with the police.[226] In other words, good citizenship will entail occasional encounters with the police. It is not necessarily a bad thing that individuals are strongly predisposed to say "yes" when they are confronted by a uniformed, weapon-clad police officer,[227] as long as the State is not punitively targeting the individual.

In the search context, the Court treats all police investigations as exercises of generally-directed coercion. That is to say, the Court would not posit any legally relevant distinction between the police's purpose in asking the housekeeper in *The Welcoming Housekeeper* for permission to search and the police's purpose in asking the driver in *The Careless Lane Changer* for permission to search. In *Schneckloth*, which announced the "totality of the circumstances" test currently used for consent searches, the Court went to great pains to distinguish a "consent search" from those rights that protect the integrity of trial.[228] The Court took consent searches to be a device for encouraging police-citizen cooperation.[229] The police are certainly called upon to confront any number of situations (many of which are not even

[222] Miranda v. Arizona, 384 U.S. 436, 477 (1966) (noting that the "adversarial process" begins at moment of accusation).

[223] *See id.* (explaining that the *Miranda* warning prevents our system from being confused with an "inquisitorial" one).

[224] *Id.* at 455–58.

[225] *Id.* at 475 (noting that the decision to confess must be made "knowingly").

[226] *Id.* at 477–78.

[227] *Cf.* Nadler, *supra* note 46, at 173–97 (reviewing psychology research on obedience, compliance, and perspective); Simmons, *supra* note 189, at 800–10 (reviewing psychology research for obedience and compliance). R

[228] Schneckloth v. Bustamonte, 412 U.S. 218, 227, 237–40 (1973).

[229] *Id.* at 243.

criminal) where there is no readily identifiable suspect in the first instance—*The Welcoming Housekeeper* is an example.[230] The police, by simple virtue of being police, will exert coercive force as they move through the civilian world.[231] That is part of the point of having police, and why the search in *The Welcoming Housekeeper* is legitimate. Just because an individual feels, as most do, that she must agree with a police officer's requests does not vitiate the legitimating force of her consent, assuming that she is not being punitively targeted. The problem, of course, is that many searches flow from punitive targeting, as in *The Careless Lane Changer*.

By failing to distinguish between *The Welcoming Housekeeper* and *The Careless Lane Changer*-type scenarios, the Court inappropriately accepts fictional consent as the touchstone for all "consent searches." The Court's "totality of the circumstances" test takes virtually any expression of consent at face value without worrying about the extent to which State coercion shaped it. For example, in *Drayton*,[232] the Court disingenuously implies that the police's bus inspection is an instance of generally-directed coercion.[233] The Court suggests that the officers in *Drayton* did not board the bus in pursuit of particular suspects, but rather as part of an effort to identify and deter drug trafficking on interstate buses,[234] an assertion of power that the Court suggested makes citizens feel safe.[235] The Court refused to acknowledge that the police officers' manner and targeting of Drayton likely prompted him to say "yes" to a search even when it was patently in his interest to refuse permission. Instead, the Court took Mr. Drayton's "yes" at face value and construed it as the cooperation that a good citizen happily volunteers as the price of citizenship.[236] The third-party consent cases where the Court takes a plausible consenter's "yes" at face value echo this sentiment.[237] As in *Illinois v. Rodriguez*, it is beside the point that the consenter does not have the search target's permission to give consent.[238] The search target bears the cost of the police's mistake.

The problem with the Court's conceptualization of consent in both *Drayton* and *Rodriguez* is that both cases are unambiguously more like *The Careless Lane Changer* than *The Welcoming Housekeeper*. The police investigation in *The Careless Lane Changer* was directed at a specific individual and calibrated to yield arrest and conviction. The same was true in both

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[230] *See id*. at 227.

[231] For more on this point, see the discussion of United States v. Drayton, 536 U.S. 194 (2002), *supra,* Section I.b.i.

[232] 536 U.S. 194 (2002). *See supra* notes 54–62 and accompanying text for description of the case.

[233] *See, e.g.*, *id.* at 204–05 (finding uniforms and sidearms insufficient to invalidate consent to search); Michigan v. Chesternut, 486 U.S. 567, 575–76 (1988) (finding the presence of a squad car insufficiently intimidating to constitute seizure).

[234] *Drayton*, 536 U.S. at 197–98.

[235] *Id*. at 204–05.

[236] *See id.* at 198.

[237] *See* United States v. Matlock, 415 U.S. 164, 171 (1974).

[238] 497 U.S. 177 (1990). *See supra* notes 69–74 and accompanying text.

Drayton and *Rodriguez*. In *Rodriguez*, Mr. Rodriguez allegedly abused his girlfriend and the police used her consent to enter his home and arrest him, an incontrovertible instance of individually-directed coercion.[239] In *Drayton*, police identified Mr. Drayton and his co-companion before they boarded the bus because they looked liked drug couriers.[240] In some ways, *Rodriguez* is more galling because the police *had* probable cause to obtain a warrant, but elected not to. *Drayton* is more typical, and more like *The Careless Lane Changer*, in the sense that a "consent search" was "the only means of obtaining important and reliable evidence" given that the police lacked "probable cause to arrest or search."[241]

Unlike in the search context, there is no distinction to be drawn between individually-directed and generally-directed coercion once the State has leveled an accusation at an individual. Although the Court requires a more stringent form of "consent" in the plea context than it does in the search and confession contexts, it still falls short of "actual consent." This is because current plea bargaining likely generates countless convictions that would not be obtainable following trial. A criminal trial affords stringent procedural protections for the accused because trial is more than just a mechanical sifter of the guilty from innocent.[242] "Guilt" and "innocence" are not simple empirical facts. Rather, trial is supposed to approximate the truth to the extent possible in the face of existential and moral uncertainty.[243] That said, plea bargaining is consistent with the liberal commitment to maximizing individual choice.[244] Defendants should be free to plead guilty in order to avoid the risk of greater punishment following conviction at trial. The problem is that it is only in theory that one is innocent until proven guilty. In practice, the State exerts coercive pressure, often in substantial doses, well before trial actually occurs. This is particularly true for those in custody pending trial. As suggested by *The Ready Pleader*, there is good reason to think that criminal defendants are not consenting to conviction in the "shadow" of reasonably expected trial outcomes.

Plea bargaining, however, should not yield convictions that would be unlikely following trial—otherwise, plea bargaining dilutes the legitimacy of the convictions our criminal justice system generates. If procedural devices do not reasonably control the imposition of pre-trial coercion, then trial, and its concerns for truth seeking and the existential and moral difficulty of establishing guilt, become empty idealism. It is precisely for this reason that the Court requires that there be a factual basis for pleas,[245] that defendants

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[239] *See id.*

[240] 536 U.S. 194, 207 (2002) (noting that officer observed Mr. Drayton and companion "reboarding" and wearing "baggy clothes" on a warm day).

[241] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[242] *See supra* notes 93–95 and accompanying text.

[243] *Id.*

[244] *See* HERZOG, *supra* note 182, at 218–19.

[245] *See, e.g.*, FED. R. CRIM. P. 11(b)(3).

have the assistance of competent counsel in considering the plea offer,[246] and that defendants engage in an in-court colloquy.[247] But, as *The Ready Pleader* suggests, our system still misses the mark. In the face of massive docket congestion, a cursory police report unsupported by any additional investigation is sufficient to create a "factual basis" for conviction.[248] And the in-court colloquy does not probe a defendant's underlying motivations for electing to plead, which in the case of misdemeanors and low-level felonies, are usually unrelated to whether the charges are provable at trial. However, short plea bargaining may fall from the ideal of actual consent, it is not nearly as inadequate as in the confession context.

Miranda warnings utterly fail to produce the kind of actual consent that should be required to legitimate the individually-directed coercion that interrogation represents. There can be little doubt that the Warren Court believed that its decision in *Miranda* would reduce the number of suspects who volunteered confessions against their own interest.[249] The Court hoped that recitation of the warning would kindle a suspect's capacity for exercising rational agency that would, in turn, generate the kind of actual consent that can justify individually-directed coercion. As *The Reluctant Confessor* demonstrates, that assumption has not proven true. *Miranda* is so formalistic that it is has proved ineffective at achieving its intended purpose, and perhaps even counterproductive.[250] This is not to say, however, that the original purpose has been forgotten. At least a plurality of the Court believes that the police should not be permitted deliberately to undermine *Miranda's* purpose of enabling "a real choice between talking and remaining silent."[251] It is, however, unlikely that the existing *Miranda* framework can adequately account for this concern.

III. CONSENT RECALIBRATED

The discussion above suggests that the Court has failed to calibrate properly the consent it requires based upon the type of coercion that is exerted in criminal procedure. Proper calibration would require that individual consent approximate actual consent whenever the State punitively targets someone. Sketched below are some of the normative consequences that flow from the discussion in Sections I and II.

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[246] Hill v. Lockhart, 474 U.S. 52, 58 (1985).

[247] *See, e.g.*, FED. R. CRIM. P. 11(b)(2).

[248] *See supra* notes 122–28 and accompanying text.

[249] *See* George C. Thomas III, Miranda's *Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1107 (2003) (reviewing WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS (2003)).

[250] *See id.* at 1095.

[251] Missouri v. Seibert, 542 U.S. 600, 609 (2004) (plurality opinion).

A. Searches

In the search context, police purpose is relevant to identifying when a specific individual has been targeted for possible punishment. Uninformed, fictional consent is only sufficient to justify generally-directed coercion, like that in *The Welcoming Housekeeper*. The moment when an individual becomes a "suspect" is pivotal. The Court has concluded that the "adversarial" process begins with arrest.[252] That is incorrect. One would be hard-pressed to persuade the individual who is convicted with evidence obtained as a result of a consent search that the search was not "adversarial."[253] A process is "adversarial" whenever the State exerts individually-directed coercion. The State's coercive authority is most difficult to justify when it is targeted at a single individual.[254] Individually-targeted coercion triggers the presumption of non-consent.[255] Requiring probable cause or individual suspicion helps ensure that there is good reason for individually-directed assertions of coercive power. Police should not be allowed to use consent, particularly third-party consent, to defeat such procedural protections. Given that consent in such situations will almost never be given quid pro quo, there will generally be good reason to question any individual's "yes."

The easy cases are those in which it is objectively clear that the police have individually targeted someone. A post-arrest search is perhaps the most straightforward example. Courts have permitted the admission of evidence that is obtained with an arrestee's consent.[256] If admissibility is to be based on consent, only actual consent should be sufficient. It is hard to imagine how the police could obtain actual consent under the circumstances of a post-arrest search. Courts should therefore presume that post-arrest consent searches are invalid. The practice of post-arrest searches seems particularly indefensible when the police have alternative means by which to search an arrestee—i.e., incident to arrest or based upon probable cause. *Illinois v. Rodriguez* is an example of an easy case. The police had probable cause to arrest the suspect and ample opportunity to obtain a warrant, but nonetheless elected to rely upon the complaining witness' consent.[257] The Court should have deemed the evidence uncovered in that search inadmissible. As written, *The Careless Lane Changer* also presents an easy case: the patrolling officer believed B might have narcotics and pulled her over for

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[252] *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966).

[253] *See* Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964).

[254] *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996) (arguing that the Fourth Amendment protects against unfair targeting).

[255] *See supra* Section I.a.

[256] *See generally* WAYNE R. LAFAVE, SEARCH & SEIZURE § 8.2(j) (2004) (discussing how *Miranda* warnings affect consent to search).

[257] 497 U.S. 177, 193 (1990) (Marshall, J., dissenting).

that reason. A court should not deem the consent valid because the officer used her authority in an individually-directed manner.

Of course, not all cases will be easy ones. Distinguishing between individually-directed and generally-directed coercion requires some knowledge of why the police elected to take a particular course of action. *The Careless Lane Changer* illustrates the difficulty. It is easy only because, as written, the officer's purpose in stopping B is clear. That will rarely be true in real-world scenarios. In a situation like in the one in *The Careless Lane Changer*, the officer's arrest report would not likely indicate that she stopped a car because of a hunch that she would find narcotics in it. To ascertain the nature of the coercion under such circumstances, a court would have to make a factual inquiry into why the police did what they did.

The Court is reluctant to scrutinize officer "state of mind," but is willing to scrutinize systemic "police purpose."[258] The Court worries that second-guessing the individual intentions of officers after the fact will create muddy rules for police-citizen encounters and may chill crime investigation.[259] In this vein, the Court has been particularly reluctant to create remedies for "pretextual stops" purportedly based on probable cause, like the stop in *The Careless Lane Changer*.[260] The Court, however, has acknowledged that the reasons why the police take a course of action should be scrutinized.[261] *Georgia v. Randolph*, for example, seems to open the door, if only a crack, to the possibility of considering police purpose.[262] The majority in *Randolph* indicated that courts should ensure that police removal of suspects from the scene is not for the impermissible purpose of preventing them from objecting to a search.[263] Extrapolating from this principle, it might be that the police's motive in seeking consent is relevant to whether the coercion is individually-directed.

The Court might also look to its own Fourth Amendment "checkpoint" cases for a model of how to ascertain purpose in distinguishing between generally- and individually-directed coercion.[264] In *Michigan v. Sitz*, the Court permitted sobriety checkpoints to which all passing motorists were subject.[265] Similarly, in *Illinois v. Lidster*, the Court authorized the use of a

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[258] *See* Indianapolis v. Edmond, 531 U.S. 32, 45 (2000) (distinguishing systemic police purpose from subjective state of mind). *See also* Whren v. United States, 517 U.S. 806, 815 (1998).

[259] *See Edmond*, 531 U.S. at 45.

[260] *See Whren*, 517 U.S. at 815.

[261] *See Edmond*, 531 U.S. at 45.

[262] 547 U.S. 103, 121 (2006). The Court has been reluctant on this front, insisting that when probable cause exists, inquiries into officers' subjective state of mind should not be allowed. *See, e.g.*, *Edmond*, 531 U.S. at 45; *Whren*, 517 U.S. at 810–813.

[263] *Randolph*, 547 U.S. at 121.

[264] *Compare* Michigan Dep't. of State Police v. Sitz, 496 U.S. 444, 453–55 (1990), *with* Delaware v. Prouse, 440 U.S. 648, 659–60 (1979).

[265] *Sitz*, 496 U.S. at 453. *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permitting suspicionless immigration searches at a permanent checkpoint operated away from the international border).

checkpoint to identify witnesses of a fatal hit and run that had occurred in the area earlier.[266] In both instances, the police were not pursuing a particular suspect or even investigating a particular kind of crime.[267] To the extent that the exercise of State coercive power is generally directed and inconveniences citizens, they can prevent it through the political process.[268] By contrast, the Court has not permitted random, suspicionless stops of individuals.[269] Doing otherwise would confer too much discretion upon officers,[270] an evil that *Katz* specifically sought to restrict.[271] Even using *Sitz*-style checkpoints is not permitted where the primary purpose is the detection of "ordinary criminal wrongdoing" such as narcotics-related offenses.[272] This simply reaffirms the *sine qua non* of legitimate police targeting: the existence of individualized suspicion or probable cause. At a more general level, the individualized suspicion and probable cause requirements get at police purpose—both rely on objective facts to arrive at a conclusion about whether officers had good reason to believe that a particular search or seizure was justified.

The most difficult consent cases will be those in which generally-directed coercion morphs imperceptibly into individually-directed coercion. The shift may occur in a diffuse way that cannot be attributed to a specific moment or officer. This may, for example, frequently be true in complex criminal investigations where an individual's status as witness or suspect may not be entirely clear. Such cases, however, are not the bread and butter of our criminal justice system. It may very well be that truly ambiguous cases should be resolved in the police's favor, but what ambiguity means and how many ambiguous cases there are cannot be known until courts begin asking the proper questions.[273]

B. Pleas

Charging someone with a criminal offense is the ultimate exertion of individually-directed coercion. Plea bargaining occurs in a strategic environment that is constituted by the State's exertion of individually-directed coercion. Accordingly, the plea colloquy and other procedural protections

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[266] 540 U.S. 419 (2004).

[267] *Id.* at 423–25.

[268] *See id.* at 426 (noting study that indicates sobriety checkpoints not widely used because they lack community support).

[269] *See Prouse*, 440 U.S. at 661. *See also* United States v. Brigoni-Ponce, 422 U.S. 873, 882 (1975) (finding suspicionless roving border patrol stops near the border unlawful).

[270] *See Prouse*, 440 U.S. at 661.

[271] *See* Katz v. United States, 389 U.S. 347, 356 (1967).

[272] Indianapolis v. Edmond, 531 U.S. 32, 38 (2000).

[273] The questions asked in the consent search context would be similar to those asked for the "custody" inquiry that triggers *Miranda*. *See supra* note 146. In *Yarborough*, for instance, it is difficult to ascertain from the Court's opinion whether the questioning officer considers the individual being questioned a suspect or simply an innocent witness. Yarborough v. Alvarado, 541 U.S. 652 (2004).

seek to ensure actual consent—i.e., that the defendant fully understands that she has a right to trial and the consequences of waiving that right. Section I.b above demonstrated why this should be true: convictions are only legitimate if they are likely to have resulted following trial. To convict is, by definition, to override a defendant's will. In principle, we think this is justified when there has been an exacting showing of guilt (as required by trial). In other words, overriding the defendant's will is justified only by a procedurally fair demonstration of guilt. That a defendant might, consensually, elect to admit guilt is consistent with the principle, provided that she would likely be proven guilty at trial. Defendants, especially those in custody, make the choice to plead in a context that is defined by individually-directed coercion. "Actual consent" cannot justify a coercive act that has already occurred. The effects of that coercion must be adequately controlled for subsequent consent to be actual consent. Of course, it does not make sense to insist that each and every defendant who pleads should anticipate an actual post-trial conviction; it is impossible to know with certainty what would happen in a particular trial. But there must be certainty that, in the majority of cases, pleas yield convictions that trials would have yielded.

Procedural protections should only permit a plea when a suspect's consent is rendered in the "shadow of expected trial outcomes."[274] It is irrelevant that a defendant is aware of the risks and benefits of going to trial if that is not the basis upon which she makes the decision to plead. *The Ready Pleader* and the discussion in Section I.b reveal some of the structural features that prevent defendants from making choices in the shadow of expected trial outcomes. Other scholars have also documented why plea outcomes, in the aggregate, likely diverge from expected trial outcomes.[275] This article has sought to demonstrate that the notion of consent requires that plea practice be tightly linked to expected trial outcomes. Absent such a linkage, the plea colloquy and attendant procedural protections will tend towards the same kind of hollow formalism that characterizes *Miranda* warnings.[276]

Plea bargain procedures should try to ensure that pleas are entered only when conviction would likely result following trial.[277] This article's analysis of consent supports a host of policy prescriptions, some of which have been advanced by others.[278] As illustrated in *The Ready Pleader*, a defendant's

[274] *See* Bibas, *supra* note 118, at 2464.

[275] *See id.* at 2467–69.

[276] *See supra* Section I.b.2.

[277] Of course, there is no way to know for certain whether in any particular case a conviction would have resulted following trial. Plea bargaining depends on some uncertainty. Plea procedures, however, should be designed to ensure that defendants base their plea decision on the possibility of conviction following trial when deciding whether to plead.

[278] *See, e.g.*, Bibas, *supra* note 118, at 2528–45. Although Bibas provides a very thorough account of the structural features that cause plea and trial outcomes to diverge, he leaves it to intuition as to why such divergence is troublesome. This article has been centrally concerned with the latter question, not the former.

inability to post bail creates the "plead to get out" dilemma in misdemeanor and low-level felony cases. Heavy reliance on non-bail alternatives and fast-track calendaring would help minimize this dilemma. Non-bail alternatives, such as electronic home monitoring, would allow defendants to forestall the most serious economic and social consequences of detention.[279] But even home monitoring would not likely have made a difference in *The Ready Pleader* because the defendant there had no address—a typical requirement for electronic home monitoring. Fast-track calendaring would be the most effective means of minimizing the pre-trial time lag that motivated the defendant in *The Ready Pleader* to plead. A case like *The Ready Pleader* should not require extensive investigation or witness preparation. Creating incentives for early investigation and adjudication would likely mean more trials, but would also better ensure the legitimacy of pleas that are entered. As the system is currently calibrated, plea bargains often save prosecutors and defense counsel from doing any meaningful investigation into a case at all.

Legislatures have given prosecutors long lists of redundant crimes from which to make charging decisions. William Stuntz has detailed the political and social incentives that generate what he calls the "pathological politics of criminal law."[280] The vast menu of charging choices amplifies prosecutorial power (unless one assumes that defendants are risk takers rather than risk averse—a conclusion that does not find support in any empirical evidence). To the extent that prosecutorial overcharging is the norm in most jurisdictions,[281] one would hope that skilled defense attorneys help their clients realistically assess the risk of conviction following trial, especially since some counts will not be viable. Large caseloads and other structural factors may, however, make it difficult for defense counsel, especially public defenders, to perform this function.[282] The Court has officially authorized prosecutors to make charging decisions as they see fit.[283] Given the pathological politics of criminal law and the centrality of plea bargaining in criminal adjudication, it is hard to blame prosecutors for basing charging decisions upon maximizing their bargaining advantage instead of basing them upon a grounded assessment of what is provable at trial. Unfortunately, there is no straightforward fix for the problem of "overcharging."

There are obstacles standing in the way of reforming plea bargaining so that it will better conform to the ideas of consent upon which it is based. It is beyond this article's scope to spell out a trajectory for comprehensive reform. The most obvious problem with all proposals is that they will likely require substantial additional investment in our criminal justice machinery.

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[279] *See id.* at 2540.
[280] *See* Stuntz, *supra* note 121, at 529–46.
[281] *See* Stuntz, *supra* note 115, at 2569.
[282] *See* Bibas, *supra* note 118, at 2479.
[283] *See* United States v. Goodwin, 457 U.S. 368, 384 (1982).

Pleas have come to serve primarily as a means of quickly disposing of criminal cases. That purpose, however, cannot be reconciled with a political theory of consent.

C. Confessions

Of the three areas analyzed, the notion of "consent" provides the most precarious justification for confessions. In some cases, a confession is tantamount to pleading guilty. Confessions are the product of individually-directed coercion. Under the political theory considerations discussed above, such coercion can only be justified by actual consent. Rather than requiring actual consent, however, the Court has embraced formalism: if police administer the *Miranda* warning, a subsequent confession is deemed to be voluntary.[284] There is little to suggest that *Miranda* does much to incite suspects' agency. *Seibert* suggests that at least four members of the Court feel some discomfort with the formalistic approach of *Miranda*.[285] It is difficult to reconcile *Miranda*'s underlying purpose of affording suspects "a real choice between talking and remaining silent"[286] with modern interrogation tactics.[287] The central technique in most interrogation practices is to persuade a suspect that she will benefit by confessing, even though this is usually not true.[288] The exertion of such individually-directed coercion and the absence of any benefit commensurate with the confession surrendered both make the *Miranda* regime seem transparently formalistic.[289]

The fact there is no compelling account of consent that justifies confessions obtained during custodial interrogation is certainly good reason to prohibit them altogether. Past arguments in this vein, however, have not been very successful in persuading policy makers. There was, of course, a moment in history where it seemed as if the Supreme Court might very well go down that path. In its pre-*Miranda* decision of *Escobedo v. Illinois*,[290] the Court inveighed against the criminal justice system's reliance on uncounseled confessions.[291] The Court suggested that uncounseled confessions are not only likely to be involuntary, but also likely to corrupt the criminal justice system.[292] But *Escobedo*'s holding was much narrower than the dicta in

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[284] United States v. Patane, 542 U.S. 630, 639 (2004).

[285] *See supra* notes 169–76 and accompanying text.

[286] Missouri v. Seibert, 542 U.S. 600, 609 (2004) (plurality opinion).

[287] *See supra* notes 147–50 and accompanying text.

[288] I do not want to exclude the possibility that in some limited set of cases psychic benefit accrues to a suspect who feels burdened by feelings of contrition.

[289] It seems likely that the formalism allowed even some of the Court's conservative members to elevate *Miranda* to the status of a constitutional rule. *See* Dickerson v. United States, 530 U.S. 428, 428 (2000).

[290] 378 U.S. 478 (1964).

[291] *Id.* at 488–90.

[292] *Id.* at 486–90 (noting that defendant's lack of awareness as to the fine points of criminal law would compromise his ability to weigh his interests before confessing).

the case might have suggested.[293] And *Escobedo*'s moment in history is long past. Utilitarian, crime-control rationales have dominated the debate on police practices. That seems likely to remain true for the foreseeable future. Reconciling the "consent of the governed" with the "consent of the accused" in a theoretically satisfying way will likely remain impossible in the confession context. That is not to say, however, that a second-best solution which brings the two a bit closer together is unfathomable.

Juries are a proxy for "the governed" in our criminal justice system. Accordingly, a greater role for juries in evaluating the voluntariness of confessions may modestly shrink the gulf separating the "governed" from the "accused." As it stands, judges decide whether the Fifth Amendment was violated as a pre-trial matter—and the inquiry, as discussed above, is usually limited to whether the police properly administered *Miranda*.[294] Deciding whether police coercion was sufficient to "overcome the will" requires complex moral and factual judgments that do not at all lend themselves to a formal legal test. It is something like the question of "guilt" itself,[295] and as such, it is precisely the kind of question that a jury should answer. As it stands now, juries are often asked to evaluate the effects of police coercion as an evidentiary matter in the context of assessing the reliability of confessions. There is nothing to suggest that juries would not be able to make a preliminary judgment as to whether the confession was voluntary. The parties would present evidence relevant to the question of voluntariness without adducing any more evidence regarding the underlying crime than necessary to create context for the voluntariness facts. It would, of course, greatly aid the jury's task if police departments kept video recordings of confessions, as some states already require and numerous commentators have urged.

Conclusion

We should be bothered by how courts use "consent" in constitutional criminal procedure. Some measure of coercion attends most police interactions with civilians. The fact that such coercion influences an individual's decisionmaking should not necessarily invalidate consent. Fictional consent is sufficient to legitimate the State's exertion of generally-directed coercion. This is not true, however, when the State's coercive power is punitive and targeted at a specific individual, as it is in many searches, all confessions, and all pleas. A principled understanding of consent requires that a distinc-

[293] *Id.* at 490–91 (interpreting the Sixth Amendment as prohibiting uncounseled confessions where investigation "has begun to focus on a particular suspect," suspect is in custody, police interrogate suspect, the "suspect has requested and been denied" an attorney, and the police have not warned the suspect of his "absolute constitutional right to remain silent").

[294] The question of whether the confession was voluntary occasionally arises under the rubric of due process. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 170 (1986) (holding that a voluntary confession not prompted by government coercion satisfied due process).

[295] *See supra* notes 93–95 and accompanying text.

tion be made between generally-directed and individually-directed coercion and that actual consent be present in all instances of the latter. Criminal enforcement is the paradigmatic example of legitimate State coercion. That legitimacy, however, runs thin unless criminal justice institutions maintain fidelity to the high principles embedded in the word "consent."